"Creative Content Online in the Single Market"

BEUC's position on the European Commission's communication on Creative Content Online in the Single Market

Contact: Hans-Marius Graasvold, Thomas Nortvedt & Cornelia Kutterer - legal@beuc.eu

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BEUC, the European Consumers' Organisation
36 avenue de Tervueren, 1040 Bruxelles - +32 2 743 15 90
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Executive summary

BEUC would like to accentuate these points from our response to the Communication

BEUC recognizes the rights holder exclusive rights to his or her works. On the other hand, the exclusive rights of the rights holder are cut short of a total monopoly on the justified grounds of other purposes. It is important to recognize that these limitations are of equal importance.

- Digital Right Management (DRM) seems to no longer be a preferred mean to curb unauthorized up and downloading of copyrighted works. This doesn't mean that DRM is not still relevant.
- That making a functioning DRM that is consumer friendly at the same time is difficult.
- Improving interoperability is necessary to support a pro-competitive market
- Information about DRMs functionality or existence is less important than the functionality the DRM implies.
- EULAs are overall e.g. biased, complex and provide consumers with legal uncertainty.
- There is no factual evidence that ADRs enhance consumers' confidence in new products or services.

As to licensing, BEUC holds that it is first for the rights holders themselves to decide what type of licensing should be preferred. The question gives birth to questions that first and foremost relate to cultural, socio economic and competition law issues. For the consumers, the critical issue is that whatever method of license is chosen, it ensures full and non-discriminatory access to cultural content at a fair and reasonable price.

Improving respect of copyright through stakeholder cooperation can only be accomplished if consumers are deemed as relevant stakeholders by the trade, and consumer interests are taken on as an integral part of business decision-making. Moreover, in order to make way for effective use of new digital media and to get content online, artists should, if necessary aided by EU regulation, be able to move to a new record label, publisher etc. if their old one refuses to actively issue their works on a digital platform during the contractual period.

In order to fully achieve respect of copyright legislation, current national legislation must be reviewed with an aim to make it more comprehensible, rather than punishing consumers on grounds of faulty and ambiguous legislation.

Also, there is an urgent need for principles of net neutrality to be established.

By demanding that ISPs act in compliance with national copyright legislation (See also the proposed amendments to the Telecom directives), the Commission, indirectly introduces an ISP liability for end users' copyright infringement. For several reasons, BEUC finds such a proposal highly questionable, and in direct conflict with fundamental principles of due process and "*nulla poena sine lege*".

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Introduction

The digital technologies influence and change the way we think and behave in the modern world. The access to knowledge, communication, online services, e-commerce etc. extends continuously and changes our economic, social and cultural life. It brings new opportunities but also challenges consumers' rights in the digital environment.

For a digital world and market to function well, it is imperative that the legal and contractual framework is clearly set out. The consumers shall have clear rights in the digital world and the rights shall not be eroded by new technology or (unclear and) unreasonable contract terms.

BEUC recognizes the rights holder exclusive rights to his or her works. On the other hand, the exclusive rights of the rights holder are cut short of a total monopoly on the justified grounds of other purposes. It is important to recognize that these limitations are of equal importance. They are simply substantiated in different ways, e.g. the right of privacy reasons the right to private copying, as freedom of speech substantiates the right of quotations.

The challenge is to obtain a reasonable balance between the stakeholders – typically the rights holders and the consumers. The Commission seeks to support creative content online (CCO) with specific measures, in particular the availability of content, interoperable Digital Right Management (DRM) systems, multi-territorial licensing, legal offers and fight against 'piracy' (in this context, we assume the Commission refers to unauthorized use of copy-protected content for non-commercial purposes).

From a consumer perspective it is difficult to distinguish these measures. DRM systems and their excessive legal protection reduce interoperability and thus the availability of content online while they do not effectively provide protection against 'piracy'.

Availability of creative content

According to the Commission, increasing the protection against illegal copying could foster the availability of CCO. We assume that the Commission fears (and believes the threat of the film industry in particular "clear the Internet first before we go online") that the content industry would reduce legal offers to counter illegal usage of content.

