

SG08-2111

Source language: English

19/02/2008

Creative Content on-line in the Single Market

David UWEMEDIMO (CISAC)

1 - Introduction to CISAC

CISAC, founded in 1926, is an international non-governmental, non-profit organisation with headquarters in Paris and with regional offices in Budapest, Buenos Aires, Singapore and Johannesburg. CISAC has a membership of 219 authors' societies in 115 countries.

CISAC indirectly represents more than 2.5 million creators (namely authors, composers and music publishers), and covers all the creative repertoires. Thus the CISAC world embraces audio-visual media, music, drama, literature, graphic arts and visual arts.

The total amount of royalties collected by CISAC's member societies in 2005 was almost 6.75 billion Euros.

Further details of CISAC may be obtained from its website <http://www.cisac.org>.

2 - Preamble to CISAC's Response

As a preamble to the responses given below, CISAC makes the following three preliminary points:

(a) The initiative of the Information Society and Media Directorate-General

CISAC welcomes the current initiative of the Information Society and Media Directorate-General and has read with interest the following three documents:

- i. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content On-line in the Single Market dated 3 January 2008 ("Communication");
- ii. Questionnaire - Creative Content On-line – Policy/Regulatory issues for consultation ("Questionnaire"); and
- iii. Commission Staff Working Document accompanying the Communication dated 3 January 2008 ("Staff Document").

CISAC fully supports the stated desire of the European Commission ("Commission") to encourage the development of innovative business models and the deployment of cross-border delivery of diverse on-line creative content services. With DG Culture, DG Competition, DG Internal Market and DG Information Society all having an overlapping area of competence in this area, CISAC looks forward to maintaining constructively consistent channels of communication between the creative community and each of these DGs.

(b) Scope of submissions

For the sake of brevity, CISAC will primarily focus its comments on those issues directly affecting CISAC's members administering rights in audio-visual works.

(c) Approach to the Communication, Questionnaire and Staff Document

In response to the Commission's enquiries, CISAC has chosen to adopt a thematic-based rather than a question-based approach. CISAC would be pleased to elaborate on specific areas of detail in subsequent rounds of the consultation process.

3 - Digital Rights Management

When providing a response to this question, CISAC believes that it is important to define the terms of such response.

CISAC sees DRMs as being composed of the following two distinct parts:

(a) Rights Management Information ("RMI")

CISAC shares the view expressed in paragraph 2.3 of the Communication that technologies allowing the management of rights in the on-line environment can be a key enabler for the development of innovative business models. CISAC also shares the Commission's desire (as expressed in paragraph 3.1.1 of the Staff Document) to promote transparency of authorship and ownership through dedicated open standards databases of rights and widespread use of standardised digital identifiers.

CISAC has been active in the RMI field for some considerable time. Through its RMI system (called the Common Information System or "CIS" for short) CISAC has championed an RMI architecture which has served the full span of the entertainment value chain from the creator to the consumer.

The aim of CIS has been, *inter alia*, to ensure that:

- i. the copyright licensing system is simplified and automated;
- ii. users bring creative works to the largest possible audience;
- iii. creators are paid fairly for the use by users;
- iv. CISAC's members distribute royalties to creators and publishers (when musical works are involved) quicker, more precisely and more transparently;

- v. works are accurately monitored in real time (real-time reporting of content usage);
- vi. all new forms of exploitation are monetised for the benefit of the creator; and
- vii. data and systems used to identify a creative works and its rights owners are compatible and adopted by all partners of the entertainment industry.

CIS is comprised of the following two essential components:

- i. the integration of unique, ISO-certified, standardised international identifiers of works and parties relevant to the creative process. Putting this simply, each element which an authors' society needs to make accurate distributions is allocated a unique and standardised identification number. Such elements include the IPI, i.e. the worldwide database of writer, author and publisher of each copyright work as well as each copyright work itself (ISWC for musical works, ISAN for AV works and ISTC for literary works); and
- ii. an international network of global databases, or sub-systems. These databases serve as the repository of authoritative information on each stage of the creative process. In other words, using the standardised identification numbers mentioned above, the CIS databases provide the necessary IT tools which enable CISAC's members to map and process exploitation of copyright works by copyright users throughout the world.

If we focus more specifically on the audio-visual field, CISAC is a founding member of the ground-breaking and multi-million Euro ISAN project (<http://www.isan.org>). ISAN, the International Standard Audio-visual Number, is a voluntary numbering and metadata system for the identification of audio-visual works. It provides a unique, internationally recognised and permanent reference number for each audio-visual work and the related versions of each work (such as subtitled, dubbed and trailer versions) registered in the ISAN system.

