

establishing standards and new services. This could lead to changes in economic and scientific power balances at global level. It is a challenge Europe cannot avoid.

3.5.3 Lastly, the Internet of Things represents a fusion of the physical and digital, the real and virtual worlds. Smart objects are fully incorporated into the ambient ubiquitous network, and will occupy a far greater place than in the humanist

participatory Web 2.0, which will be dissolved into and become part of the wider and larger scale network.

3.5.4 Finally, the new network poses problems of governance in view of its scale and new content, the requirements of finding hundreds of billions of names and the universal standards which will need to be used. RFIDs are currently regulated through private standards and commercial relations with global EPC, but will this continue to be a practical solution when the Internet of the future is fully developed?

Brussels, 18 September 2008.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market’

COM(2007) 836 final

(2009/C 77/16)

On 3 January 2008, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 16 July 2008. The rapporteur was Mr Retureau.

At its 447th plenary session, held on 17 and 18 September 2008 (meeting of 18 September), the European Economic and Social Committee adopted the following opinion by 115 votes to 1 with 5 abstentions.

1. Conclusions and recommendations

1.1 Consumers' rights:

1.1.1 The EESC endorses the idea of high-level consumer protection. It consequently looks forward to the publication of the Guide for consumers and users of Information Society services.

1.1.2 In the EESC's view, this guide should cover at least the following points:

- Ensuring the network's neutrality, in order to improve consumer choice
- Guaranteeing the proper protection of personal data, and a high level of security for the electronic trading environment
- Helping to establish voluntary regulations and trust marks for e-commerce

— Determining how consumers' rights apply in the digital environment, in particular access rights, universal service and protection from unfair commercial practices

— Setting quality parameters for online services

— Establishing a simple European online form for notifying fraudulent activity

— Introducing an online out-of-court dispute settlement scheme.

1.2 Interoperability:

1.2.1 The EESC wishes to emphasise that interoperability is a factor of key economic importance and notes that open standards are central to achieving interoperability and help to ensure security and reliability.

1.2.2 The continuing lack of interoperability limits the European public's access to technology, services and content, forces them to pay higher prices for equipment and at the same time limits the choice of such devices and obliges people to use backdoor approaches, since some of the parties concerned take advantage of unnecessary technical differences to create monopolistic markets.

1.2.3 The EESC considers the concept of Euro-compatible Digital Rights Management systems (DRM) ⁽¹⁾ to be less useful than it might appear, causing more problems than it solves and potentially excluding some creators from online distribution; further, the content market is now global, as demonstrated by the practice of zoning, which restricts user freedom.

1.3 The Committee considers that the almost anarchic taxation of all types of digital media or memory devices, which reveals considerable disparities between Member States, leads to major market distortions.

1.4 The criminal measures and exception procedures implemented in the Olivennes proposal in France far exceed the WTO's requirements, as laid down in the 1994 Marrakesh agreement. As stated by the Court of Justice in the *Promusicae* judgment, the choice of methods used to enforce copyright must comply with the principle of proportionality and a proper balance must be struck between rights and freedoms and the interests at stake.

1.5 The EESC looks forward, therefore, to seeing the Commission's planned recommendation on creative content online, in order to make specific comments on transparency (labelling) and on new forms of establishing and managing digital rights at the European level, fostering and contributing to innovative schemes for distributing creative content online and researching the most effective means of putting an end to illegal copies made for commercial purposes and any other form of piracy.

2. Commission proposal

2.1 The main aspects of the Commission communication and questions aim to:

- regulate and harmonise and harmonise a European market for creative content online;
- develop a European copyright and related rights, multi-territory rights licensing and greater protection for rights relating to literary and artistic property;
- establish interoperable European DRMs, appropriate to the media devices concerned, in particular for online content;
- ensure the security of communications and financial settlements, combat piracy and fraud, in order to boost confidence in the digital economy and to foster the growth of online services;

⁽¹⁾ Digital Rights Management — (a 'politically correct' term meaning software or technical devices preventing copying).