This assumption confounds the causality between illegal copying and missing availability of CCO:

- refraining from offering legal content has increased illegal distribution channels;
- rights holders also believed that they could restrict and control the usage of their content in a very detailed way, often beyond limitations of exclusive rights. In addition, the legislator protected this behaviour through very general legal protection of DRM.

Both restrictions have in common, that they have almost exclusively hindered the availability of legal content while these measures most likely fostered the illegal content available on the Internet.

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Net neutrality and open standards

Other important conditions for available content are not even mentioned in this communication: net neutrality, access neutrality and open standards for devices. Open standards are not only a precondition to compatibility of content and devices as discussed below but also a question of unrestrained access on the supply and demand side. In this meaning, it is important to prohibit any restriction of competition based on vertically integrated offers. This includes cooperation between rights holders, online platforms, software providers, network providers and hardware manufacturers that aim at privileging specific content or prevent other content to reach potential users.

We generally refer to previous submissions, in particular:

- DRM consultation 2004[1];
- previous content online consultation[2];
- Levies position[3].

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

For a long time consumers have demanded the right to use music in a way that is consistent with consumption patterns. The music industry however has had difficulties meeting this new reality and selling music digitally[4]. Today sales, distribution, production and marketing have gradually been digitalised and the music industry should therefore match the consumers' needs.

Until now we have seen a certain extent of control of the digital rights since the administration of rights is based on individual platforms or providers, and also file formats are protected. This administration of rights restricts consumers' access and use and prevents free competition. The information about DRM systems is often hidden to consumers – or incomprehensible.

During 2007, we have witnessed a change in the use of DRM, at least within the American music industry. There seems to be a situation where certain market players opt for online distribution of content without any copy-restriction mechanisms. Therefore in some respects the development of the market and the consumers' demands and needs as users of the product seem to have overtaken the suggestions from the Commission regarding DRM. At least regarding online music, even though we have seen similar developments in other content areas.[5]

BEUC expects consumers to embrace these efforts taken by the rights holders, and that they in turn, will continue to explore new, different and consumer friendly ways to bring their works to the cultural markets. In our opinion the best way to control your content is to be the best provider of it.

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1 BEUC/025/2004 Digital Rights Management.
2 BEUC X/076/2006 Content Online in the Single Market – Public consultation – BEUC response.
3 BEUC X/047/2007 Copyright levies in a converging world – BEUC position.
4 http://nymag.com/daily/entertainment/2007/11/universal_music_ceo_doug_morris.html
5 http://craphound.com/DRMLetter22108.pdf

So far, to our knowledge, no DRM has been programmed in such a way that the system opens up or is destroyed/deactivated at the end of the copyright protection term. This in itself could imply a violation on copyright legislation.

DRM in the form of copy-restriction mechanisms will have to provide the same individual it is supposed to keep out, with the key to open and access content. Otherwise, the transaction of content is meaningless. With this in mind, Cory Doctorow[6] draws this conclusion in the article "Pushing the impossible"[7]:

> "*DRM is supposed to force those unwilling to pay into buying, rather than nicking, their media - but once the cheapskates can search for a cracked copy on Google, it is meaningless.*
>
> *This means that ultimately, DRM only affects people who buy media honestly, rather those who nick, borrow or cheat their way to it. In turn that means that the people who ultimately bear the inconvenience, cost and insult of DRM are the paying customers, not the pirates.*
>
> *There are some fundamental truths in the universe. We cannot travel faster than light, and we cannot make a copy protection system that is uncrackable. The only question is: how long will paying customers stay when the companies they're buying from treat them as attackers?*"

Despite the recent developments in the music industry, DRM as an exercise of exclusive rights is not dead. DRM is also just one of many Technical Protection Measures (TPMs) the rights holders are (experimenting on) using to enforce their rights thus protecting their works. It is in this context that BEUC presents these comments on DRM.

We demand that consumers have the right to full and transparent information and to "technical neutrality" enabling content and programmes to "talk together".

Consumers' behaviour is not only controlled by contract licenses on the administration of rights. Also requirements for product dependence force consumers into particular trading patterns resulting in particular limits of behaviour. If consumers defy the format restrictions, it constitutes a violation of copyrights and consumers are criminalised even if they have bought the digital content legally.

