Consumers' priorities in digital issues

The Internet has become a vital feature of the business, personal and professional lives of more and more European consumers. Although it offers virtually unlimited possibilities in terms of access to knowledge, culture, products and services, consumers are nevertheless faced with access restrictions according to their nationality or country of residence, even though they should have access to a dynamic market for affordable offers throughout Europe. UFC-Que Choisir therefore strongly encourages European decision-makers to take action in favour of a genuine single market for digital services. Although this new environment is constantly gaining in importance, it is a good idea to remind everyone that consumers deserve as much protection online as they do off-line. The right to the protection of personal data should not be eroded or undermined simply because it has become easier or more profitable to circumvent this fundamental right in the online environment. When examining the proposed data protection regulation, the association strongly encourages the European decision-makers to continue the work initiated under the previous term to guarantee European consumers solid principles, powerful rights and effective implementation. Similarly, European consumers are demanding a genuine single market for telecommunications, with no artificial barriers between EU states. Consumers should be able to use communication services regardless of where they or the person they are communicating with is located in the EU without having to face unjustified costs. A high level of consumer protection should be guaranteed due to the fact that too many abuses still exist today. In an ever more interconnected and online society, protecting the future of the Internet in Europe means guaranteeing consumers the right to access an open Internet without discrimination. Currently, consumers face a certain form of discrimination both in terms of access to online content (numerous online stores are only accessible to residents of their own country) and usage once this content has been acquired (with a ban on transferring the legally acquired content of one digital product to another device). This situation must cease. Finally, the directive on the information society defines the authorised use of legally acquired digital products. The necessary revision of this directive must finally ensure that there are no restrictions on usage based on unfair interpretations of copyright.

1. Data protection

In January 2012, the European Commission presented its proposed data protection Regulation, aimed at revising European legislation which has existed since 1995. UFC-Que Choisir welcomes this initiative and encourages lawmakers to establish a solid legal framework for the protection of personal data, making it possible to promote consumer confidence and supply a structured legal framework for all member states.

As the association sees it, a reinforcement of the current rights and principles should make it possible to return direct control of consumer data to the consumer himself. In its position adopted in first reading on 12 March 2014, for the first time in a legislative text the European Parliament has established a right to control one's data. The result of this vote is a positive step for European consumers as it reinforces the main provisions of the proposal, including the key principles governing the processing of data such as transparency, the minimisation of data collection and purpose limitation of the data collected. Apart from consumer rights regarding deletion, opposition and modification which are maintained, new rights such as the right to data portability have been introduced. Following this vote in first reading and under the terms of the authorisation voted to begin negotiations with the Council, UFC-Que Choisir encourages Europe's decision-makers to continue the work already started and to finally give European

consumers a stable legal framework with solid principles, strong rights and effective implementation:

Enabling consumers to retain control of their personal data and to exercise their rights:

- **The definition of personal data**: In order to ensure that the new rules concerning data protection remain relevant in the years to come, the definition of personal data must be both wide and flexible, in keeping with the rapid development of information and communication technology itself. It is vital to establish a clear definition of personal data to be able to avoid abuses such as re-identification and de-anonymization. It must be able to take account of new types of personal data, including that reconstituted by means of tools which combine, compare and aggregate data which in itself may not identify an individual.
- **Limitation of the end purpose and data minimization**: The principle of purpose limitation is one of the cornerstones of data protection legislation. It is essential to define clear criteria: the processing of data over and above the purpose for which it was collected is only authorised if the new purpose is compatible with that initially stated or if it is covered by a new expressly-granted consent from the person concerned.
- **Control over one's data**: The key challenge for the consumer is to ensure that the new legislation enables him to have access to tools enabling him to effectively control his data. Transparency and informed consent by the consumer (please see our legal action against the social networks over unfair terms) are critical if we are to give consumers back effective control of their data. The creation of a dashboard providing access at all times to a secure, clear and standard webpage designed to inform the consumer of the usage made of his data, of the data necessary to the service, of that which contributes to its quality and that which if transferred will make it possible to further empower the consumer by enabling him to effectively exercise his rights. In this respect, the introduction of new provisions making it necessary to take account of data protection from the design stage and as standard is a necessary corollary to guarantee this level of control.
- **The right to erasure *vs*. The right to be forgotten:** The right to be forgotten as presented by the public authorities, whether in France or Europe, is something of an illusion. In reality, this idea refers to the issue of delisting. Although the concept may appear attractive, we may legitimately consider the relevance of this law: even in the case of delisting, it is impossible in reality to guarantee the consumer that the information in question is no longer available. Following the ruling from the European Court of Justice of 13 May 2014, UFC-Que Choisir considers that European decision-makers must address the matter, by guaranteeing the necessary safeguards to strike a balance between the public's right to information and the protection of privacy while also reinforcing the right to erasure which currently exists in European legislation, which the consumer may exercise vis-à-vis the original publisher of the publication.

