

**Achieving a free flow of Digital Content across Member States by  
eliminating regulatory barriers**

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## **About Telenor Group**

Telenor Group is a global provider of electronic communications networks and services with a leading position in Scandinavia and a strong footprint in Central and Eastern Europe and in Asia. Telenor offers a variety of services on all platforms, including mobile voice and data communications services throughout its footprint, and telephony, broadband as well as television distribution services over digital terrestrial, cable and satellite networks in the Nordics.

For more information about the Telenor Group, please visit: [www.telenor.com](http://www.telenor.com)

## **Introduction**

The emergence of the Internet as a place for making available, sharing and using digital content has created many opportunities and challenges for EU policy-makers and stakeholders participating in the online content market. The latter include tackling piracy, stimulating demand for legal offers, reforming content licensing and establishing consumer rights in the online world.

Telenor would like to take this opportunity to present some of our views on digital online content and how we believe that a vibrant digital single market can be developed. The views presented in this paper are based on Telenor's experiences from working in different forms of commercial partnerships with online digital content providers, including Voddler (films and TV) and WiMP (music). It is our opinion that the solution to the threat of digital copyright infringements lays in the provision of innovative services and new business models that make available sufficient legal content offers that are user friendly and available when the demand is peaking, i.e. the time that illegal content usually is available. We believe that today there are barriers that hinders the exploring of the potential of Europe's digital future such as lack of cross-border licenses, restricted release windows, lack of inclusive information concerning ownership of rights and deficient transparency and governance of collective rights societies.

Telenor acknowledges that the European Commission has launched a number of initiatives in recent years in order to create a stronger and more consumer-friendly single market for online content. As part of the Digital Agenda for Europe the Commission has proposed some very positive initiatives with the aim to stimulate legal online content, for instance the proposed Framework Directive on collective rights management and a wide stakeholder debate.

## **Background, current progress and way forward**

Digital piracy has in recent years become a widespread challenge worldwide and a debate on piracy prevention has been present all around Europe. Right-holders have often stated that measures such as graduate response and blocking of web-pages are the right means to prevent digital piracy. Telenor conversely believes that the emergence of legal alternatives is the way forward to combat illegal file sharing. To further develop the market for attractive legal content, Telenor has at an early stage taken the role of a digital enabler for providing this content to our customers by closely cooperating with and assisting new innovative content service providers. Telenor cooperates with companies such as Voddler and WiMP, who are examples of content providers who offer user-friendly legal content using new inventive business models based on efficient technological solutions.

Telenor furthermore sees commercial opportunities in being an enabler of digital content i.e. providing a means for digital content providers to distribute their services to end customers by using our networks. By partnering with content service providers Telenor makes available attractive and easy- to- use legal content offers to our customers. This provides a competitive advantage for Telenor and increases customer loyalty.

There have been a lot of suggestions for measures that are meant to prevent digital IPR infringements, such as graduate response and blocking of web-pages. Telenor believes that some of these suggested measures would decrease the openness and innovation of internet, restrict internet usage and would deprive end user privacy rights. With an increase of usage of legal digital content services such as Voddler and WiMP provided in the Scandinavian markets, Telenor believes that there will be a decrease in digital IPR

infringements. This means that far-reaching and often disproportional measures suggested by some right-holders will not be needed.

The cooperation's between Telenor and different content providers have in several cases commenced when the content providers have been in an early start-up phase. Telenor has been of assistance both when it comes to distribution, payment solutions, marketing and strategies. One thing that has been of outmost help, according to Telenor's content provider partners is that Telenor has helped them build an initial customer base. This has been achieved by Telenor providing information and exclusive trial offers of digital content to all of our customers within a Member State where the content service is provided.

Telenor believes that easy access to attractive content is the cornerstone to achieving the full potential of the online content market and also to boost cross border e-commerce in the internal market. Many Internet users have, due to illegal content being widely accessible, become accustomed to having digital content of their choice available where and when they want to access it. Legal options have too long been missing, or have been associated with business models that did not have the potential to attract the large masses of consumers. An argument often raised by rights holders, is that it is impossible to compete with "free content". However in the last two years the VOD turnover in EU has increased by 250% to a total of € 644 million.<sup>1</sup> This is a clear indication that there is a demand across the European Union for legal digital content for which users are willing to pay. The fact that online content services become increasingly advanced (e.g. through streaming technology) and consumer friendly, stimulates the development further. Additionally, a recent survey shows that users to a high extent are willing to pay for legal digital content such as theatrical movies and TV shows.<sup>2</sup>

## **Barriers recognised and solutions**

As an Internet Service Provider, eager to accommodate our customers' increasing demand for easy accessible content via various platforms, our attention have through our collaborations been drawn to a number of barriers existing for digital content service providers establishing their business in the EU. The challenges are related to very different copyright clearance systems, within the EU, lack of governance and transparency within the community of collecting societies, and shortcomings concerning ownership of rights. The challenges and suggestions for improvements are outlined in more details below.

