

EDiMA positioning on territoriality

The European digital consumer continues to rewrite the rules of engagement for the EU online environment, with changing expectations regarding convenience, portability and availability, all of which demands a harmonised European Digital Single Market. EDiMA has always been a keen supporter of the Digital Single Market and stood behind the principles thereof. Furthermore we strongly support the Commission's ambition towards the realisation of a functioning Digital Single Market for Europe, and echoes the sentiment of Vice-President Ansip and Commissioner Oettinger and in their effort to bring down the barriers that currently limit benefits for consumers and businesses alike within the EU.

We do however believe that in order to allow for continued innovation in the online space and to foster innovation in Europe it is essential that services are made accessible but in a balanced fashion. We would therefore caution against measures that would threaten the fundamental principles that guarantee the freedom to conduct business (Article 16 of the EU Charter of Fundamental Rights). The Digital Single Market should enable flexible and easy access to legal digital content at a fair price for consumers, while boosting diversity, creativity and culture and generating more revenues for creators.

Portability

EDiMA supports services being offered across Member States and while we understand the desire to promote measures that facilitate greater portability we believe that this should not undermine current or the development of new commercial business models and allow service providers to compete by developing better and more innovative offerings to the benefit of consumers.

Furthermore, we would like to point out that portability should focus on ensuring that the subscriber has access to services and the ability to access and view content or a subscription while travelling to another Member State and that this should not be confused with interoperability (the ability to carry one format from one platform to another).

Legal uncertainty and territorial fragmentation

For both consumers and business alike the fragmented nature of the European market for digital goods, content and services is still a major stumbling block to growth, jobs and innovation. Some ways in which the EU deals with issues such as copyright and licensing can be considered barriers to harnessing the potential of the online environment.

However, EDiMA would like to highlight that while some bottlenecks exist within the current copyright framework there are numerous other factors, independent of copyright legislation that continue to fragment the internal market.

Service providers offering services from different EU Member States are still faced with legal uncertainty and territorial fragmentation as divergences remain in a number of areas such as consumer protection laws, national rating systems, child protection obligations, and promotion of local content that necessitates service providers to develop market-specific offerings.

Difficulties in cross-border situations may often stem from the fact that copyright is territorial by nature and limitations and exceptions are different from one Member State to the next.

The EU VAT Directive has changed the applicable VAT for online services from the country of origin to the country of destination. Online services providers must, as of January 2015, apply local VAT rates which differ from market to market – thus making cross-border transactions more cumbersome.

In addition, the current VAT regime creates a barrier to growth by its differential treatment of e-books and printed books. Whereas physical books benefit from a reduced rate in nearly all EU Member States, e-books are subject to standard VAT rates. This is a major barrier to the distribution of e-books in the EU. Attractive and competitive prices are important to drive the adoption of digital content and combat digital piracy. Furthermore customers expect e-books to be priced at 30-40% below that of their physical equivalent. EU Culture Ministers have recently recognised the problem that higher prices – e.g. caused by higher VAT applied to e-books or fixed price regulation – lead to a reduction in consumer choice and availability which lead to a lower consumer take-up of e-books but this issue still needs to be efficiently addressed.

The EU market remains significantly fragmented and any company, regardless of their origin, wanting to offer services would need to overcome a number of factors. These include among other things: 1) territorial fragmentation of IP rights; 2) high transaction costs (rights clearing, translation costs); 3) the general absence of legal digital alternatives in the first release window for audio visual content¹.

EDiMA members have experienced major challenges licensing premium television video content for multiple EU countries. For example, some German premium video content licensing agreements usually limit the rights to use the content to German speaking countries (Austria, Switzerland and Germany) or sometimes only in Germany. In addition, IP blocking of foreign addresses is often contractually required. This limits the ability from making these services available to German-speaking users while they travel to other jurisdictions, even within the EU.

Recommendation

EDiMA believes that a harmonised, consistent and coherent approach will benefit consumers dramatically by facilitating the development of a more robust marketplace with greater consumer choice, and higher levels of consumer confidence with respect to cross-border access to online goods and services. We believe that there are a number of areas, including some low hanging fruit, which would go a long way in achieving these goals. For audio visual content, the country of origin principle, with its one stop regulatory approach to the free movement of services across the EU, is one of the greatest achievements of the AVMS Directive. It needs to be reinforced. The EU requires a consistent application of the country of origin principle, and further removal of fragmented rules.