Force companies to apply the law:

- **Notification of a data violation**: Any violation of personal data must not only be the subject of a notification to the supervisory authority but also to the person concerned in order that the latter may quickly take all necessary measures to protect himself.
- **The competent supervisory authority –A one-stop shop:** The success of this legislation will require regular and effective control of the data processing managers by the regulators. The proposed regulation states that the authority responsible for dealing with disputes with a professional, is that of the country in which it has its main establishment. Although at first sight we are not especially alarmed at this choice as by harmonising the 28 legislations the regulation will significantly reduce the risk of *Forum Shopping*, some concerns nevertheless remain:

- Differences between the national authorities in terms of available resources;
- The concentration of cases in the hands of a number of DPAs (most of the major groups whose business model is based on the use of private data are based in Ireland: does the Irish state possess the resources to ensure that the Authorities of its country can meet the requirements of European consumers?);
- Problems of proximity *vis-a-vis* the consumer.

UFC-Que Choisir is not opposed to the idea of setting up a one-stop shop but the consumer must always have the possibility to refer the matter back to his national regulator. We therefore feel that it is essential to introduce an obligation of cooperation in the regulation, between the competent authority and the authority for the country in which the consumer is resident, in addition to an obligation of shared responsibility.

- **Have the law apply to interested parties from all around the world:** Consumer protection should be guaranteed regardless of the country in which the companies are located. Any company proposing services in Europe and/or addressing itself to European consumers must be subject to the rules applicable in Europe. Similarly, any transfer of data to third-party countries (outside the European Union) must be carried out based on the criteria detailed in European legislation in order to guarantee the application of European protection standards for all personal data of a European citizen even if this data is transferred outside the European Union. In this respect, a complete review of the recently suspended Safe Harbour is necessary.

References:

- Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data- COM(2012)11
- EP legislative resolution on the proposal for a regulation on protection of individuals with regard to the processing of personal data and on the free movement of such data
- UFC-Que Choisir issues a warning to the social networks : Web surfers must be able to retain control of their data – June 2013
- UFC-Que Choisir takes on the social networks and calls for consumers to "retain control of their data" - March 2014
- Ruling from the CJEU – Google Spain – 13 May 2014 – C-131/12
- Right to be forgotten : Google condemned… wrongly – UFC-Que Choisir – May 2014

2. An interconnected continent: Telecommunications and Net Neutrality

In September 2013, the European Commission presented its proposed regulation for an interconnected continent. The new proposal is designed to be more ambitious and wider reaching than the last Telecommunications package as it concerns not only the question of roaming charges but also net neutrality and users' rights. Although UFC-Que Choisir favourably welcomes this proposal and the European Commission's intention to finally introduce the principle of neutrality in European legislation, it nevertheless wants to see a framework which generally protects consumers, based on the approach adopted by the European Parliament in its vote of 3 April 2014 in the three subject areas mentioned below.

The single market for telecommunications: abolition of roaming charges: a genuine single market will never see the day for as long as roaming charges continue to exist.

Consumers should not only be able to use their services at home without worrying about borders but should also be able to use the services elsewhere, regardless of where they may be at any given time in the European Union. The market mechanism initially favoured by the European Commission's proposal creates market incentives to encourage the operators to expand, which is unacceptable, being far too complex to implement and too difficult for European consumers to understand. In this respect, UFC-Que Choisir supports the approach adopted by the European Parliament which includes the abolition of roaming charges for late 2015. The limitation in the use of mobile roaming services through the "reasonable use clause" included in the text from the European Parliament should be strictly supervised.

