



## **TELEFONICA'S RESPONSE TO EC REFLECTION DOCUMENT ON CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET**

### **INTRODUCTION**

Telefónica welcomes the opportunity it has been given by the European Commission to comment on this Reflection Paper on Creative Content in a European Digital Single Market. We particularly appreciate the continuity of the debate among the different stakeholders on this important issue following the previous initiatives identified within the Reflection Paper itself.

Telefónica is present in 6 EU Member States (Spain, Germany, Ireland, UK, Czech Republic and Slovakia) and is one of the world's largest integrated telecommunications companies, offering fixed, mobile, broadband and TV services across 25 key markets in 3 continents (Europe, Latin America and Asia). Depending on each country, Telefónica's operations offer a wide variety of digital multimedia content (audiovisual and musical) services across different platforms and/or distribution means, including mobile portals and applications, DSL connectivity, IP-TV, Internet Portals, and as such it is an important commercial user of intellectual property rights. Telefónica has grown in scale to become a global telecom company whilst remaining European based and committed to the ongoing success of the Information Society in Europe.

Within this context, Telefónica understands online content as an increasingly appealing market across the EU, as it is becoming crucial to contributing to the growth of a thriving digital economy. This market is, however, facing important challenges as all the agents across the value chain are in the process of adapting their business and operation models to this promising digital paradigm. Therefore, Telefónica's view is that all efforts should be made to favour the establishment of a sustainable and more flexible environment in which agents are able to develop innovative and user-friendly offers that satisfy the main desire of consumers in the Information Society: to access content anytime, anywhere, and through any device.

Overall, we are supportive of the Commission's aim to foster "a modern, pro competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online". We also welcome the focus on practical solutions to look for new business models to make available attractive content offers in terms of pricing, choice and ease of use. Only availability under these terms will create an attractive offer of a wide range of services that can be supplied on a sound and sustainable commercial basis. We are convinced that this offer is the right approach to undermine and tackle the existence of illicit online content consumption.

In the following sections, Telefónica provides a detailed review and specific comments on the main possible actions identified in the Reflection Paper.

### **SPECIFIC COMMENTS**

#### **Possible EU Actions for a single Market for Creative Content Online**

The Reflection Paper is a good attempt to try to bring together the various aspects of the debate around online content. It highlights the complexities of the current licensing regimes when applied to the online world, and recognises the important role that commercial users play in the online content market. Telefónica is active in trying to allow its customers access to content across all platforms in a convenient and user-friendly way, and as such, Telefónica is interested in developing this market, with the participation of the other stakeholders involved across the value chain (rightholders, producers, technical service providers, consumers...). With that in mind, Telefónica's main focus is to ensure a

greater degree of flexibility and innovation when developing new business models which are critical to satisfy the demands of our customers.

The Reflection Paper rightly questions the current evolution of collecting societies' licensing practices, particularly as the possible fragmentation of repertoire across different collecting societies goes in the opposite direction to that desired by the European Commission, consumers and commercial users – this leads to fragmentation of the internal market and a lack of a truly internal market for digital content. This fact risks continuing traditional inefficiencies related to the lack of competition between collecting societies which has already been addressed by the CISAC Decision on multi-territory licensing. Furthermore, this problem associated with the fragmentation of repertoire leads to less transparency in managing rights, and potentially to additional complexities/uncertainties within the relationships between commercial users of such rights and their holders. Collective rights therefore need to be managed in a smarter way, so that rightholders can make the most of their creativity by allowing access to their creative content in innovative and appealing ways. As pointed out above, more flexibility in the rights management system would open the door to the Digital Single Market in Europe, without putting at risk the current system of copyright protection.

### **5.1.- Consumer Access**

Consumers of online content are possibly the most relevant stakeholder across the value chain. The possibilities presented by the online media channels are changing their habits and demands when consuming content and business models should be able to acknowledge and to adapt to this environment.

Telefónica understands the difficulties faced by consumers as they attempt to access to online content, particularly regarding the possibilities derived from a truly EU internal market, and therefore, supports any efforts to ensure a more comprehensive and user-friendly approach to satisfy their demands and to ease their understanding of the copyright framework and limitations.