- the greatest problem on the horizon will undoubtedly concern private copying, which is the source of considerable controversy in Europe, because legislation on this issue in the different EU Member States is far from being harmonised.

2.2 According to the 41-page Commission staff working document, which is published separately from the Communication and is available only in English ⁽²⁾, the cross-border nature of online communications and the new business models required by the new technologies mean that EU policies should aim to promote the fast and efficient implementation of new business models for the creation and circulation of European content and knowledge online. In this context, the Commission has identified as 'creative content distributed online': content and services such as audiovisual media online (film, television, music and radio), games online, online publishing, educational content as well as user-generated content, such as social networks, blogs, etc.).

2.3 The main aim, already stated in the document entitled *i2010* ⁽³⁾, is to establish a single European information area. The problems described in that document still exist and, at the same time, technological distribution platforms are diversifying and expanding.

2.4 With regard to the problem of confidence in the digital economy, a recurring question concerns interoperability between hardware, services and platforms and some people consider that criminalising 'peer to peer' (P2P) or BitTorrent file-exchange systems and imposing draconian measures to protect intellectual property rights do not foster a climate of confidence. This holds all the more true because the explosion of user-generated content, which gives a new dimension to the role played by those users in the digital economy, has resulted in a number of challenges for public policy in different areas, such as confidence and security.

2.5 The use of DRM (digital rights management) is heavily criticised by consumers' organisations, which consider them to infringe basic consumer rights. They also imply data-protection risks and are not easy for users to manage. Some industry representatives defend DRM, however, claiming that the interoperability-related problems are caused by the product manufacturers and software designers.

2.6 On the global market, national market operators are confronted with the diversity of languages and the limitations of certain markets, as well as the disparities in national licensing rules. The ISPs (Internet service providers) support multi-territory licences and rules, but other areas of the industry are by and large opposed to this approach. National licences would help to ensure that authors are better remunerated; although a sizeable number of rights collection agencies operate in more than one country. Furthermore, music organisations and mobile operators would like the rights recovery process to be simplified.

⁽²⁾ COM(2007) 836 final, Brussels, 3.1.2008, SEC(2007) 1710 Commission staff working document.

⁽³⁾ *i2010* — A European Information Society for growth and employment' (COM(2005) 229 final).

2.7 The ISPs are also critical of the differences in systems for collecting rights for private copying, which are increasingly burdensome and complex, as well as the amounts involved. The ISPs also question the benefit of these systems where DRM is concerned.

2.8 The lack of availability of content for online distribution, market fragmentation and the considerable diversity in the types of contract for different uses make it difficult to place creations online rapidly and act as a brake on the development of services.

2.9 The Commission working document reflects the results of two consultations and shows the variety of positions held by the different interests at stake; the Commission would, however, like to push ahead in the (controversial) areas of multi-territory licences and a European copyright, increased use of interoperable DRM in particular and see the completion of a genuine European market, which includes the full range of cultures.

2.10 The aim is to ensure that the European online content market (covering music, films, games, etc) grows four-fold by 2010, with revenues increasing from the 2005 figure of EUR 1.8 billion to EUR 8.3 billion.

3. Comments

3.1 The Committee is fully aware of the fact that the Internet allows the digital collection or distribution of goods and services using methods which infringe the immaterial property rights of authors and distributors of creative content online, as well as the invasion of people's privacy and new forms of fraud affecting businesses and individuals.

3.2 Contemporary music and, increasingly, audio-visual works and software of all kinds are the creations most subject to illegal circulation. This phenomenon became very widespread during the period when distributors had not proposed any business model which took account of the new possibilities for infringing immaterial property rights. Education on Internet use by adolescents was also needed, but no institution has taken this initiative and education of this nature continues to be totally inadequate.