Net neutrality: protecting the right of each consumer to access an open Internet: the developments in the European telecommunication markets are increasingly threatening the neutrality and openness of the Internet. UFC-Que Choisir favourably welcomes the European Commission's intention to establish a neutral Internet as a legislative principle and consequently supports the amendments adopted by the European Parliament which guarantee European citizens the right to access a neutral and open Internet without discrimination:

- Accessing an open and neutral Internet should be a genuine right rather than a simple and vague "freedom".
- The recognition of the end user's right to access an open Internet should include a general ban on any form of discrimination between the various types of traffic, content or online services. UFC-Que Choisir also supports the legal approach which seeks to define strictly supervised exceptions to this general ban in the event that traffic management measures are required.
- The development of specialised services cannot be achieved to the detriment of or as a substitute to internet access services. Specialised services must be differentiated from an Internet access service even if these are delivered through the same physical network. In this respect, a legal instrument must be drafted in such a manner as to prevent telecommunications operators from taking the Internet content, categorising it as a "specialised service" and selling it separately at a higher price, which would necessarily entail an unacceptable segmentation of the market.
- The obligation to avoid any discrimination must apply to all Internet traffic regardless of what has been agreed contractually.

Users' rights: Using the right instrument*:* UFC-Que Choisir supports the amendments from the European Parliament which seek to remove the articles concerning users' rights from the scope of the Regulation and include them within the framework of the revision of the universal service directive. The national governments need a certain degree of flexibility to be able to deal with specific issues and new threats in the telecommunications market and minimal harmonisation appears in our view to be the instrument best suited to dealing with users' rights.

References:

- Proposal for a regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent – COM(2013)627
- EP legislative Resolution of 3 April 2014 on the proposal for a regulation on the European single market for electronic communications and to achieve a connected continent
- Competition in the telecommunications industry: The regulatory authorities must retain control –UFC-Que Choisir press release –March 2014
- 4G, or empty promises: UFC-Que Choisir formally complains– UFC-Que Choisir press release and study –November 2013
- 3G quality : even more "freeture" on the networks – UFC-Que Choisir press release and study –November 2013

3. Copyright in the information society

Directive 2001/29 on copyright in the information society was adopted with the goal of harmonising the legislations of the member states and facilitating the creation of an internal market for copyright. It cannot be denied that this goal is far from being reached and that consumers still do not enjoy the benefits of this market. Numerous divergences exist between the member states concerning the application of limitations and exceptions, this being partly due to the exhaustive and optional aspect of the various exceptions.
The main problem lies in the fact that the exceptions to copyright are not rights for the consumer but only limitations on the exclusive rights of the artist/author, or a simple possibility opened or otherwise by the right holder. The result is that the consumer does not have any direct means of redress against the right holder to request the application of an exception. A revision of the directive on the information society is therefore necessary and must seek to guarantee a European framework offering legal security and recognising genuine rights for the user-consumer. Among other things, this means harmonising the exceptions and limitations to copyright. This need to revise and adapt the European legislative framework to the growth of the digital sector was reiterated in the Recommendations from Antonio Vitorino on the future of remuneration for private copying in Europe following the mediation assigned to him by Michel Barnier, the European Commissioner for the internal market and supported by the MEPs in their resolution of 27 February 2014. At the end of the consultation carried out by the European Commission, UFC-Que Choisir therefore encourages European decision-makers to tackle this matter and to propose an ambitious European framework suitable for creating the conditions needed to adapt the cultural industry to the digital era.

