



Public Consultation by Commerce Commission, New Zealand



Issues paper 3 Content, applications and willingness to pay

Ericsson Submission

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1. Background

Ericsson is pleased to provide input to the Commerce Commission on the Issues paper 3: “Content, applications and willingness to pay” related to the High Speed Broadband Service Demand Side Study (“study”).

Ericsson is the world’s leading provider of technology and services to telecom operators. Ericsson is the leader in 2G, 3G and 4G mobile technologies, and provides support for networks with over 2 billion subscribers and has the leading position in managed services. The company’s portfolio comprises mobile and fixed infrastructure, telecom services, software, broadband and multimedia solutions (including IPTV and Mobile TV) for operators, enterprises and the media and broadcasting industry. As the world’s leading technology provider, Ericsson plays a key role in the development of standards in fixed and mobile voice, data (IP) and TV/video technologies, and so is a key actor in the convergence process by enabling and empowering the convergence process with technological means and solutions.



1.1 Introduction

Ericsson appreciates the ambitious and investigative approach that the Commission has taken in order to identify and analyze the demand-side equation of the high speed broadband services market. In addition, the Commission's investigation into demand-side barriers regarding the uptake of high speed broadband services is a necessary and very much welcomed initiative.

Broadly speaking, Ericsson agrees with the main points identified in the study by the Commission. However, Ericsson would like to comment and nuance some of the policy implications and reform ramifications that can potentially result from the analysis and conclusions made in the report. It is our ambition that Ericsson's comments will provide valuable input and constructively contribute to the finalization of the investigation.

A vital link between digital productivity and digital creativity is the presence – and the mass adoption, not just mere rollout – of ubiquitous high-speed broadband. High-speed broadband on its own is not enough; demand-side drivers need to be in place. These include economies of scope (expanding digitization of trade in goods and services) and scale (the geographic size of the Digital Market); lowered transaction costs; personalization of services according to individual preferences; and the establishment of trusted relationships between creators, innovators and end users.

Another vital link between digital productivity and digital creativity is the availability of consumer-friendly legal digital¹ content services. This is because they incentivize a vast share of the consumer market to adopt higher broadband speed services on which digital productivity services can be delivered, and at low or no marginal distribution cost to the end consumer. In other words, one of the fundamental key benefits that high-speed broadband services have to offer is the concurrent use of personalized services e.g. the benefit of economies of scope at minimal marginal distribution cost. No other networked or non-networked distribution platform can provide this strategic benefit.

Hence, this interdependency between digital creativity and digital productivity amalgamates telecom, broadcast, media and copyright policy frameworks and potentially puts these different frameworks and their corresponding sector specific policy goals at odds with each other (e.g. regulatory convergence).

¹ In this context digital refers to a number of attributes such; on-demand, personalization, device shifting etc.

1.2 Detailed Comments

1.2.1 Consumer Cloud Computing

Private content cloud services are highly dependent on: 1) the availability of licensed content for any screen/device/place exploitation which is significantly determined by rights holder market characteristics and the complexity of cross platform licensing; 2) the degree of technology neutrality of private copy exception and related exceptions in copyright and 3) safe harbors, e.g. sufficient protection provisions in copyright for all key intermediaries in the online value chain from third party liability claims.

The conclusion made in the report regarding the prospect of consumer cloud computing in the context of content in New Zealand seems to be based on international benchmarks/data. However, the report does not appear to validate whether the relevant regulatory framework and market dynamics in these international markets also applies to New Zealand, or if barriers exist in the New Zealand framework and/or market that need to be addressed to achieve comparable growth.

1.2.2 Availability of content – general remarks

As concluded in the report, availability of content and premium content in particular is expected to be one of the most significant drivers of consumer uptake of high speed broadband services. The report identifies rightly worrying signs such as high concentration and limited differentiation in the current state of play in the networked distribution market for content (satellite, terrestrial broadcast and broadband be it OTT or IPTV).

