

ETNO Expert Contribution to the Film on Line project – follow up of the Enlarged Meeting on Film on Line, January 13, 2006

Introduction

ETNO welcomes the EU initiative to foster the growth of film-on-line. The project is a timely potential complement to EU media regulation which needs to promote competition and diversity and to facilitate the transition to digital modes of delivery.

The Association strongly supports increased collaboration between all stakeholders as illustrated by its workshop: "Any content, any platform, any time, anywhere" (March 2005). However, development of a dialogue and identification of common solutions requires a balanced approach which takes the interests of all concerned parties carefully into account.

Cooperation to fight piracy

Discussion of this topic needs to avoid confusing two separate issues:

- the extent of ISP cooperation that is required by the public interest
- the extent of ISP cooperation that is required by rightsholders' interests.

Two comprehensive debates on the first issue have already been carried out at the EU level. The consensus reached at the conclusion of these debates is reflected in the provisions of the E-Commerce Directive and the IPR Enforcement Directive. These provisions acknowledge that the interests of rightsholders need to be balanced against other considerations: e.g., the rights of law-abiding telecoms users, and society's need for an open "common carrier" electronic communications platform.

In particular, ETNO would highlight articles 12 to 14 of the E-Commerce Directive which define the conditions under which service providers should not be held primarily or secondarily responsible for copyright infringements by their customers, and article 15 of the same Directive which establishes that there is no general obligation for Internet Service Providers to monitor the information they transmit or store, nor a general obligation to seek facts or circumstances indicating illegal activity.

The proposals for ISP action in response to copyright infringement complaints which have been advanced in the framework of the Film on Line discussion are not characterised by a similarly balanced approach. In particular, ETNO is concerned by suggestions that ISPs should commit themselves to a 3-step graduated response (warning letter, followed by reduction in bandwidth, followed by suspension/termination of service) to copyright infringement complaints.

Such proposals are not only contrary to the provisions of the E-Commerce Directive. Since they involve the imposition of sanctions relating to disputes in which ISPs have no direct involvement, ETNO doubts their consistency with the legal framework of many Member States. We also believe that, in the absence of a court order, an ISP's matching of a customer name and address to an IP address supplied in a third party complaint would be considered as a violation of data protection laws in at least some Member States – *even where the customer's name and address is not disclosed to the third party.*

Where the legal framework does not exclude implementation of such an approach, responsibility for judging of the validity of complaints remains a central issue. The issue is easy to overlook since the graduated response proposals are being advanced by large, highly-professional rightsholder organisations with a well-known repertoire and a strong need to protect their good reputation. But even these organisations sometimes make mistakes.

Furthermore, since any ISP commitments made in an EU Charter would have to be offered to all rightholders, ISPs would have to deal with complaints from unfamiliar sources concerning previously-unseen content items in which rights ownership is unclear. They would also have to take account of the scope for abuse of copyright complaints to suppress inconvenient criticism or to undermine legitimate businesses (application of the US Digital Millennium Copyright Act has amply confirmed this point).

Against this background, any ISP undertaking to implement the 3-step response would have either to:

- tolerate the exposure of innocent customers to unjustified harassment, as well as the liability claims and negative publicity arising from this harassment,
- invest large resources in the verification of complaints (even in this scenario, the risk of unjustified harassment and liability claims would not be completely removed and the prompt response demanded by complainants would rarely be possible).

It is unlikely that such efforts would have a significant impact on piracy levels since determined infringers would simply switch to other providers.

To sum up, rather than creating copyright enforcement mechanisms where none exist, the graduated response proposals seem more concerned with shifting the costs of enforcement from rightsholders to ISPs. In other words, ISPs are being asked to provide a service to rightsholders. It follows that if

the graduated response is to be discussed at all (as noted above it may be illegal in many Member States), it is necessarily a matter for commercial negotiation rather than an EU Charter.

Working together to improve the availability of film on line on a mutually profitable basis

“The advent of film on line offers immense opportunities for the film industry both with regards to access to new audiences and with regards to wider circulation of European films including on international markets” as was recorded by Ministerial declaration at the Cannes Film Festival in May 2005.

It is ETNO's understanding that - to reach this objective - the Sherpa Group should focus on finding appropriate shared solutions to promote the online market of European films. This will bring benefits to all stakeholders who are involved in the value chain.

Financing of European production was introduced as a related issue during the meeting of January 13. While ETNO agrees that this is an important issue, the Association would underline the following points:

- Imposing financing obligations on digital distributors will be detrimental to the development of the market of the film on line, and - in the end - of film financing itself.
- Development of the on line audiovisual market itself is the best instrument to promote European cultural diversity and the widespread diffusion of the European audiovisual works.
- The best way to foster production and distribution of European works is by means of current financial programmes such as Media 2007 and eContent Plus.

Content on Line

ETNO considers that a broader Content on Line initiative, along the lines of the current Film on Line project, is premature at this stage. We believe it to be preferable to concentrate our efforts on the activities which are currently on the table for film on line. A possible exercise on content on line should only be considered when an agreement has been reached and concrete actions have been decided in the current film on line discussions.