We demand that consumers should be free to decide for themselves what player or platform they will use, and consumers should be allowed to move any content they have accessed legally to the player of their choice, e.g. from the computer to any portable player. Also the format of the storage medium must not be used for protectionist barriers preventing consumers' free choice and preventing consumers from using their rights.

We strongly believe that DRMs that reduce the consumers experience during normal and legit use of creative content are in the end detrimental to consumption.

From a consumer perspective, DRM interoperability is essential to improve confidence in whether a specific product corresponds to the usage expectations and is thus worthwhile the purchase expenditure. In addition, interoperability potentially increases choice. In consequence, online service providers will equally benefit from a higher demand and improve considerably market access for specialised content providers.

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6 http://en.wikipedia.org/wiki/Cory_Doctorow

7 http://www.guardian.co.uk/technology/2007/sep/04/lightspeed

Up until now, keeping the system secret has been considered the most important aspect of a functioning DRM system. The market has failed to deliver interoperable systems. Any existing DRM system has proven to be anti-competitive. Nevertheless, the legislator has prohibited any form of circumvention of DRM systems. In consequence, any attempt of consumers to drive the market towards more competitiveness correlates with the illegality of his behaviour. Or in other words, if a consumer attempts to use the best online offer by-passing DRM on players, he is acting illegally. A recommendation could thus only be to lower the legal protection of DRM.

It is common knowledge that DRM are not suitable instruments to avoid commercial copying.

It is in this context that many music rights holders offer in the meantime their services online without DRM, mainly on the US market but likely to be available on the EU market rather soon.

From a consumer perspective, the most important recommendation to improve interoperability is thus:

1. to abandon legal protection of TPMs and DRMs if circumvention is necessary to ensure interoperability;
2. equal access for content providers to all media platforms;
3. refrain from imposing any form of encryption for free-to-air services;
4. ensuring a favourable legal framework for full interoperability through:

    - open standards, and by
    - adopting and making use of traditional ex-ante regulatory approaches, in particular we would demand the European legislator to apply effectively, enforce vigorously and adapt where necessary traditional consumer protection laws to the digital environment by amending information requirements, amending unfair commercial practices laws, clarifying unfair contract terms and including sales guarantees legislation.

As to the latter point, we would like to refer to concrete suggestions made in a TACD (The Transatlantic Consumer Dialogue[8]) resolution on interoperability and open standards, to be published in April.

In this context, we would also like to point to two approaches put forward in national discussions that are worthwhile to be scrutinized and discussed at European level:

1. A legislative proposal in Italy has been put forward by Digital Media (dmin)[9], and supported by our member Altroconsumo. This proposal could be summed up as follow:

    - dmin.it proposes that the law determines that operators who release content with proprietary DRM technologies must release the same content also using the “interoperable DRM” (iDRM) technologies as specified in its document, under the conditions that the latter are not discriminatory in comparison with the proprietary DRM technologies used by the operator. In

[8] The Transatlantic Consumer Dialogue is a forum of US and EU consumer organisations which develops and agrees joint consumer policy recommendations to the US government and European Union to promote the consumer interest in EU and US policy making.

[9] http://www.dmin.it/specifiche/summary.htm

annex to this document, you will find an English translation of the dmin.it proposal to modify Italian Copyright Law that Altroconsumo supports[10] and an English translation of a compromised proposal presented by Altroconsumo during the working activities of the Committee for the modification of Italian Copyright law at the Italian Ministry of Culture[11].

- Concerning the **access** to broadband digital networks, dmin.it proposes that the law determines that a broadband digital network operator can offer access to his network based on freely determined technical characteristics, provided a network user (content provider, intermediary or end user) may request and obtain from that broadband digital network operator the raw "service-agnostic" access to "big Internet", according to the specification of this document, with the technical characteristics the operator adopts for its offer and at conditions that are not discriminatory if compared with those used by the operator for his own offer.
- Concerning the **pay and cash**, dmin.it proposes that anybody, within the terms of banking regulation, may offer "account" services that are not directly monetary (points, credits) for transactions connected to the use of digital media, according to the specification of this document. Transactions are effected between "accounts" that rely on payment instruments with guaranteed cashing, e.g. bank account, credit card, prepaid card, electronic purse etc. Synchronisation of an "account" with its payment means is not effected at each transaction but at fixed times or on demand.