However, the report does not seem to analyse the situation in the physical content market (e.g. Cinema, DVD-sell through, and DVD-rentals) relative to the networked based market. In other words, it seems that the analysis is limited by the omission of the physical market. Since high-speed broadband is both capable and dependent on the degree it is allowed to compete with the physical market, further analysis is warranted. For example, premium VOD is a digital filmed entertainment service that should be allowed to compete without prejudice or fear of distribution boycotts² in the first release window with physical Cinema retailers. [More analysis on premium VOD visit: <http://filmthinktank.org/papers/>]

The ability of high-speed broadband enabled providers to acquire necessary rights at reasonable terms and launch compelling premium VOD services is currently dictated by Cinema operators.³ Ericsson believes that the report should be complemented to also consider the possibility to establish a premium VOD market and analyse the impact on the uptake of high speed broadband services. Ericsson also supports the view that broadband enabled

² See for example the UK experience: <http://www.guardian.co.uk/film/2010/feb/17/european-cinemas-boycott-alice-in-wonderland>

³ See for example: <http://blogs.wsj.com/speakeasy/2011/04/19/directv-officially-launches-premium-video-on-demand-service-home-premiere/>



market participants should not be discriminated relative to physical distributors.

While windowing is a commercial strategy, its existence is based on the monopoly power position that is statutory granted under the current copyright regime. While exercising this power in a creative market is currently acceptable with little concerns for the functioning of the distribution market and the welfare of consumers, technology specific exclusive licensing underpins the conflict with the contradicting UFB policy goals. As the latter aims to provide open access to stimulate competition, innovation, inclusion, affordability and hereby enable the digital economy over ubiquitous high speed broadband, conventional media exploitation practice enabled by the current copyright regime aims to control, limit, maximise rent seeking and preserve distribution to physical channels at the expense of high speed broadband enabled digital strategies.

1.2.3 Simplification of Rights clearing – general remarks

Unfortunately, when assessing the “content market” the report does not address the related licensing complexities of classes of creative works (film, TV, Music etc) for digital/on-line exploitation. Ericsson believes that a key obstacle to the development of the digital content market and hence the prospect of high speed broadband service uptake is fragmentation in the licensing of rights. Fragmentation occurs on many different levels:

Fragmentation of rights: Audiovisual works are composed of multiple protected works, and involved several economic rights (reproduction right, making available right, distribution right, etc.). Furthermore, specific copyrighted materials included in audiovisual works may be subject to overlapping rights: copyrights, neighboring rights, rights of publicity, etc.

Fragmentation of right owners: Copyrights and related rights are rarely owned by one single entity. In practice, rights are divided along vertical and horizontal lines, for different modes of exploitation and different territories. Moreover, some rights will be exercised by agents or collective licensing societies.

Fragmentation of licensing practices: Individuals and businesses wishing to distribute audiovisual works online are confronted with a bewildering variety of licensing schemes. Each “family of rights” has its own licensing tradition with no commonly accepted method for licensing or pricing related rights in a consistent manner.

In Ericsson’s view, efforts towards a simpler licensing regime would increase the availability of creative content while decreasing the administrative burden of acquiring and maintaining licences. As noted above, Ericsson believes that a Digital Copyright Exchange concept, elaborated in Professor Ian Hargreaves’ report to the United Kingdom government, would provide a good starting point for this discussion. However, irrespective of which licensing

scheme is chosen, Ericsson considers that the discussions should be guided by the following key principles:

1. **Simplification:** Users need simpler solutions for licensing these works, corresponding to each market and each exploitation form.
2. **Technological neutrality:** Online rights should not be treated differently from other offline rights.
3. **User choice:** Users should not be required to use a specific licensing scheme. The most logical and most efficient way to obtain the necessary permissions should be available. If it is by negotiating with a right holder when both users and rights holders agree, this should be possible; likewise, if the users wish to use one-stop-shop licensing so as to avoid, in particular in the area of music, the fragmentation of rights and / or repertoires, they should be allowed. Competition among various licensing schemes should be encouraged.
4. **Legal and financial certainty:** Users need to be confident that the licensing scheme will give the right to use the works as intended (legal certainty) and at specific and transparent costs (financial certainty).
5. **Comprehensive repertoire:** Licensing scheme providers should have the ability to issue licenses for the entire repertoire where required.

