

ETNO Reflection Document on Content-related issues

Executive Summary

ETNO is eager to express its views on several content-related issues from a telecom sector perspective i.e. against the background of new business models and distribution channels enabled by convergence and the development of broadband. In order to facilitate the flow of legitimate on-line content and thus the development of a strong broadband industry across Europe, ETNO recommends that the EU, Member States and industry prioritise and co-ordinate their efforts on the following key issues:

- Fostering the development and distribution of on-line content and creating a level playing field for all distribution platforms by facilitating the availability of content also for New Media (3G or Broadband).
- Encouraging the use of open and interoperable Digital Rights Management for the distribution of content over broadband platforms. Respecting intellectual property rights is fundamental to the development of a culturally rich and diverse society. However, a balance between IPR and users' expectations must be achieved and DRM may ensure a fair collection of revenues and appropriate remuneration schemes for all players in the value-chain.
- Adapting the role of collecting societies and content licensing to the on-line world.
- Encouraging the use of open standards and interoperable platforms as a necessary pre-condition for a smooth flow of services and content over the networks of the Information Society.
- Creating an adequate clear legal framework for on-line content preferably through horizontal legislation.

1. Introduction

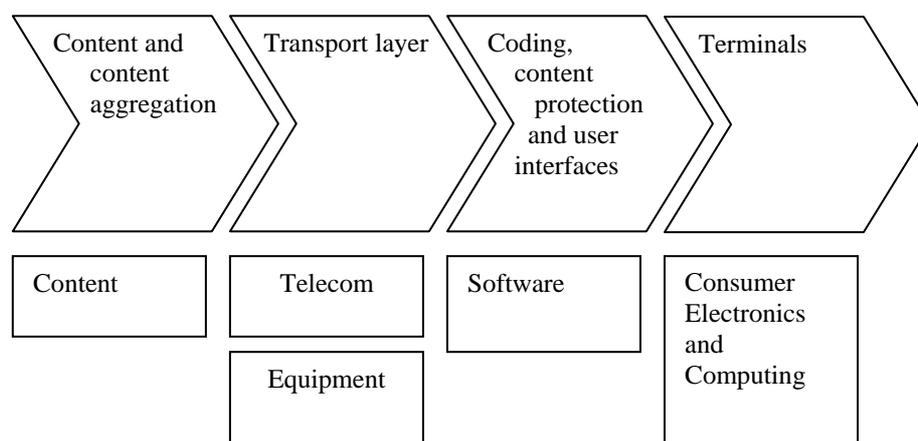
Since 1992 ETNO has been the leading voice of European telecommunications network operators, representing 41 major companies operating in 34 European countries including all 25 EU Member States. They account for an aggregate turnover of over 210 billion euro and employ more than one million people across Europe.

ETNO is increasingly becoming involved in the content-related policy debate, as it is increasingly related to the development of the broadband market. Broadband provides users with an always-on, high-speed Internet connection, which facilitates the development and provision of a plethora of broadband services, including the distribution of on-line content in a multi-platform environment. The development of new digital technologies (e.g. compression and storage technologies) is creating the condition for the convergence of a diverse range of platforms, terminals and services, allowing the take-up of new convergent services.

Users can already receive content over a wide range of different devices (mobile phones, PDAs, PCs, etc.), previously only accessible through traditional broadcasting, thus creating, a new set of market opportunities.

It is well acknowledged that making digital content available on digital networks has the potential of bringing benefits to all stakeholders. This potential will only be fully exploited if all players in the value chain are jointly able to provide value for customers by means of high-quality content and services. The characteristics of the market will be shaped by technological developments, convergence, and availability of added-value services to the consumer.

Five main industrial sectors will be involved in shaping such a convergent market: consumer electronics and computing, communications equipment, software, content, and the telecom sector. Thus, collaborative business models, developed in a competitive environment, are essential. ETNO members are at the forefront of the process of creating cutting-edge European broadband content and services industry of the future.



In order to raise awareness of the importance of content the development of a strong European broadband industry, ETNO recommends that the EU, Member States and industry as a whole prioritise and co-ordinate their efforts on the following key issues:

- Making content available for all distribution platforms, including New Media (3G or Broadband access)

- Deployment of Digital Rights Management (DRMs) for the distribution of content over broadband platforms
- The role of collecting societies in the on-line world
- The role of open standards and Interoperability
- The regulatory treatment of on-line content

2. Availability of content

Along with applications, circulation of content over multiple platforms is driving the growth of the electronic communications market. This implies that content should be made available to the various distribution platforms providing users with a wider variety of choice. In this context, content owners and on-line distributors need to work together to enhance the value chain and provide value for customers.