2. A legislative proposal in France put forward by our member UFC Que Choisir. It proposes the use of extended collective licence (licence collective étendue), which is in place in Scandinavian countries for secondary use of creative content. It would be a contract by which a body representing all rights holders (authors, artists, producers) authorises one or several users (university, radio, TV, e-platform…) to use copy-protected works. This system allows for an increase of the legal offer in allowing smaller operators to broadcast. It also allows for a fair remuneration of rights holders. The extended collective license would not apply to phonograms and video recordings of less than 2 years old (see in this respect the submission of UFC Que Choisir).

We would underline in this context the importance that any impact assessment in preparation of a proposal put forward by the European Commission must include ALL possible options, and be undertaken in the most transparent way.

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

We would like to underline once more that due to the considerations above we do not believe that DRM systems are suitable for preventing unauthorized copying.

The consumer needs to be informed that the content he wants is protected with DRM in the first place. Then the customer has to be given information about in what way the DRM

[10] Annex A, English.
[11] Annex B, English.

will influence his or her use of the content in question. This information has to be clear, and given in such a manner and at such a time that the information is helpful in the decision of whether he wants the content at all or not. Yet, labelling needs to be either self-explanatory or requires sufficient knowledge which cannot be expected by the average consumer, in particular when it relates to technical questions such as interoperability. This said, labelling cannot accommodate in itself the consumer need for interoperability (and it is questionable whether the demand power would be sufficient to do so).

The use of personal data is otherwise thoroughly regulated within the EU and is a matter of informed consent rather than pure asymmetries of information. Any routine or other aim of collecting, gathering, use etc. of personal data is to be dealt with within the respective legal framework, i.e. data protection. In this respect, it could be useful to amend the respective copyright directive with a data protection clause underlining that the copyright directive (and in particular the use of DRM systems) is without prejudice to data protection legislation. In this context, we would in particular like to point to the recent decision of the German constitutional court, which has in a landmark decision developed a new right of digital private sphere[12]. This new right supplements the right of data protection and the right of informational self-determination. It may have very serious implications on the use of DRM and the graduated response proposed within this communication (see below), at least in the German context.

If DRM is to be a successful mean to protect copyrighted material, first and foremost, it needs to be user friendly. It cannot devaluate the consumer experience to a point where it diminishes enjoyment and generates frustration. Information requirements are logically not an instrument as such to achieve interoperable solutions and to improve data protection.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

The complexity and lack of legibility of End User Licence Agreements (EULAs) is a major obstacle for the development of creative content services in the internal market. In general, the lack of accessibility and simplicity in most EULAs represent a major hinder for an educated customer, which is a precondition for a well functioning market. This also introduces a growing danger for “contractual apathy” amongst consumers.

EULAs are without exemption presented and interpreted by one part of the contract, namely the business side. This often results in somewhat biased EULAs.

EULAs are without exemption in a content online context presented to the consumer in a way and at a time were the consumer does not have a real possibility of influencing the contract. On top, the consumer, when presented the contract, does not have any real choice; he either has to oblige or not enter into the contract all together. This means, in the context of the above-mentioned issues, that the consumer is forced to enter into the contractual obligation as presented by the content provider.

[12] http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007.html

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The UK National Consumer Council (NCC) has very recently performed a survey[13] that followed a typical consumer journey, from purchase through to installation, of 25 popular software products. There is no indication that their findings don't represent EULAs giving the contractual framework for creative content online. And we find it most relevant to present some of the results in this consultation.