An ISAN uniquely distinguishes one audio-visual content from other registered audio-visual content. Because each ISAN is a unique number that is permanently assigned to an audio-visual work, it can effortlessly identify that work across national boundaries and language barriers.

As a unique identifier, the ISAN is useful in a wide range of computerised applications, particularly those which involve databases or the exchange of information related to audio-visual content. Some of the applications using ISAN are to:

- i. track the use of audio-visual works;
- ii. counter piracy when associated with digital watermarking, as well as audio and video fingerprinting; and
- iii. assist authors' and producers' societies in the management of rights.

Headquartered in Switzerland, ISAN currently has 17 appointed Registration Agencies around the world. Other applicants have filed to become Registration Agencies (in Argentina, Austria, Belgium, China, Czech Republic, India, Japan, Mexico, Portugal, Romania) and are under consideration.

Over half a million ISANs have already been allocated. Moreover, ISAN has already been adopted by the major Hollywood studios and European film producers, video game producers and of course authors' societies. Mandatory for Blu-Ray DVDs, ISAN has also become a reference ID for the identification of protected content on the video-sharing site Dailymotion.

In short, CISAC has long ago anticipated the needs identified by the Commission and has been at the forefront of RMI systems for the best part of two decades. CISAC would be pleased to arrange for the Commission to receive a full and detailed presentation on CISAC's RMI initiatives.

(b) Technical Protection Measures ("TPMs").

As the Commission is aware, TPMs are the "digital locks" which protect many DVDs and which have been championed (until relatively recently at least) by a large part of the record industry. By their very nature, TPMs hinder the consumer's ability to access and exploit creative content such as films. As CISAC states in paragraph 4 below, CISAC and its members have always favoured the making of creative content available to the maximum number of people around the world over the locking up of such creative content.

4 - Multi-territory rights licensing

Before turning to the substance of this critical subject, CISAC would like to make a preliminary comment on the underlying premises contained in paragraph 2.1 of the Communication and in paragraph 5.1.2 of the Staff Document that:

- (a) copyright licensing is somehow making it difficult for on-line services to benefit fully from the Internal Market potential;
- (b) there is a lack of active licensing of the new platforms; and
- (c) the lack of licensing activity remains a major obstacle for the development of on-line content services.

Certainly in so far as the rights of composers, authors and (when applicable) publishers are concerned, CISAC does not concur with the given premises and would respectfully point out that the aforementioned paragraphs ignore the following four factors:

- (a) There is no reliable empirical evidence to demonstrate that users are in any way failing to benefit fully from the Internal Market potential. It follows

logically from this that there is no reliable empirical evidence linking existing copyright arrangements with such failure.

- (b) Naturally, CISAC and its members are continually revisiting licensing arrangements, notably in the music world where a real need for multi-territorial licensing has been identified¹ with a view to ensuring that those arrangements develop in accordance with the needs of the market. This having been said, it is already possible, even today, for a relevant multi-territorial user to secure clearance for the relevant rights owned and controlled by the creative community. Indeed, millions of Euros are already being collected by CISAC's members from such users. No multi-territorial user can argue with either conviction or credibility that its business model has failed because an authors' society has declined to grant it a licence.
- (c) Production companies rely on exclusivity for most of the exploitations mainly because they find it necessary to keep absolute control of all the windows of exploitation of films;
- (d) Unlike other sectors of the entertainment industry, CISAC's members have always encouraged maximum exploitation of their copyright material. CISAC and its members have every interest in ensuring that the copyright licensing process is made as easy as possible and that on-line services benefit fully from the Internal Market potential.

Dealing now with the substance of this critical issue and taking into account the above-mentioned provisos, CISAC recognizes that for some repertoires and in some cases there is a need for the multi-territorial exploitation of copyright works. At the same time, CISAC believes that the most efficient way of fostering multi-territory rights licensing in the area of audio-visual works is by taking into account the following four factors:

(a) harmonisation

There are at present notable and inequitable discrepancies in the level of protection from one member state to the next in relation to the economic and moral rights enjoyed by the audio-visual creator. CISAC refers the Commission to the submissions of its audiovisual rights French member society SACD as well as the one from FERA which contain detailed examples of such discrepancies.

The discrepancies mentioned above are exacerbated by the nature of the on-line market. With users able to transport servers from one jurisdiction to another relatively easy, there is a possible short-term business incentive for a user to base its centre of operations in those territories where copyright protection is at its weakest and where copyright enforcement is weak or virtually non-existent.