### **Cross border licenses**

Today a company such as Voddler<sup>3</sup>, who wishes to offer a movie or TV-series to a span of several territories within the EU/EEA, will have to clear copyright and related rights by entering into separate agreements with one or more collecting societies and/or other right-holders in respect of each country where users can access the content. This process is both time-consuming, costly, and delays the expansion of digital content services to other countries within Europe. In our view a lot of the restrictions that consumers experience when it comes to accessing legal digital content online are related to shortcomings and inefficiencies in the copyright and licensing regimes.

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<sup>1</sup> EAO, Video on demand and cath-up television in Europé, 2009.

<sup>2</sup> Changing Models: A Global Perspective on Paying for Content Online, The Nielsen Company, February 2010. More than 27000 consumers across 52 counties participated.

<sup>3</sup> Voddler is a TV and Film streaming service, offering legal content on demand. Voddler offer its services throughout Scandinavia and currently have over 3300 titles. Voddler has more than 830 000 registered users who so far in 2010 have watched over 5 million movies and TV-shows. <http://www.voddler.com/>

Today, the audiovisual industry is mainly focusing on geographical bound markets. The believed rationale behind this is historical, as geographical bound rights were supposed to ensure right-holders as much revenue as possible. However, we see that this rationale is not valid any longer as technologies have developed and the digital content market has become global. Current technology denotes the possibility to easily distribute and access digital content worldwide, and right-holders are not necessarily maximizing their revenue by dividing rights on territorial basis. Content is easily distributed across borders, new business models are evolving and the structure and distribution of rights need to develop accordingly, to match and encourage this development.

There are more than 1100 films produced within the EU each year, and the European audiovisual sector was in 2008 valued at € 96 billion.<sup>4</sup> However, only a fraction of Europe's audiovisual works is digitally available outside the countries where they are produced. Telenor's content partners believe that there is a demand within Europe for European online content. Due to difficulties in getting copyright clearances online content providers often only offer "*top selling American*" movies. This evidently hampers the pan-European online distribution of European produced content. European content producers miss out on a good business opportunity and European consumers are deprived of a means to access the creative works and cultural offerings from other EU member states.

Today, collecting societies often have exclusivity to certain rights for their respective territory. This makes it difficult and often impossible to obtain a multi-territory licensing from one individual collecting society. The creation of several platforms that offers both EU/EEA-wide licenses and rights on a geographical basis or multi-territory licenses being provided by an individual collecting society could be a solution to this challenge. Assumably this would create a business model where licensing terms would be driven by commercial and market powers, and more user-friendly services would be offered by collecting societies. It is furthermore believed that if collecting societies would be able to clear EU/EEA wide licences and multi-territorial licenses, license fees would probably be reduced due to competition and reduction in administrative costs.

An alternative course which is believed to reduce the challenges of clearing copyrights on a pan-European scale would be to introduce the principles set out in the Council Directive 1993/83/EEC, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ("Satellite and Cable Directive") .

By transposing the rationale behind the main principle of the Satellite and Cable Directive, namely the principle applying to Satellite distribution which denotes that once a right is cleared in one Member State then the right would be considered cleared in the whole of EU/EEA, to online distribution of audiovisual content, cross-border management of rights is understood to be greatly simplified. For content providers this would make the process of clearing rights more straightforward and therefore more cost efficient. For Telenor as an ISP, who is present in several countries within Europe, this would greatly enhance our possibility of providing new content services, such as Vodder and WiMP, to all our European end-users. Something which would benefit both us and the content service provider.

To create competition content service providers should have the right to chose from which collecting society within the EU/EEA to clear the needed rights. There is furthermore a need for collecting societies to be provided with efficient tools to be able to compete with each other i.e. introduce regulation to avoid that rights would become exclusive to one collecting society.

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<sup>4</sup> PWC Global Entertainment and Media Outlook 2009-2013, June 2009, p. 193.

The principle should however not be applied in a way that leads to content providers having to reimburse right-holders for the clearance of a copy right at a level which would be equivalent to what they would have had to pay today to clear that right in all EU/EEA States . It should neither be implemented in a way that takes away right-holders entitlement to fair compensation for the clearance of their copyrights. Telenor rather believes that new business models for clearing rights need to be introduced, where for example the number of users could be an indicator for the level of remuneration of a specific right. With the introduction of the *single state clearance* principle we have reason to believe that administrative costs would be reduced significantly and with effective competition between collecting societies, the overall level of licenses fees is believed to decrease.