Private copying

In UFC-Que Choisir's view, there is a clear need to clarify the exception for private copying which authorises a person to reproduce a work for his own private use but a part of the price of supports such as CDs and DVDs used for copying (such as a USB stick for example) is used to remunerate creators, publishers, performers and producers in return for the prejudice suffered. As mentioned previously, its optional nature and the lack of legal security concerning its application is resulting in divergences between member states, unequal treatment for European consumers and creators but also inadequate application within the member states themselves, as seen at French level.
UFC-Que Choisir is not opposed to the actual principle of the private copy levy (PCL) but is critical of the current system which does not comply with the fundamental basis of this right to private copying as defined in European legislation. In France in 2012, the collection of the PCL per inhabitant was five times higher than the European average (excluding France), i.e. €2.65 compared to €0.55. Worse still, this gap visibly increased in 2013 as the sum received per inhabitant rose to €3.15 in France (a spectacular rise of 19%!). This "French exception" is a result of scales which have been systematically higher in France than elsewhere in Europe. This has had the effect of making goods subject to the PCL more expensive. This situation is resulting in a reduction in the purchasing power of consumers, and is proving to be an obstacle to innovation and to the expansion of the legal range of online content.
Essentially, the PCL is intended to offset the actual prejudice suffered by the beneficiaries. Its aim is to compensate a possible loss of earnings caused to the creator due to the possibility of copying his work for private use (article 5.5 and recital 35 of the directive). UFC-Que Choisir is not questioning the need for this "compensation" which should be granted based on the prejudice suffered and which should not be confused with the notion of fair remuneration. However, in France today the PCL is completely based on a rather opaque and arbitrary methodology: scales set up by a committee dominated by the representatives of the beneficiaries (with the manufacturers departing in November

2012): decisions taken without quorum conditions and an increase in the PCL which bears no relation to the prejudice suffered or to the general lost earnings of the beneficiaries. Finally part of the sums collected is dedicated to the financing of culture in France. For consumers, in return for the use of their funds they should be imperatively guaranteed transparency concerning the financing in question

UFC-Que Choisir is therefore critical of the manner in which the remuneration mechanism for private copying works in France as its application does not respect the fundamental aspects of the private copying law as defined in European legislation. The decree adopted in December 2013 should enable France to comply with European law, particularly concerning the reimbursement for professionals which are not subject to the PCL. However, there are many barriers to this reimbursement, with the result being that the law is not applied effectively. The association is therefore calling for a revision of the directive of 2001/29, based on the following proposals which comply with case law and European legislation:

- A necessary harmonisation of the notion of "prejudice": this notion, the sole justification for the PCL, must be defined in a uniform manner at a Europe wide level. This definition, which would make it possible to calculate the sum of the loss must be based on an independent and neutral economic and legal assessment which will make it possible to identify a common European methodology for its calculation.
- A clarification of the scope of the PCL which excludes professional use, works under license (as the license already provides remuneration for the artist, and double payment through compensation by the user is not acceptable) and all illegal reproduction.
- Total transparency on the manner in which the sums received (indirectly) from consumers are used by the collecting societies.

Finally, in the digital age it is quite obvious that the scope of copying using recording media is reducing in favour of catch-up TV, video on demand, streaming packages and cloud computing. The phasing out of the PCL must also be envisaged, and we feel that this is vital. Alternative solutions must therefore be discussed and envisaged in order to enable the development of a legal high-quality content offer and fair remuneration for authors and creators.

The need to develop a high quality legal offer

The issue of adapting the cultural industry to the digital age is certainly not a new one. Remuneration for creation has been a central theme of both European and national discussions concerning copyright. In UFC-Que Choisir's view, this question should not reduce consumers' access to culture but on the contrary solutions must be found to strike the right balance between the development of a legal, high-quality offer where content is concerned and fair remuneration for creative artists, the aim being to guide the consumer to a supply of legally available commercial products or at the very least to allow for the remuneration of artists and creators. In UFC-Que Choisir's view, such an objective can only be reached through the development of an attractive legal content offer. However, although everyone agrees that the current status quo is not acceptable, ambitious and courageous proposals at both a French and European level have only emerged with great difficulty. We need to come up with a new form of financing for culture adapted to the digital era.

The growth of the digital environment offers new opportunities for consumers and creators alike. The current legal environment does not however enable them to fully benefit from this potential. The digital content distribution platforms and streaming sites today provide the consumer with easy access to a range of digital cultural content. However, to make the most of the content of the sites offering services of this kind, it is important to have a

wide selection available at a reasonable price. However, the development of a range of digitised works presents a real problem: the existence of entry barriers in the content market: the use of these platforms is still limited particularly due to conflicts which constantly arise between their managers and the right holders. The platforms complain about the difficulty in accessing content (high wholesale prices, locked catalogues) and the beneficiaries are unhappy that they are not (or not sufficiently) paid for the use of their works. This situation is detrimental both to the consumer but also to the artist. Firstly, it prevents the development of an innovative content offer and prices corresponding to what consumers are prepared to pay. Secondly it deprives artists of new forms of revenue and a distribution method capable of competing with so-called "illegal" downloads.