NCC key findings are described in its report as follows:

> *"We found that there is little clear information available up-front. Of the 25 products we surveyed, 14 did not mention on their packaging that installation requires the user to accept a licence agreement. Many licence agreements are presented in formats that make them hard to read, or that don't encourage users to read them. Furthermore, if they do read them, jargon makes it harder for consumers to understand their rights and responsibilities. Many providers have adopted terms which protect their interests to the detriment of end users. This widespread use of potentially unfair terms is a major concern. Our research highlights examples of:*
>
> - *complex wording and widespread use of legal jargon;*
> - *legal uncertainty, with frequent references to legislation in other countries;*
> - *immediate contract termination rights for the provider;*
> - *the right for the provider to remove services without notice;*
> - *ambiguous references to 'statutory rights';*
> - *restrictions on the transfer of the users' rights to a third party;*
> - *excessive exclusion of liability.*

A similar study undertaken by our German member vzbv in 2006 came to the conclusion that most license terms were not complying with unfair terms legislation[14]. We expect in this context that the current work done on the user guide within the Commission will clarify implications for EULAs in view of the Unfair Contract Terms (UCT) Directive and Unfair Commercial Practices (UCP) Directive as it is clear that they are both applicable to EULAs. A clarification in this regard would be recommendable. Further more, BEUC recommends that:

- Clauses that restrict the use of digital content to specific devices or persons, the prohibition of back-up copies, the prohibition of re-sale or usage tools for disabled persons should in addition be prohibited.
- Gaps in the legal framework of consumer rights and responsibilities must be filled. The exclusion of software and digital content from the Consumer Sales and Guarantees Directive is most pressing.
- Providers must supply information about the licence, as well as access to the terms of the agreement, at a stage before a decision to purchase has been made.
- Providers must ensure that licence agreements are written in plain language and presented in a clear and accessible format.
- Providers must not shift the legal burden on to the consumer: licence agreements should be relevant to the product and applicable in local law.
- The European Commission should bring forward proposals to extend the Consumer Sales and Sales Guarantees Directives to include digital contracts and licence agreements, through the review of the Consumer Law Acquis.

[13] http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr_whose_licence.pdf
[14] http://www.vzbv.de/go/dokumente/546/5/index.html

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

There are no factual evidence that alternative dispute resolutions (ADRs) would enhance consumers' confidence in new products and services.

ADRs seem to be an underdeveloped institute within most countries in the EU, and in some ways ADRs can been understood as a rather rigorous process than needed in situations where a consumer's normal use of a product is hindered by DRM. For a single consumer in a single sales moment, this becomes rather clear. With an implementation of a possible group action (allowing for collective out of court settlements), the consumers would be handed a more general and effective redress alternative.

If an ADR mechanism is presented, it must be opened to both consumers and content creators. To make sure the ADR is a useful instrument, decisions that come from it, must be applicable to all operators using other, but similar or practical compatible DRM. If a DRM is thought/judged/sentenced/ as non-compliant with consumer regulation, the ADR must be given the power to not only force the operator to open the DRM, but also include in its decision penalties and compensation arrangements.

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

Yes, see question 1.

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

In practice, the question of licensing is of great importance to consumers.

The problem, as addressed in the working staff document, is not as much "copyright territoriality", but rather copyright licensing territoriality. The Nordic countries have for a long time succeeded with collective management of copyright through mandatory licence provisions in copyright legislation.[15] These rules – in practice representing exemptions to copyright – serve people with particular needs, like functional disabilities, studies etc.

We think that it is first for the rights holders themselves to decide what type of licensing should be preferred. The question gives birth to questions that first and foremost relate to cultural, socio economic and competition law issues. For the consumers, the critical issue is that whatever method of license is chosen, it ensures full and non-discriminatory access to cultural content at a fair and reasonable price.

We refer to our submission to the consultation in 2005[16].

[15] E.g. on the print-reprography area: http://www.kopinor.org/avtaler and http://www.kopinor.org/opphavsrett.

[16] BEUC X/007/2005 BEUC Response to the European Commission consultation on the Communication on the Management of Copyright and Related Rights in the Internal Market

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

N.A./ see answer to question 6).

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

N.A./see answer to question 6).