According to the Satellite and Cable Directive program carrying signals may be encrypted, i.e. broadcasters are provided with a right to encrypt their signals so that programs can only be accessed by subscription.<sup>5</sup> Service providers distributing audiovisual content via Internet should also be entitled to use means which ensures that only subscribers who are permitted may access their content services. The right to hinder users from accessing content services shall however not be seen as a reason for prohibiting clearance of rights on a pan-European scale, and content service providers may not prohibit access to their services based merely on the users location when this is within the EU/EEA territory .

Despite the ambition of the *single State clearance* principle set out for distribution via satellite in the Satellite and Cable Directive, practice has shown that transfer of rights still mostly occur on national basis.<sup>6</sup> If the *single State clearance* principle would be introduced to audiovisual content services distributed via Internet it is important that the principle is transposed in a way that ensures the logic of the internal market and envisages that content users will only have to clear rights once in the territory of EU/EEA.

Regardless of what method is applied to reduce the barriers related to cross-border licences, Telenor want to emphasise the need to encourage effective competition between collecting societies within the EU/EEA and choice for creators. Furthermore, users of rights, such as online content providers, should be able to choose between different entities to clear their use of the rights and under terms and conditions that reflect the commercial users' requirements. The solution must facilitate access to legal content by users, however, at the same time ensure that creators can make the most of their creativity. Telenor believes that a legislative solution may be necessary at this stage as previous attempts to use soft law or competition judgments have not delivered the necessary changes. Telenor furthermore want to underline the need for a broad regulative perspective and approach, where all EU regulations related to IPR must be aligned.

### **Lack of transparency and governance**

Today, there is very little information available concerning collecting societies activities and the way that they distribute royalties to creators. There is a need for collecting societies to improve transparency of ownership of rights so that users of rights are not put in the position of remunerating rights to a society with respect to rights which that collecting society does not own or manage. In addition, the increase in fragmented repertoires over the last years has made it even more challenging to find out and ensure that the necessary rights are cleared.

The fact that there is a divergence of systems for clearing rights throughout Europe makes it difficult for online content providers to ensure that they have obtained the necessary and required copyrights. When

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<sup>5</sup> Satellite and Cable Directive Article 1.2 C

<sup>6</sup> Report from the Commission, Report from the European commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM(2002)430

cooperating with content providers, Telenor sees that this is an essential barrier since it increases costs for content service providers and delays the process of clearing rights.

By improving the structure and also supporting the creation of a European database of works and rights holders, some central clearing rights challenges can be reduced. This since a data base would provide answer to whom to approach to obtain clearance for intended exploitation of a work.

Furthermore, there is a need for good governance for collecting societies and a right for arbitration or other dispute mechanism in cases of dispute. This guidance should preferably be provided in an EU wide framework and provide for harmonisation and leveled playing field.

### **Release windows**

Another significant barrier for providing digital content that can compete with illegal online content are the restrictions related to release windows. Currently legal content produced in a Member State or international produced content, is made available much later (if at all) on the Internet in the whole of EU, than the corresponding illegal content. For example many Europeans follow American and UK TV-shows and many also participate in online-chat rooms or have discussions with friends and family-members about the series and the events in the latest episodes. Today there is no fully legal way of viewing these TV shows online in the EU until the series have been aired on TV in the same Member State as the user is located, which often is several months after the show was first aired in the US or UK. This makes it impossible to participate in online-discussions which commonly take place in close connection with the first airing of the show or discuss it with family and/or friends who have accessed the content in other ways than the right-holders intended. This makes legal offers less attractive and therefore Telenor believes that the barrier related to different release windows also needs to be addressed. At the same time Telenor strongly supports that right-holders are able to define their own models for their business.

Furthermore there are several EU based public film establishments, such as the public-private partnership between the Swedish Government and the Swedish Film Industry, that are not neutral when it comes to release windows. This means that a film-project would often not benefit from financial support from a public film institute if certain release window criteria's are not complied with. The public film establishments have been considered to be of significant importance for the European film industry. This is the case since many European movies would not have been produced had it not been for the financial support of these establishments. As release windows have a negative impact on development of legal content services and digital e-commerce in the internal market, Telenor believes that release windows should be further evaluated as part of the ongoing debate.

### **Summary**

As a digital enabler, Telenor provides legal content via new inventive business models and technologies – e.g. with Voddler and WiMP. Based on our concrete experiences, we see that to achieve a vital online content market some specific barriers and problems have to be addressed. By eliminating regulatory barriers for cross-border licenses, by promoting new business models, by evaluating the current release window model and and by establishing a European Information platform providing transparent and complete information about ownership of rights for audiovisual content, the vision of a vibrant digital single market for digital online content could according to Telenor be accomplished.