3.3 The initial reactions were sometimes extreme and sometimes, more rarely, lax. In general, distributors have introduced copy-restriction mechanisms (so-called 'DRMs'), concurrently with the demand for financial compensation for rights holders and penal measures which are strong deterrents but, in practice, inapplicable given the scale of the fraud, except in cases of mass counterfeiting, principally from Eastern Europe and Asia. A small number of people have been caught out to serve as a deterrent, but it has not been possible to assess the real impact of this deterrent given the lack of independent studies and realistic data on the damage caused by counterfeiting.

3.4 However, the Committee expresses some surprise at the Commission's proposal to create 'European', interoperable DRMs for content distributed online. As regards music, millions of songs are already available on commercial sites without DRMs, which are expected to disappear over time. Distribution companies are designing a variety of distribution systems for

this category of content, including the possibilities of listening directly without being able to record, or arrangements whereby a certain number of works can be downloaded, or free content in return for 'compulsory' advertising etc.

3.5 Physical protection mechanisms for mobile media, or even terminals, are now viewed as barriers to 'fair use' more than as effective protection against piracy; they can also result in anti-competitive vertical integration (sites, property coding with some degree of loss of quality, dedicated players: Apple distribution systems with AAC coding and iPod or iPhone players). One common form of protection, particularly for software or games and a number of online publications, is based on a digital access key, sent to the purchaser after he has paid for his purchase per unit or for his subscription for a given period; this system is reasonably effective and is already widely used.

3.6 The Committee believes that integrated, interoperable digital DRMs are outdated in practice; it would doubtless be preferable to study developments in the various sectors of the online content market, which seem to be conducive to the protection of copyright and related rights, based in particular on appropriate codes of conduct and realistic business models ⁽⁴⁾, rather than using a European initiative to force a transitory, rapidly changing situation into a rigid framework.

3.7 With reference to copyright and related rights, the existing international agreements and conventions constitute a legal basis which in principle is common for Member States and relations with third countries. In practice, however, differences persist, despite Community law. The proposal for a 'European copyright' for the internal market would also render protection automatic in all Member States once these rights are recognised in one of them, and would guarantee uniform protection.

3.8 In the age of the Internet and the knowledge society, it is vital that a genuine balance be found between the general interest and private interests. Fair payment for authors and distributors is imperative. Readers or listeners and users must be able to make reasonable use of legitimately acquired content, in the home, in libraries or for teaching in educational establishments.

3.9 It must be acknowledged that there is a rigorous criminal law system in a number of countries, protecting copyright and stipulating exorbitant sanctions against unlicensed individuals, while private usage and copying rights have been restricted; however, while police methods imposed on Internet service providers may be useful in the fight against terrorism, they appear disproportionate and likely to infringe the right to privacy in a legal framework unilaterally favourable to

⁽⁴⁾ The fact that music is sold on the Internet at the same price as CDs sold in shops represents excessive profit for manufacturers, which does not encourage those concerned to look for more realistic models that take account of the cost price and a reasonable profit margin.

distributors. Ultimately, this type of legislation may well be challenged at the European Court of Human Rights in Strasbourg, which watches over respect for privacy. For its part, the ECJ in Luxembourg calls on the parties concerned to respect the principle of proportionality and strike a balance between the different rights involved (*Promusicae* judgment).

3.10 Furthermore, some countries, often the same ones, levy a tax on all types of digital media, considering them to be tools for piracy, whatever their intended use. Although this is often referred to as a 'tax on private copying', it generates considerable revenues, which are often shared out in a far from transparent manner. This approach, which places any private or fair-use copying in the same category as an infringement of copyright and related rights is particularly intolerable for honest ICT users, that is to say, a very large majority, and for companies which use them for purposes other than copying pop songs or games. Such levies should at least be reasonable and proportionate to the real cost of storing digital units (a percentage of the device's sale price, divided by its total capacity in Gigabytes, for example, because considerable distortions have been observed in the pricing of storage devices).

3.11 The rights of the different parties concerned must be respected, but so too must the directives in force as well as the principle of proportionality, as clearly stated by the Court of Justice in its *Promusicae* ruling ⁽⁵⁾.

