



Online Games do not belong in the Audiovisual Media Services ('AMS') Directive

Introduction

The comprehensive hearings held on the AMS Directive at the European Parliament on June 1-2 have encouraged ISFE to again clarify herein its position on that legislation. Our assessment is that whatever logic is used on-line interactive software (video games) should not be included in a Directive focused on audiovisual media services. The on-line interactive software community represents a distinct and separate creative sector from those at which the Directive is aimed. The sector is highly individual and definitely not 'mass media'. Therefore we will demonstrate again in this paper why our sector is different and why the Directive cannot and should not apply to the dynamic end product of consumer input, education and entertainment that is interactive software. We also submit that an express exclusion in the text is necessary to deliver the certainty that this industry needs for its continued development and growth.

1. Should the Directive cover content which can only be experienced interactively?

If the European Parliament decide to endorse the 'linear/non-linear' split put forward by the Commission in the current text, ISFE would like to reiterate its position (http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/consultation_2005/contributions/index_en.htm). In summary, we say that interactive software is alien to the services envisioned by the Commission as 'non-linear'.

In reality, online gaming (featuring the fully interactive involvement of a consumer with other consumers at a time of his/her own choice) has nothing to do with Video on Demand (passive watching at a time of one's own choosing), even less so with traditional broadcasting (passive watching of fixed content at a fixed time). As a matter of fact, movies, TV shows delivered by these methods do not feature **artificial intelligence** ('AI') or an **unscripted plot**^{*}, two integral and defining features of online games.

The clarification provided in February 2006 by the Commission suggested a list of criteria, complete with examples, to help ascertain whether a particular service comes within the Directive. We submit that online game play fails to meet three of the tests concerned. These are as follows:

- 1.2.1. The audiovisual element in online games is only *ancillary* to the computer software element that ensures interactivity, which is itself the key feature of video games. This view has been clearly accepted by courts in a number of member states, most particularly France (see *Urban Runner* Cour d'Appel de Versailles 18/11/1999; *Havas Interactive*, Cour d'Appel de Paris, 28/04/2000 and Cour de Cassation 28/01/2003).

^{*} *AI is a combination of micro-sensors and engines embedded in the game which allow a user to develop a distinct identity which in turn will deliver a highly individual gaming experience. The second defining factor follows from this individuality: a game's plot can differ every time a game is played unlike, for example, in movies where a final and fixed script is used to determine the plot. In game play participants come and go, and win and lose, as plots are re-invented according to players' progress in the game.*

Interactive software should therefore be included as one of the express exemptions listed by the Commission, (along with e.g. gambling sites etc.).

1.2.2. Article 1 (2) (a) of the Directive specifically deals with the “*provision* of moving images...to the *general public*”. Online gaming is about user content *creation*. The mere *provision* of moving images or, as phrased by the Commission in its clarifications, ‘the mere *delivery* of a specific programme on the basis of a choice of content selected by the media service provider’, fails to capture the main characteristic of the gaming experience, i.e. *interactivity*. Online gaming occurs only when users are enabled by the interactive software at the core of the game to send instructions, i.e. content, back and forth to individual fellow players by way of regular point-to-point communication.

1.2.3. Likewise, Article 1 (2) (b) describes a “media service provider” as “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized”. Irrespective of the fact that audiovisual features are not the principal characteristic of PC and video games (see 1.2.1), it is *impossible to affix editorial responsibility* to one particular natural or legal person as online games are being played, since all participants are constantly reorganizing and creating content in the form of ever changing identities, ad lib chat, etc.

To put it another way, the Directive claims to cover content “pushed” by broadcasters as well as “pulled” by users, thus spanning both “business to business” (B2B) and “business to consumer” (B2C) relations. However, for lack of a reference to “consumer to consumer” (C2C) relations, it fails to include content “pushed” by users to fellow users, an integral part of online gaming.

By this taxonomy, interactive software actually combines features of all three classes:

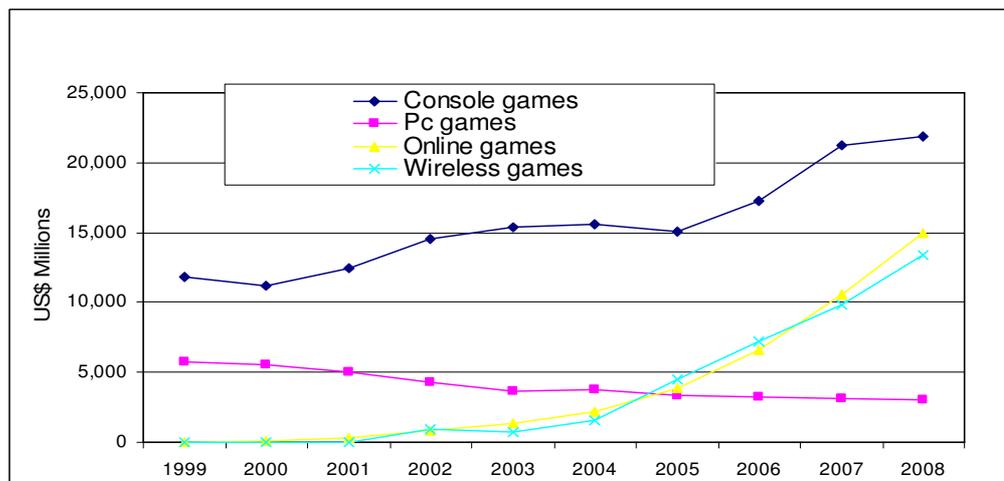
- B2B, when instructors demonstrate technologically innovative concepts by availing of the unique attention-grabbing power of games e.g. “Teaching with Games” (<http://www.futurelab.org.uk/research/teachingwithgames.htm>), or the “Serious Games” workshops run by the DC-based Woodrow Wilson Center or conventional flight training sessions.
- B2C, as in the conventional video game publisher/user relationship.
- C2C, when online game players make their own contribution through point-to-point communication, in a way not dissimilar to the dissemination of blogs or other self-made content.