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

Firstly, consumers must be deemed as relevant stakeholders by the trade, and consumer interests must be taken on as an integral part of business decision-making. "Stakeholder cooperation" too often manifests in cooperation between commercial actors, while non-commercial actors (i.e. users generating content and "mere" consumers) are excluded.[17][18] In order to improve respect of copyright, the content industry should take end-users on board and include them in their discussions, rather than merely relate to consumers as passive and accidental "beneficiaries" of whatever results that come off negotiations between commercial actors.

Moreover, we wholeheartedly agree with the Commission that a substantial obstacle for making content online is represented by businesses (i.e. publishers), who, in order to protect current business models, suppress emerging publishing forms of digital publication. This problem is especially acute within the literary publishing sector, where publishers, by use of "vacuum cleaner" contracts, gain total control of the author's copyright, of which they most often only disseminate the print rights, leaving other types of use dead. In order to make way for effective use of new digital media and to get content online, artists should, if necessary aided by EU regulation, be able to move to a new record label, publisher etc. if their old one refuses to actively issue their works on a digital platform during the contractual period.

As to the proposed instigation of a "code of conduct" between stakeholders, we agree to the extent that principles of net neutrality need to be established. However, codes of conduct that aim to establish contractual obligations between ISPs and end-users in order to force the latter to comply with IPR regulation, is not the way to go.

Regarding the proposed amendment to article 20 (6) in the Universal Services Directive, while supporting the general idea that consumers should be aware of current IPR legislation, we are convinced that the provision falls short of complying with consumer

[17] http://www.ugcprinciples.com/
[18] http://ec.europa.eu/avpolicy/docs/other_actions/film_online_en.pdf

protection rules, in particular the unfair terms directive, as will be elaborated in the following.

There is general consensus that copyright legislation is not easily understood. In 2006, the Consumer Council of Norway conducted an informal inquiry amongst national legal experts, lawmakers and consumer organizations to survey their comprehension of the Norwegian copyright act (after the implementation of the INFOSOC directive).[19] Their respective answers to a questionnaire (on choice emerging and consumer relevant IPR issues) revealed fundamental differences in opinion. The inquiry clearly shows that Norwegian – and presumably European – copyright legislation is next to impossible to comprehend and live up to. BEUC holds that it is a fundamental right, not only for consumers, but for the people in general, that legislation is comprehensible and practically possible to comply with. This is also the expressed view of the UN[20] and – as well – connects directly with the fundamental right to due process and the "*nulla poena sine lege"* principle[21].

This is aggravated by the fact that many consumers have difficulties finding out what is legal or illegal. In 2007, the Danish Consumer Council carried out a study on digital music copying[22]. In general the results showed that consumers do not know the rules, neither what they are not allowed to do, nor the actual possibilities of copying music, and also a large share of the respondents were in doubts. So the study showed that actually 65 % of the respondents may have done something illegal without necessarily knowing it.

Consequently, in order to fully achieve respect of copyright legislation, current national legislation must be reviewed with an aim to make it more comprehensible, rather than punishing consumers on grounds of faulty and ambiguous legislation.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to follow?

BEUC strongly disapproves the French approach to unauthorized use of copy-protected content for non-commercial purposes. BEUC is opposed to making Internet Service Providers (ISP's) become some sort of a private 'Internet Service Police'. It would be equivalent to making the postal services responsible for the content of letters or making the mobile companies prohibit any discussions on the phone if they have a criminal content. BEUC considers that the approach is absolutely out of step with realities to cut consumers' electronic lifeline to the surrounding world. It is inconsistent with the expectations for individual citizens in our modern society, which is becoming increasingly digitalized. The Internet has become a basic means of communication for modern people and the most important means of access to knowledge and general information. The Internet has also become a platform for consumers' access to participate in the public, democratic debate.

This repressive approach raises fundamental questions but does not provide an effective measure against unauthorized copying. In particular:

- If put into place through standard terms, it fails to comply with unfair terms legislation (see above).

19 Annex C, English.
20 See also General Comment no. 17 (adopted on November 21st 2005) by the UN Committee on Economic, Social and Cultural Rights.
21 No penalty without law.
22 http://www.forbrugerraadet.dk/english/digital/

- It fails to comply with fundamental rights, in particular:
    1. presumption of innocence;
    2. due process (evidence, alleged infringements, etc);
    3. right of defence;
    4. "*nulla poena sine lege*" principle;
    5. private sphere (see in particular the new German constitutional right of confidentiality and integrity of information systems).