Problems associated with fragmentation are well illustrated by Professor Ian Hargreaves in his report to the United Kingdom government⁴:

Examples of inefficiency in copyright licensing are not difficult to find. The BBC has said that it took nearly five years to assemble the rights necessary to launch its popular iPlayer service. Among a group of young technology SMEs the Review met at a meeting at TechHub, half claimed to have had difficulty licensing others' IP across all rights. One SME, providing on demand streaming of radio shows and DJ mixes, reported it took about nine months of lobbying music collecting societies to make any headway on licensing. Others said that licensing discussions are inconsistent, with some users offered access to licences and others denied without clear explanation. Some were met with threats of legal action rather than a business discussion about terms. Others reported that it was simply impossible to get the information needed on what terms might be available, since there was no precise clarity about who should be contacted and how to discuss licensing needs. In discussing these issues with those responsible for selling licences, a routine response is that many SMEs are not willing or able to pay prices acceptable to the licensors and/or that their new business models are not viable. These are the judgments that licensors in a free market are entitled to make. But they also indicate the difficulties which arise when a market fails to deliver clear signals about price and other terms of trade as a matter of routine.

The lack of a simple and efficient licensing scheme has induced many players in the industry to adopt a wait-and-see approach. As a result, consumers are deprived of access to new and innovative platforms for the online distribution

⁴ Review of Intellectual Property and Growth, Hargreaves 2010 page 29.



of creative works. Ultimately, all this is bad news for the uptake of high speed broadband services and also omitted in the report.

1.2.4 Copyright - Technology neutrality – general remarks

As heterogeneous categories of works, media and platforms converge into homogenous multimedia environment, existing regulatory distinctions (works, media, and technologies) will be increasingly difficult to maintain.”⁵

The consequences of fragmentation of rights are disturbing in the digital age, as digital technology produces a breakdown and conflation of legal categories (works, exclusive rights etc) that were meaningful in the analog era. Ericsson believes that it is necessary to adopt a technology neutral copyright regime in the digital environment hereby making it more up to date and adequate for the digital economy. In particular;

- Ensuring the principle of technology-neutral licensing by mandating an “anywhere, anytime and any device” exploitation right which is not specific to distribution, technology or device. This digital right should be combined with a remuneration principle based on actual and identifiable private-sphere consumption, rather than potential consumption and reach.
- Ensuring the principle of technology-neutral exhaustion, or the first-sale principle for creative works extending to digital/electronic formats, hereby prohibiting and abolishing any technology specific windowing practice and consequently abolishing discrimination against premium VOD services released in competition with cinema-release windows.
- Ensuring technology-neutral fair-use/exception regime that can enable the proliferation of private “cloud” content services such as TV, film, music, e-books, thereby ensuring that contract law and technical standards cannot be allowed to override statutory exceptions, such as fair-use regimes or private copy exemptions, in ways that would limit the ability of lawfully acquired content to shift format, place or device within the private sphere.

Ericsson would like to once again stress the importance of the copyright regime that incentivizes certain market behavior and hence licensing conduct. As the report has indentified the availability of content for digital exploitation will decisively dictate the uptake of high speed broadband services. Therefore, Ericsson argues that it is in the policy makers’ interest to: **promote open and competitive markets in licensed digital content, with the aim to increase availability of more legitimate digital content, at prices which appeal to consumers and to decrease technology specificity of copyright, e.g. licensing, exemptions/fair use, safe harbors and hereby promote innovation and growth of digital creative market.**

⁵ The Recasting of Copyright & Related Rights for the Knowledge Economy, IVIR 2006



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Ericsson is advancing its vision of being the "prime driver in an all-communicating world" through innovation, technology, and sustainable business solutions. Working in 180 countries, more than 90,000 employees generated revenue of SEK 203.3 billion (USD 28.2 billion) in 2010. Founded in 1876 with the headquarters in Stockholm, Sweden, Ericsson is listed on NASDAQ OMX, Stockholm and NASDAQ New York.