Repertoire Transparency

In order to provide a comprehensive pan-European music service, licensees still need to secure rights from all national collecting societies in all Member States for their respective member repertoires, as well as repertoires from outside the EU, resulting in a significant number of licences that are required for coverage of all repertoires. The market needs a reliable mechanism to enable rights holders to aggregate their repertoires so that the number of licenses needed is reasonable while at the same time avoiding the creation of super-monopolies. The complexity and lack of transparency in rights

¹ Even though on rare occasions parallel releases do occur.

ownership has, however, led to significant uncertainty in the securing of rights. It is still not necessarily clear by whom certain rights are held, leading to possible double payments by licensees for the same right.

Recommendation

Promoting better repertoire transparency and providing support for corresponding initiatives should continue to be pursued as a priority.

Flexible market-based licensing regime

A well-functioning and flexible market-based licensing regime is critical to the promotion of cultural diversity in Europe and to the development of a dynamic and successful new media sector. Recent developments in securing licences for music has significantly changed the licensing processes and the landscape of associated rights. These changes have, in some instances, encouraged the development of new business models but have also led to increased compliance and liability costs. Indeed, the simple cost of administering a licence has challenged the viability of some online business models at a time when the industry must cut costs in order to remain competitive.

Today, the way copyright levies are applied and managed act as a barrier to cross-border e-commerce. This unfairly penalises customers and creators as the unnecessary red tape and costs created by the complexity of the collection and management of copyright levies increase price for the consumers and revenues for the creators. Whereas in the offline world the customer pays the levy of the country where the retailer is based, for products sold over the internet levies may end up being paid twice – once in the country where the retailer is based and again in the country where the customer is based.

The differences among the EU Member States regarding the private copy levies create also legal complexity for service providers and lead to piracy. It does not reflect the usage and of needs of the consumers today.

Recommendations

The high administrative costs of licensing have caused some providers to exit the market, removing revenue from the content sector. More change is necessary to encourage the market to adjust to the realities of the online world, to respond to unmet consumer demand and to deliver economies of scale. The challenges experienced in the music space are increased in the launch of music services: local difference in collective management (with some rights being managed collectively in some countries and not in others, some rights are collectively managed on a territorial basis); separate music licensing; less information on repertoire and need to match music and audio visual.

Consumers should be allowed to make copies of lawfully acquired works for use within a household without this triggering a copyright levy since it does not cause harm to the right holder.

Risks of intervention on territoriality restrictions

The territoriality restrictions of the European copyright regimes are currently the main obstacle or the most urgent one to be tackled for the further expansion of digital services in the EU. Before imposing a pan-European copyright model, there should be a thorough impact assessment to evaluate the benefits and the risks for all stakeholders of the EU digital sector and the consumers alike. For instance,

the licensing costs may rise artificially if a company wants to have a service only in one or a few EU Member States but has to pay for an EU wide license. Companies, both large and small, should not be forced to provide services, develop infrastructure, or alter their business models to serve markets that are not part of their current service offering. Ultimately, those higher licensing costs would likely be reflected in higher prices for the consumers. Furthermore this would not address other obstacles like languages, cultural differences and in particular varying VAT regimes, which have an equally large impact.

When considering removing territorial restrictions within the EU to allow, for example, that content licensed for access in one Member State can be accessed by consumers from another Member State, a number of key issues need to be addressed.

For example, it is unclear in the situation where content licensed for access in Member State A, and available for access by consumers from Member State B, who the right holders are who would need to be remunerated? As the service would only have contractual relationships with licensors in Member State A, paying only right holders in Member State A would undermine the licensor in Member State B. What measures would need to be taken to alleviate these situations? Would this have an impact on all types of content (books, news, films, sports, etc.)?

Recommendation

Rather than impose a sweeping ban on geo-blocking, which could ultimately unearth a plethora of legal uncertainties and greatly impact the business models and capabilities of many EU businesses, a potential resolution could be: to limit the ban less sensitive types of content (for example books or music); archive film material in situations where all exclusive licensing windows across the EU markets have lapsed; and for content that is not available in a particular market a license can be obtained from a licensor in another market.

Conclusion:

Whereas the end objective should remain: improving accessibility to services and content online – a nuanced way of balancing this objective with supporting innovation is needed. Sweeping bans on geo-blocking are not the way to address the accessibility issues and will only leave the online space with a number of imbalances and some service providers unable to continue providing their services online.