We refer to a study by our French member UFC Que Choisir on the Olivennes report.[23]

In sum, the approach is economically unsound and disproportionate and difficult to implement: How will they secure consumers' privacy in case of such surveillance? And how will they handle situations where, due to shortcomings in the IT safety systems (e.g. when using wireless networks), there is a possibility that somebody else may have used the consumer's web access for illegal file sharing? And will they cut the family's Internet access if a minor daughter/son has downloaded illegal material? How will they attribute the infringement to a given person?

In this context, we also warn against introducing – through the back door – an ISP liability in the Telecom package and express also here our doubts as to the full meaning of the proposed new paragraph 19 to the Annex. According to the proposal, National Regulatory Authorities may refer to the measures foreseen in the directives on copyrights and IPR (Directive 2001/29/EC of the European Parliament and of the Council and Directive 2004/48/EC of the European Parliament and of the Council) to grant ISP's a general authorization. By demanding that ISPs act in compliance with national copyright legislation, the Commission, as we see it, indirectly introduces an ISP liability for end-users' copyright infringement. Thus, we understand this as a means to introducing "graduated response", whereas ISPs will have to shut down an end-user's Internet access upon suspicion of copyright infringement.

For several reasons, BEUC finds such a proposal highly questionable:

Firstly, BEUC acknowledges that a court or an administrative authority, in accordance with Member States' legal systems, must have the possibility of requiring the service provider to terminate or prevent an infringement. In this respect, the E-commerce directive strikes a good balance between the different interests involved, by establishing an exemption from liability for intermediaries where they play a passive role as a "mere conduit" of information from third parties and limits service providers' liability for other "intermediary" activities such as the storage of information. The proposal however, hampers the said balance, by imposing an obligation for ISPs to comply with IPR legislation, and thereby indirectly imposing an obligation for them to monitor the information transmitted by end-users. Subject to the E-commerce directive article 15, several EU and EEC Member States hold that intermediaries cannot be imposed an obligation to monitor or search for illegal content or activities. Therefore, we deem the proposal to be in direct conflict with article 15 of the E-commerce directive.

Secondly, holding mere intermediaries responsible for the content that they transmit is most likely to have a "chilling effect" on freedom of speech. Amongst others, when implementing the E-commerce directive, Norwegian authorities held that ISPs may only be held responsible if such a means is deemed relevant, sufficient and proportionate to the end purpose. Having ISPs close down Internet access upon suspicion of copyright infringement will in most cases seem neither sufficient nor proportionate to the alleged offence.

[23] Annex D, French.

Thirdly, intermediaries will be put in a situation where they, on the one hand, have a contractual obligation to a third party to transmit the content and, on the other hand, risk being held liable in case the content proves to be illegal. That way, ISPs risk incriminating themselves one way or another, which in turn is most likely to cause market disturbances.

Fourthly, on basis of a cost/benefit analysis, we fear that especially smaller businesses with limited human and/or technical resources for monitoring end-user activity, will play it safe by suppressing a lot of content that is in fact legal, but for some reason, for example because of the way it is being technically transmitted (file sharing), causes a suspicion of illegal activities.

Fifthly, suppression or cancellation of an end-user's Internet access calls for due process and court trial, and not merely an – in many cases – unqualified suspicion by the ISP.

Sixthly, due to a high degree of legal uncertainty as to what constitutes copyright infringement, such "private enforcement" of copyright by ISPs will most likely create differences between Member States as to what rights and freedoms consumers may enjoy. The result – a "disharmonization" of European consumer rights – is hardly in accordance with the intentions behind these amendments.

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

BEUC opposes applying filtering measures, as it is neither effective nor proportionate a means of curbing online copyright infringements. In respect to this, please see our answer to question 10) that corresponds also to this issue.

END

BEUC, the European Consumers' Organisation
36 avenue de Tervueren, 1040 Bruxelles - +32 2 743 15 90
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