- **harmonisation of exceptions.**

Harmonisation of exceptions to exclusive rights could be a positive step in achieving more uniformity and clarity within the current legal framework as this will provide a better understanding to all stakeholders on the limits of applying copyright laws to digital products, as a coherent concept through all EU. Nevertheless, Telefónica considers that caution should be exercised not to change the fundamental framework which underlies the current system of copyright in the EU. In particular, we consider that the basic principles recognised in the eCopyright Directive (Directive 2001/29/EC) are a sound basis for the protection of artistic content, although their applicability should be more flexible considering the new trends and particularities associated with the online market.

### **5.2.- Commercial users' Access**

Telefónica welcomes the focus on commercial users' problems in the area of online content – we have been active interlocutors with the Commission on this matter, participating in the 2008 Content on Online Platform and the 2009 Stakeholder Dialogue on Illicit Downloads. Commercial users of content are a crucial link in the value chain, and currently face many obstacles in developing new business models, due to the inflexible, fragmented and complicated nature of rights licensing and clearance.

We therefore are in total agreement with the Commission's aim to increase licensing efficiency and to ease its practical applicability.

In particular, regarding music online rights management, a single online database with a comprehensive set of information on rights and their owners would be a simple yet valuable solution for rights clearance purposes, and would decrease the risk of rightholders not being paid for their works. This centralised database, apart from compensating the increasing administrative burden for the commercial users, would strengthen the legal certainty for all players in the market.

Telefónica also supports the idea of a multi-territory, multi-repertoire licence (on a “one-stop-blanket-licence” basis), which could significantly simplify the current clearance system. After the CISAC Decision, obstacles to the adoption of multi-territory licences have been reduced although not completely eliminated in practice. However, without both elements (multi-territory and multi-repertoire), there is still a risk of fragmentation in the market, as repertoires are split and commercial users would still face a multiple reporting requirement and a lack of competition in the market. Competition between collecting societies must be introduced along the lines of Option 2 of the Commission’s 2005 Recommendation. It is **essential for the EC to encourage and improve the reciprocal agreements between the collecting societies in a way which pushes each collecting society to grant multi-territory and multi-repertoire licenses**. Arrangements for multi-territory and multi-repertoire licensing and opening of markets for competition among collecting societies needs to be accompanied by regulatory competition safeguards, especially regarding price competition. It should be guaranteed that collecting societies freely compete in the rates and fees charged for the rights licensed; the country of destination rate, which is usually imposed by each local collecting society, should be abolished as it hampers competition in the market.

Therefore, a pan-EU or multi-territory licence should be judged by its practical effect on competition and choice for commercial users. Some entities, certain publishers and other national societies are favouring a fragmentation into repertoires which is also harmful for the competition as has been described. We think that granting exclusive licences to just one collecting society or entity should not be allowed in order to avoid the creation of new monopolies, by repertoire instead of the previous monopolies by territory.

Furthermore, regulation for multi-territory licensing and multi-repertoire should be harmonised for all types of content. The most efficient way to foster multi-territory and multi-repertoire rights licensing would be to assure to intermediaries (web casters, carriers, ISPs) and rightholders the freedom to negotiate full rights in any EU Member State under a fully competitive scenario. Any modification of the current legal framework should ensure taking these issues into account as it is indispensable for establishing a sustainable and innovative market. The CISAC Decision can contribute to this objective, although taking into account previous and current experiences: a more ambitious approach considering alternative legislative measures to the current framework governing rights management should be considered and assessed in detail. Additionally, a more transparent approach should be pursued within relationships among collecting societies and the rightholders which they represent.

Finally, even if Telefónica strongly supports the multi-territory licence this does not imply that in cases whereas an operator wants to get the license only for his territory he should be forced to pay for all territories. Multi-territorial licences should be set as an option.

#### - **Satellite & Cable Directive**

An extension of the scope of the Satellite and Cable Directive may have a positive impact in terms of legal certainty and cross-border content offers. However, given the limited range of the content covered by the Directive, careful consideration should be given to the impact on all rights. Without an extension of scope to cover all content, the extension to online content would not be a complete solution. It may be more practical to encourage collecting societies to work together on allowing an EU-wide use of rights.