The development of a “broadband environment”, with its new distribution channels for on-line content, entails a transformation and redefines the role of traditional and new stakeholders. In the new business models that are in the process of emerging around the new media content services over broadband platforms, the roles of traditional stakeholders will have to expand to take advantage of new market possibilities whilst new stakeholders will have to be accommodated (e.g. telecommunication industry, equipment and software industries). New business models, agreed upon by service and content owners/providers too, represent the correct way forward.

In this context, availability of premium content is of crucial importance for new media platforms. As such content is essential to attract viewers and enables the take-off of the new media market. So far it has been difficult for these platforms to gain access to premium content such as movies, sports and even TV channels.

The traditional value chains need to be reviewed in light of converging services to avoid hampering the distribution of audio-visual content over the newest platforms, and thus restricting competition amongst platforms. In practice, it is frequent for premium content right holders to request fixed up-front payments from new media operators and minimum guarantees similar to those requested from traditional platform operators such as broadcasters. However, these conditions can represent significant barriers for new entrants, thereby excluding them from access to content.

Furthermore, the pricing power of content owners/aggregators reduces the possibility for both new and existing players delivering content via new platforms to explore these new market possibilities. Moreover, hold-back clauses, i.e. the system of exploitation of time-windows for movie distribution and – in some cases – the application of “most favoured nation” contractual clauses to new media providers, might restrict their possibilities to enter the market. In this respect, a proper balance should be sought between the interests of content and service providers in light of the

common objective of meeting consumers' interests and maximising the benefits of the new value chains for all stakeholders.

In addition, clauses that discriminate against particular platforms, i.e. by offering delayed access or other forms of restriction on what content may be transmitted, do not seem to be consistent with competition rules. Competition authorities should carefully assess the possible foreclosure of markets stemming from the concentration of rights by dominant players for their distribution across all possible distribution platforms.

Hence, the relevant European and national authorities should intervene to avoid possible market foreclosures. European institutions should continue to uphold both the availability of content for new media and the investments in digital infrastructures as essential conditions for the development of new markets for online services.

In particular, DG Competition should continue monitoring the market to ensure that (a) a level playing field is maintained between different platforms and (b) neither content owners nor operators of traditional distribution channels erect artificial barriers to bar market entry of new media service providers.

Against this background, ETNO welcomes DG Competition's recent initiatives such as the sector inquiry into the provision of sports content over 3G (and over fixed-broadband, which is expected shortly), and the investigations regarding the possible restrictive effects of notified agreements (2006 World Cup, Olympic Games and Bundesliga agreements, exclusive agreements amongst major US networks and EU pay-TV's).

Furthermore, the Commission's willingness to strengthen programmes such as MEDIA and Media +, as well as its intention to launch additional, separate programmes to boost the creation of broadband specific content (e.g. eContent plus) are crucial. It is clear that new on-line multimedia services will also provide new opportunities for the creation of ad hoc content. Radio-on-the-web has illustrated how to create new radio channels not available with traditional broadcasting, thereby expanding the scope of radio programmes, and revenue possibilities for content creators and providers.

The public sector also has a key role to play in providing broadband content and services. The Commission and Member States should encourage the provision of public sector information as well as specific content and applications in areas such as e-learning, e-health and e-government available to all users, in line with public policy goals and with due regards for competition policy.

Finally, the right to information and access to short excerpts should be maintained and its distribution should be allowed for all new media.

3. Intellectual Property Rights

Respecting intellectual property rights is fundamental to the continuous development of a culturally rich and diverse society. The recognition of intellectual property rights together with strong copyright protection and enforcement are indispensable tools for exploiting the full potential of on-line content. However, a balance between IPR and users' expectations must be reached to eliminate barriers to the development of new digital services.

In this scenario, the use of DRM may benefit all stakeholders, by facilitating the licensing, acquisition and protection of copyright and neighbouring rights through technical means, without interfering with normal consumption by the end-user. DRM systems could ensure fair collection of revenues and appropriate remuneration schemes for all players in the value-chain, promoting wider availability of high-quality digital content. DRMs are a key enabler for new business models for distribution of content and should be further promoted to the benefit of end users.

Interoperable DRMs may provide consumers with a wider variety of choice, including an increased number of ways and formats for receiving content, at the same time providing the right holders with more flexibility for pricing.

The EU Commission in co-operation with all industry players should encourage the adoption of efficient and user-friendly DRM mechanisms through the support of open and interoperable solutions, as the most appropriate way of developing the market for consumers while protecting the interest of the right holders.