With this in mind, UFC-Que Choisir's proposals seek to create conditions favourable to the emergence of an operational model for the financing of culture with complementary measures:

- **Encouraging the distribution of digital content**: UFC-Que Choisir considers that film or music catalogues constitute an essential resource. Access to the latter must therefore be allowed under reasonable and transparent (pricing) terms for all. In Europe, with the "Magill" case law of 5 October 1995, the Court of Justice of the European Communities included copyright within competition law. This ruling recognised that a database held by a specific company and protected by copyright may constitute a critical asset for other stakeholders. In the case in question, the company owning this database must allow access to the latter for third-party stakeholders. The court of justice of the European communities therefore opened the way to the regulation of companies potentially enjoying a monopoly on an intangible asset protected by copyright. Access to the catalogues must therefore be transparent and accessible to all and supervised by regulator.

    - **Introducing a mutualised financing system backed by a compulsory extended collective license for rights**: this would involve creating an extended collective management system similar to that which could exist for the radio via the *Société pour la Perception de la Rémunération Equitable* (SPRE) in France. The goal is to create an environment which favours the creation, distribution and enhancement of content in a manner which respects authors' rights by simplifying the authorisation procedures for the use of protected content and to provide for a fair remuneration mechanism for the parties involved. This "collective extended licence" system would require that national legislation introduces an extended effect for the licences granted by a specific copyright/neighbouring rights agreement. The extended effect would apply to beneficiaries who are not members of the collection society, including foreign beneficiaries. Online rights must be subject to the mandatory collective management of rights. In this way, the collecting societies would operate as a one-stop shop. Users would benefit from the system by obtaining pan-European cross-border licences and would be fully covered, and the beneficiaries are guaranteed fair remuneration for this use by means of a central system in which the rights are clearly and easily identified. In practice, content hosting and distribution companies would pay a contribution proportional to the turnover generated in the country in question for their activity. The centralised European body given the task of collecting contributions would apply the principle of fairness in redistribution to the artists, authors/composers and neighbouring right holders.

- **Legalising not-for-profit file sharing between individuals**: as a supplementary or corollary measure of the extended collective license, UFC-Que Choisir is arguing for the legalisation and supervision of off-market exchanges make it possible to move away

from the sterile logic of stigmatisation where downloading is concerned (with a pioneer in this area being France with the repressive measures contained in the HADOPI law) to enable everyone to access a diverse range of culture and to introduce a fair payment system for creators. This remuneration would come from a contribution paid by the consumer and collected by the Internet service providers from their subscriptions, which will be shown as a separate item on the invoice.

The status of technical intermediaries

As UFC-Que Choisir sees it, placing greater responsibility on technical intermediaries (ISPs, platforms, etc.) regarding net surveillance is not the way forward. The surveillance obligations imposed by the Hadopi law of 2009 in France for the ISPs has already shown its limits and its propensity to erode fundamental liberties. UFC-Que Choisir considers that the current rules regarding the responsibility of technical intermediaries as defined in directive 2000/31 on e-Commerce and enacted in France via the Law on Confidence in the Digital Economy of 2004 are effective and should not be amended. These state that the Internet service providers or content hosting companies are not subject to a general obligation to monitor the information they transmit or store, or a general obligation to seek facts or circumstances pointing to illegal activities. Similarly, any filtering measures imposed upon the ISPs would necessarily result in questions concerning cost and technical accountability which go against the spirit of directive 2004/48 which states in its article 3 that the measures should not be unnecessarily complex and costly. Leaving the application of and monitoring of compliance with copyright law in the hands of the ISPs through filtering appears to us to be contrary to European law and an infringement of fundamental liberties. Any sanctions or restrictions of the end user's fundamental rights or freedoms should not occur without a prior legal decision. In light of our experience with the implementation of Hadopi in France, repression gets us nowhere and provides satisfaction neither for the right holders who are not seeing their revenue increase, nor the consumers who have not changed their behaviour where downloading is concerned and still do not have access to a legal high-quality content offer.

References:

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- Mediation on fees for private copying and reprography levies: António Vitorino presents his recommendations to Commissioner Barnier: European Commission press release –January 2013
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