#### - **EU Copyright Law**

The reflection paper mentions that one option would be a “Regulation to create a single EU copyright law”. Telefónica believes that the current overall framework principles embedded in the e-Copyright Directive are still valid, and would recommend that a more practical answer may lie in finding new ways for rightholders to manage and monetise their creative content – a legislative revision of the EU copyright framework will not lead to quick solutions for consumers or commercial users, and would have difficulty in keeping pace with technological developments. However, and as acknowledged above, a more flexible application should be very useful in order to reach solutions on some practical

difficulties currently faced by the players when developing business models in the online market, as for example in certain collective management practices. It should also be remembered that copyright is not the only way to protect creative productions, and other concepts which are gaining popularity online could provide more flexible solutions for the future content producer.

#### **- Alternative forms of remuneration, including internet levy**

Telefónica fully agrees with the Commission's doubts over an internet levy to compensate rightholders for illicit downloads. Telefónica considers that a blanket levy on internet connections is a very inexact penalty on consumers, whether they are downloading content or not, and it is fully against it. Furthermore, such a tax also goes against the current justification for levies, which are used to compensate for legitimate copying – a levy to cover illegal activities could perhaps have the opposite effect, and act as an encouragement for more illicit downloading. This would go against all of the efforts made so far by rightholders, collecting societies and commercial users to create new and attractive legal offers, and it would also create a new burden to build a more comprehensive and transparent online content market. It is an instrument which cannot by its very nature properly or proportionally compensate rightholders for their work.

To this end, technology also evolves towards the possibility to facilitate an easier way to compensate for rights effectively used, and DRM or other technological solutions could be envisaged when appropriate for the business model developed for each type of online offer. It is particularly important that these systems should surely be used in a consumer friendly way, if they are to succeed in the market; otherwise, consumers will see them as “artificial” barriers for their content consumption demands.

### **5.3.- Protection of Rightholders**

#### **- Reform of collective rights management**

Telefónica agrees with and supports any measure that would enhance the governance and transparency of collective rights management organisations for the sake of rightholders and commercial users. More clarity about the way in which collecting societies are managed, and how the revenue made from licensing is distributed, is an essential first step in bringing the benefits of competition to the field of rights.

#### **- Collaboration with ISPs**

ISPs are happy to collaborate with content owners. This collaboration, as recognised within the Reflection Paper, should mainly focus on practical efforts to develop innovative business models to the market. To this end, no “one size fits all” solution should be pursued as these business models will have to consider technological as well as consumers' demand particularities in each of the specific cases. As already acknowledged, Telefónica is of the opinion that these new legal offers will surely contribute to reduce illicit content consumption as the consumers' needs will then be better satisfied through the user-friendly offers in the market.

Apart from this collaboration, ISPs obviously operate under a legal framework which should always be respected; specifically a balance between content owners' rights and individual users' rights cannot be achieved to the detriment of protection of users' personal data. We support the European Parliament's insistence in the recent debate over the Telecoms Package that user rights online must shall be respected, and any measures to limit access need to be “appropriate, proportionate and necessary”, and with “adequate procedural safeguards” such as judicial review.

#### **- Financial incentives**

Telefónica is supportive of innovation in this field, and is working with rightholders and collecting societies to find new ways of disseminating content and rewarding creativity. Nevertheless, financial incentives should come from the government or state body, as part of cultural goals, or on contractual bases negotiated freely between content creators and other operators. Simplistic taxes on one part of the industry to fund another distort the market and lead to inefficient outcomes for the consumer. There is therefore a clear need to properly evaluate financial incentives for online multi-territory offers from a competition point of view.

## **FINAL REMARKS**

Telefónica believes that this Public Consultation is an important step to continue an open dialogue between all stakeholders involved. Telefónica wishes to re-iterate its interest in continuing to constructively engage on these issues in view of the crucial role that telecommunications operators play in fostering the growth of creative online content via the enormous opportunities they offer for the distribution of content.

Therefore, Telefónica asks the European Commission to focus its efforts on improving the current reciprocal agreements to enable the collecting societies to grant multi-territory and multi-repertoire licenses as the best way to protect rightholders whilst, at the same time, strengthening cultural diversity in Europe.

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