Against this background ETNO believes that in a world of effective DRMs levies have a diminishing place. The implementation of remuneration principles should be in line with the principles of the EU Copyright Directive¹ that no duplicate payment for content to right holders is due. Therefore, the Commission and national authorities should support the DRMs' potential. Likewise, ETNO does not support the extension of levies to new supports and devices such as mobile handsets, and strongly opposes any levy on traffic data ("bit or broadband levy") on the grounds of copyright usage or compensation.²

The Commission along with relevant national authorities have an important role to play in encouraging the distribution of authorised digital content. Consumer awareness and education about the role of copyright and the use of legitimate services (by means of new technologies) should definitely be promoted. To this effect, ETNO welcomes the Commission's

¹ (2001/29/EC)

² ETNO's specific position paper on DRMs can be found at <http://www.etno.be> , RD193
"ETNO Reflection Document on the European Commission Communication on the Management of Copyright and Related Rights in the Internal Market"

establishment of the High Level Group on DRMs. Many of the Group's conclusions and recommendations are in line with the Association's existing positions.

However, although much work clearly remains to be done particularly in relation to interoperability, previous doubts about the viability of DRM technologies are no longer justified as successful DRM-based business models for content distribution are already operational.

In particular, the level of protection offered by DRM systems is now adequate for making illegal copying an insignificant risk, although a 100% guarantee against illegal copying is, in any case, utopic. In order to provide the basis for viable commercial activity, DRM systems only need to offer a level of protection that is sufficient for providing average users with an "incentive to honesty" (for example, the absence of a theft-proof vehicle has not prevented the emergence of a healthy global car-manufacturing industry). Further delay in the launch of legitimate digital distribution businesses will only serve to promote the proliferation and consolidation of illegal services, which contribute nothing to the content-production economy.

Finally, DRM should not jeopardise legitimate privacy interests. In order to safeguard the right to privacy and enhance consumer confidence, DRM should be subject to data protection rules. Likewise, Privacy Enhancing Technologies (PETs) should be promoted for the entire industry.

4. On-line content distribution and the role of collecting societies

As already stated in previous ETNO papers, the current licensing framework requires that rights for the marketing of music and related multimedia copyrights be acquired at each of the national collecting societies for the different territories in which content will be distributed.

Collecting societies exist in every Member State. They are involved in collecting royalties on behalf of the right holders and enable legal use of content in the national territory where they are established. However, reciprocal agreements amongst those societies have put them in a strong bargaining position, in particular with their "exclusive right" for their territorial sale/use.

In this respect, ETNO supports the initiatives carried out by the Commission as for example within the framework of the Santiago Agreement³. It is clear that territorial protection systems provided for in such agreements, have no reason to exist in the on-line world, where IPR

³ Under the Santiago Agreement, the Collecting societies use reciprocal agreements to impose territorial restrictions, which oblige the commercial user to acquire the national and cross-national distribution-rights from its national collecting society. According to DG Competition, this lack of choice and the maintenance of the old monopolistic structure seem contradictory to the objective of an Internal Market, violate competition law and could impair the development of coherent business strategies within the industries.

holders can remotely control the copy and distribution of their works through DRM systems without a local presence.

The possibility of obtaining a Community-wide licence based on a genuine one-stop-shop system for each of the necessary collectively managed rights without territorial exclusivity, will definitely simplify the process of acquisition of rights. It would allow for the clearance of each such rights at a single point (of the user's choice) for the EU as a whole, increasing competition amongst collecting societies at the same time as guaranteeing greater price transparency for the cost of such services.

5. Open standards and Interoperability

Interoperability is a necessary pre-condition to ensure the smooth flow of services and content over the networks of the Information Society. It also increases consumer satisfaction as a result of having a wider choice.

ETNO understands interoperability as the ability of information and communications technology (ICT) products to exchange and re-use data, enabling broad communication, and access to information and applications through a wider range of systems, devices and services. Since DRM and Technical Protection Systems (TPS) provide security, interoperability means that whenever services and devices from different providers can be used interchangeably an overall level of both functionality and security must be maintained. More importantly, interoperability must not mean homogeneity - standards should allow for the differentiation and inclusion of value-added features, as long as inter-working amongst products/services is maintained.

In this respect, the relevance of standardisation and spectrum policy becomes increasingly important. ETNO therefore welcomes the Commission's in-depth investigation into the Microsoft/Content Guard case given the strategic importance that DRM have for the development of new business models.

Even though there is strong interest in interoperability from both the public policy and user perspectives, in most cases, governments should not regulate interoperability in a certain market segment by mandating the use of specific standards. Instead governments should promote the development of industry-lead open standards⁴ and their voluntary

⁴ The term "open standards" as used here means standards that are developed or affirmed by a group with membership open to all qualified participants (usually including ICT firms, but also often including researchers and academics) through discussion, collaboration and consensus in a transparent process or forum. Open standards are also fully published and always made available on fair and reasonable terms to anyone who wants to use the standard. In some cases, open standards simply mean that they are accessible and available on FRND terms. Some insist that "open standards" must be published by a recognized standardisation body (ETSI, ISO, etc.). A debate is still going on regarding the meaning of Open Standard. The proposed definition safeguards TIMs interest in OMA, etc.)

adoption. In this context, interoperability could be facilitated through the development of open standards agreed by industry consortia (such as MPEG, OMA and DVB) and endorsed by European standardization bodies (ETSI/CEN/CENELEC). This process should meet certain criteria for openness in relation to participation, access to standards and availability of intellectual property rights. This represents the best solution for promoting convergence in the communication market, maintaining competition in the technology market and developing the Information Society.