4. Additional comments by the Committee

4.1 The Committee shares the opinion that interoperability, which is crucial to free competition, can only be achieved when consumers are able to use whatever device they choose to read

their content. The only solution to this problem is for content to be open source encoded and thus universally accessible. All DRM systems, however, automatically prevent content being read by any device, hardware or software, that has not been explicitly authorised by the DRM's publisher. By definition, DRM rely on the secrecy of their closed formats, the technical specifications of which are not publicly available. Systems that are not authorised or certified by the DRM's publisher are thus excluded from mounting any competition. Further, no open source DRM yet exists. This solution would require the implementation of complex cross-licensing systems and a number of content creators could find themselves excluded from the market, as a result, for example, of not using DRM. An entire sector within the sphere of digital content creation, including scientific institutions and research centres and universities, as well as free software and content created under alternative licences could be excluded from any market that only allows commercial content. This would appear to be incompatible with the information and knowledge society, of which Europe wishes to be a pioneer.

4.2 None of these approaches is satisfactory, for example for the import of works and content from third countries into Europe or for export from Europe. Any European software-based DRM scheme would therefore also have to be compatible with those used in external markets, which are often much more active in the audio-visual sector. DRM schemes open the door to anti-competitive attitudes and attempts at vertical integration in the multimedia sector. A case in point is Apple iTunes, which uses a proprietary DRM scheme and coding, which in practice forces users to use an iPod or iPhone player.

4.3 If only the API (application programming interface) of a software-based DRM scheme and not the entire source programme is revealed, which might be a considerable temptation for some providers, there will always be the risk that genuine interoperability will be impossible.

4.4 Pirates rapidly find out how to get around or reproduce any protection system, to such an extent that content providers no longer trust DRM schemes and are looking for new commercial distribution models, such as flat-rate subscription, listening without charge but paying to download, incorporating advertising, etc. It would be better to trust the market than to pass hasty and confused legislation, as in France where a succession of laws has given rise to contradictory interpretations by the courts. Lobbying by the major record labels (five global 'majors' dominate the music industry, and six or seven dominate the audio-visual sector) has so far been a key factor in inducing some countries to abandon the right to private copying and criminalise file sharing between individuals. France's most recent legislative proposal fell into this trap of excessive regulation.

4.5 As the Committee has stated in previous opinions, criminal law should only apply to counterfeiting for commercial purposes (production and distribution, e.g. by criminal organisations). In some Member States, it is very easy, even on the open market, to obtain pirated copies of software, music or video material. A European pirating industry does exist, but most

⁽⁵⁾ Judgment of the Court (Grand Chamber) 29 January 2008.

In Case C-275/06,

Reference for a preliminary ruling

The Court (Grand Chamber), rules that:

'Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality ...'.

copies come from Asia. Priority should be given to targeting and punishing large-scale counterfeiting for commercial purposes and to developing police and judicial cooperation with a view to dismantling international criminal networks.

4.6 With reference to sharing, particularly between adolescents, priority should be given to launching campaigns to publicise the need for fair payment for authors and producers (particularly authors, who often receive the smallest share of receipts) and to promote civic education.

4.7 Large-scale file sharing does not necessarily involve files protected by copyright. It may involve the sharing and publishing of miscellaneous free content (results of scientific experiments and studies or works submitted for non-restrictive copying or distribution licences).

4.8 However, under the legislative proposal under discussion in France, the entire network would be monitored, with long-term storage of internet users' personal data. This data would be accessible to representatives of the major record companies. However, if a system of this kind actually were introduced, access to the data ought to be restricted to public authorities having obtained an appropriate court order.

4.9 The right to private copying would become an exception subject to heavy restrictions set out in 'contracts' drawn up by content providers, using opaque jargon and incompatible with the common practice of impulse buying.

4.10 In practice only professional creators and distributors benefit from this kind of excessive legal protection, and there is no specific protection for individual producers, unknown artists or those using alternative licences (there are some fifty types of licence, including GPL, LGPL and creative commons), although these licences are governed by copyright and are not necessarily free of charge. The only recourse available to these rights holders would be legal action for counterfeiting, which would create a profound disparity between the legal treatment of major multinational distributors and that of small companies or individuals.