Absent a reference to content ‘pushed’ by users to other users (a C2C mode) in the draft Directive or in the Commission’s clarifications, the Directive cannot cover operations the essence of which is left out of its scope.

In summary it can be seen the AMS Directive is not designed or, we submit, intended, to address fully interactive forms of entertainment. The text should therefore make it clear that online games are exempted, unless the intent is to deprive this industry of the commercial and legal certainty vital for its continued growth in the EU. **A simple way of achieving certainty would be to amend Recital (14) of the Preamble using the wording we now attach (see Annex).**

2. Online games are an essential ingredient in the growth of an dynamic industry.

There is a trend towards online games in PCs and consoles, as most if not all, new PC and console games are released with some online network capabilities. This is expected to lead to a decline in off-line PC computer game sales, and moderate growth rates in the off-line console market possibly to the point where all computer games will become at least in part online games. “ Projected market proportions by 2008 are: console games 41%, PC games (not online) 6%, wireless games 25% and online games of advanced kinds 28% (PwC, 2004)” as quoted in the OECD study on the online computer and video game industry (www1.oecd.org/publications/e-book/9304021E.PDF).



Aside therefore from the fact that their interactive nature clearly rules them out of the scope of the Directive why should games made available or played online be put by the text at a competitive disadvantage to those made available offline? The latter represent the industry's true origins but are fast being outpaced worldwide by the rapid growth and development of their online equivalent and a related user community that transcends all borders. If EU game players are to be the subject of what are, we submit, inappropriate and/or uncertain regulatory parameters, both European game players and the European industry that supports them will be isolated intellectually and commercially from a rapidly developing creative medium. European investment both intellectual and commercial in online gaming is bound to suffer relative to regions of the world offering more propitious environments. The industry may move elsewhere in whole or in part.

In particular, Article 3 (f) invites Member States to use their best judgment (“where practicable and by appropriate means”) to promote the production of and access to European works. While established industries based on the territorial nature of copyright are used to what can be a cumbersome business environment, applying Article 3 (f) to an industry which has thrived on the full benefit of the EU Internal Market would clearly run contrary to the Commission's proclaimed goal of enhancing the competitiveness of the EU content industries by way of this Directive.

3. Conclusion:

Any inclusion of interactive software in the Directive would run counter to its oft-stated economic goal of promoting European business and the Internal Market; such inclusion is also unwarranted in fulfillment of the Directive's second set of "general interest" objectives (protection of minors, cultural diversity, etc).

To sum up:

- online games are *principally computer software*. Any audiovisual features are only *ancillary* to their main purpose of making interactive play - often referred to as the gaming experience - possible.
- the AMS Directive does not deal with *interactivity*, the single most important driver of online games. As per section 2 of the Commission's aforementioned clarification, the Directive considers content "pushed" by suppliers or "pulled" by users. By stopping short of considering content "pushed" by users towards fellow players, it therefore does not accommodate online games within its scope.
- the intellectual and commercial development of an EU-based online gaming community requires a **legally certain regulatory environment** .
- as mentioned in our previous paper any concerns about **protection of minors** are **fully addressed** by this industry's self regulatory PEGI and EC-funded PEGI online systems.

Over the last 30 years, the European interactive software industry has grown into a €5.5bn business with a truly global reach. By the same token, it has become known for 'blazing a trail' in a challenging environment based on cutting edge digital technology. The industry has also moved as fast as its user community (the average age of European players itself grew from 15 to 29 over the last 10 years). While exploring these uncharted waters, the European industry has managed to make a significant contribution to the competitiveness of the EU ICT industries and also to display an unusual sense of social responsibility toward its customers, as best exemplified by the PEGI system. With the phasing in of online gaming as our next frontier, this industry is now poised to undergo its most delicate transition ever. At this critical juncture, we very much hope that European policy makers will not further complicate the maze of intellectual, commercial and legal obstacles we already navigate by adding a layer of uncertainty.

ISFE therefore requests that the European Parliament now make it explicit that this Directive does not concern video games by supporting the attached amendment.

ISFE Brussels, June 2006