Finally, ETNO welcomes the European Commission Communication on the interoperability of interactive digital TV services⁵. ETNO supports the Commission's decision not to take any further action at this stage for setting a uniform technical standard for interactive digital TV. Moreover, ETNO also supports Member States should continue to promote open and interoperable standards – including the Multimedia Home Platform (MHP) – on a voluntary basis.

6. A favourable environment for on-line content

ETNO wishes to stress that current uncertainty regarding the availability of quality on-line content is a barrier to the flourishing new content-based services, and may very well deter the necessary investments by both the infrastructure and content industry.

The convergence of technologies and the development of digital television through new networks, launched a debate on whether to broaden the current scope of the TV without Frontiers Directive (TVWF-Directive). The ongoing review of the TVWF-Directive should not, in any way, herald content regulation but foster the creation of new multimedia content by eliminating threats and barriers to its delivery over all delivery channels in a technologically neutral way.

By their very nature, interactive services based on individual requests, fall into the category of Information Society services governed by the e-Commerce Directive. This should continue in the future. It would be inappropriate to extend the TVWF Directive to include the interactive world.

Moreover, audio-visual services should be regulated by the new Draft Services Directive⁶, as currently stated under Recital 14. ETNO wishes to draw the Commission's attention to the need to maintain the scope of the draft Directive and not grant new exceptions for specific classes of services. Otherwise, we may risk having similar services falling under different regulations⁷, due to inappropriate extension of legacy sectoral regulation.

⁵ COM (2004) 541 of July 30, 2004

⁶ Recital 14 of the Proposed Directive on Services in the internal market 5.3.04.

⁷ Electronic communications services and networks are covered by the 2003 electronic communications regulatory framework would be excluded from the scope of the proposed Directive. Nevertheless an increasing number of new on-line services (information society

For regulation to be effective, it should give market forces sufficient leeway to explore new avenues without trying to influence the commercial success of services.

As the current electronic communications framework guarantees access to the end customer, no further regulation in addition to competition law, should be applicable to new capital-intensive technologies (e.g. fibre) and for new innovative services (e.g. broadband TV). The development of new business models should not be made more difficult by inappropriate regulation.

Therefore, ETNO urges the Commission to clarify the regulatory framework for broadband audio-visual services currently defined by up to four different Directives⁸, stemming mostly from the Information Society framework and dealing with highly heterogeneous issues.

7. Conclusions and recommendations

In order to ensure an appropriate content environment for the development of the Information Society, ETNO wishes to make the following recommendations:

- Co-operation among all stakeholders (service providers, content providers, aggregators, broadcasters, network operators, mobile and the other New Media Operators) should be promoted for the development and distribution of digital content. By doing so they will be able to best serve the customer's interests at the same time as developing successful business models.
- European institutions should continue to monitor and actively support the new emerging market for the distribution of digital content, in order to ensure the establishment of a level playing field for all the different convergent platforms and stakeholders involved in the availability and distribution of content.
- Competition rules should be respected with regard to negotiation of content and audio-visual rights, to avoid hold back clauses and anti-competitive long-term exclusivities. DG Competition should continue to monitor this sensitive environment in order to guarantee a wide availability of content.

services) would not fall under existing sector specific framework. ETNO understands that on-line services and audiovisual services should be covered by horizontal regulation such as the proposed Services Directive

⁸ See: Directive 89/552/EC "Television without Frontiers" of 3rd October 1989 and Directive 97/36/EC of June 30, 1997 amending the 1989 Directive, Directive 93/83 of 27th September 1993 "SatCab", Directive 2000/31/EC of 8th June 2000 "Electronic Commerce".

- Compliance with Intellectual Property Rights is fundamental to create a fair environment for the availability and distribution of content. Open, interoperable and voluntary DRM systems should be preferred over mandatory legal instruments for the enforcement of exclusive rights. Furthermore, consumer awareness and education in the use of copyright-protected content should be promoted.
- Interoperability is a necessary pre-condition for a smooth flow of services and content over the networks of the Information Society. Open, interoperable and commercially agreed-upon standards should be preferred to mandatory solutions.
- The Commission should clarify the regulatory status of new content-based broadband services. In the area of on-line multi-media markets, harmonisation should preferably be achieved through horizontal legislation (i.e. e-commerce, services directive, competition law) rather than through narrowly focused regulation.