4.11 The Committee considers that the basic principle of legislation must be the protection of bona fide consumers and fair remuneration for content creators.

4.12 Restrictions on the use of legally acquired licences and access to personal data by representatives of the major record companies are detrimental to the objectives pursued, since 'commercial' counterfeiters will be able to overcome all technical barriers and cover their tracks on the network. Only (legal or illegal) file sharing by internet users with no commercial purpose will be accessible for monitoring. Much of this sharing

is admittedly illegal and must be combated using means appropriate to such a large-scale phenomenon. A few 'deterrent' convictions and the resulting publicity intended to discourage certain internet users will not suffice, since statistically the chances of being caught are minimal and this will not worry, for example, adolescents who are not aware of the harm they are doing to their favourite artists.

4.13 The long-term storage by ISPs of all internet users' personal data constitutes a major violation of their privacy. Is such storage absolutely necessary to enforce copyright and related rights, or is it in fact disproportionate to the objective pursued? Are these rights so absolute that they require permanent violation of the privacy of all internet users?

4.14 This stored data may perhaps be used in the fight against terrorism, but internet users must have legal guarantees of the confidentiality of their internet connections. This could, however, be waived in the general interest by an authority which has obtained a proper warrant, for a specific purpose limited by the terms of the court order.

4.15 The use of data for information-gathering and analytical purposes may be authorised under certain conditions, in particular that of anonymity. On the other hand, cross-referencing named files, collating named data for profiling with a view to more efficient advertising, and storing and linking this data with the list of key words used by search engines, and other practices which are already current (and which mainly benefit the major record labels and other large companies), should be prohibited, as they constitute an invasion of privacy.

4.16 Taxes are levied in many countries on all data media, whether fixed or mobile, for the exclusive benefit of rights owners (especially audio-visual content rights), even on media not intended for such use. Under this system any user of a digital medium is seen as a potential pirate. Certain categories of user should be exempt, including companies. On the other hand, broadband access providers, which owe the development of their networks in part to their potentially illegal use, could be taxed at a relatively low rate, but linked to the volume of traffic between individuals, so as to contribute to copyright revenue and the promotion of new content. Except for collection and redistribution expenses, States should not pocket the proceeds of these taxes.

4.17 Examples of rights management from Scandinavia, in particular Sweden, should be preferred to the succession of French laws and proposals, which are unbalanced and unconvincing as a way of assisting young artists and small and medium-sized businesses.

4.18 After a reasonable period during which exclusive rights would be guaranteed, a global system could kick in, as is the practice in Sweden.

4.19 During its discussion on the draft directive on protection of intellectual property rights (IP-LAP: Industrial property, literary and artistic property and other related or ad hoc rights recognised and protected in the EU), the Committee called for a firm but measured approach to the fight against counterfeiting for commercial purposes.

4.20 For its part, in the Agreement on intellectual property rights, the WTO warned against abuse by rights owners who might restrain competition or fail to comply with the general interest.

4.21 'Objectives: the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of

technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'

4.22 'Principles: ... 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.'

4.23 The above comments by the Committee, which are already contained in the EESC opinion of 29 October 2003 ⁽⁶⁾ on the 'Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights' are in keeping with the TRIPS objectives (Article 7) and their underlying principles (Article 8(2)): these should be included in the recitals of the directive, since the possible penalties cannot be entirely dissociated from substantive law, and possible abuses of IP-LAP rights by right holders must not be overlooked ⁽⁷⁾.

Brussels, 18 September 2008.

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⁽⁶⁾ OJ C 32, 5.2.2004, p. 15.

⁽⁷⁾ The TRIPS Agreement, which forms Appendix 1 C of the Agreement establishing the World Trade Organisation (WTO) signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, p. 1) is entitled 'Enforcement of Intellectual Property Rights'. This Part includes Article 41(1), which states: 'Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'