Moreover, such discrepancies inevitably have a negative impact on the following three levels:

¹ Notably by CISAC members since the second half of the nineties, a process that led as early as in 2000 to the "Santiago agreements"

- i. For the European Union, the discrepancies run contrary to its stated aims of creating a single harmonised market - and therefore runs contrary to the long term interests of the European Union.
- ii. For the consumer, the discrepancies undermine the economic incentive which is fundamental to any copyright regime. The discrepancies therefore have a long term detrimental effect on the cultural environment in which the consumer is the ultimate beneficiary.
- iii. For the audio-visual creator, the lack of effective protection of his moral and economic rights in certain countries means that he will neither be able to exercise effective control over the use of his works in certain territories, nor will he receive all the royalties which he so richly deserves. Indeed, at present, audio-visual creators receive limited revenues from such exploitation. CISAC and its members fully support multi-territorial forms of exploitation – but multi-territorial forms of exploitation must be accompanied by effective multi-territorial protection.

In the light of the above, CISAC urges the Commission to ensure an adequate level of protection for the audio-visual creator throughout the Union. Such adequate level of protection can only be assured by introducing a harmonised level of minimum standards.

(b) Fair compensation

The audio-visual creator must receive fair compensation from all forms of multi-territorial exploitation and from all sources of revenue. The link between copyright works and the revenues generated by a user is inextricable and incontrovertible. After all, without the original creation, there would be no revenue. Fair compensation therefore dictates that the audio-visual creator receive royalties based on the total gross revenues generated by the multi-territorial exploitation of his work - irrespective of whether a user's business model is based on subscription income, per use income, advertising revenue or some other form of revenue. As a user's fortunes rise - thanks to the success of the audio-visual and other works which it is exploiting - so too should the fortunes of the creators rise. Similarly, should the user's fortunes fall, then the creator's share will also fall.

In the light of the above, CISAC was gratified to read in paragraph 3.1.2 of the Staff Document that the Commission has reaffirmed its concern to ensure that "a multi-territory licensing model does not erode the value of music when it is disseminated on-line". CISAC urges the Commission to express exactly the same concerns in relation to other categories of creative content, such as audio-visual content. After all, those arguments which are valid in relation to the erosion of the value of music are equally valid in relation to all other categories of creative content.

(c) Cultural Diversity and creative content

The European Union has a proud history of diverse cultural origins and is all the stronger for that diversity – whilst “unity in diversity” is an apt slogan, so too is “strength in diversity”. Recognising the fact that the Europe of today is built on the diverse cultural origins of yesterday, the European Union’s members played a leading role in the successful conclusion of UNESCO’s convention on the Protection and Promotion of the Diversity of Cultural Expressions. Indeed, the European Union is obliged to implement the Convention’s provisions.

Creative content is unique in nature since it encompasses not just economic goods but also cultural goods. Given the inextricable link between cultural diversity and creative content, CISAC was disappointed to see that there were no express references to cultural diversity in the Communication, Questionnaire or Staff Document.

CISAC believes that the issue of cultural diversity should not only be included in forthcoming discussions on creative content on-line – it should also be at the centre of those discussions. These discussions need to recognise that, in an ever-changing digital media landscape where forms of exploitation are becoming increasingly multi-territorial, the issue of cultural diversity is all the more critical. Cultural diversity and the promotion of those minority cultures which make such cultural diversity a reality must be preserved at all costs.

(d) Liability allocation

Primary responsibility for copyright liability should be borne by the “end user” of the audio-visual creator’s creation. It is therefore this end user which should bear primarily responsible for the payment of royalties to the creator.

5 - Legal offers and piracy

CISAC shares the Commission’s view (expressed in paragraph 2.1.4 of the Staff Document) that piracy and other unauthorised exploitation of creative content remains one of the central issues to be addressed within the context of multi-territorial on-line licensing. It is a fact of life that today’s audio-visual creator is faced, not just with the challenge of increased access to his creations through a wide range of multi-territorial on-line and mobile services, but also with the challenge of the often unlawful exploitation of his copyright works.

In the light of the threat of widespread and uncontrolled copyright infringement which is no respecter of national frontiers, the audio-visual creator might be expected to see technological developments as a threat. Indeed, other sectors of the entertainment industry have reacted to the advent of multi-territorial forms of exploitation by placing greater emphasis on preventing the exploitation of their intellectual property rather than on encouraging such exploitation. As is clear from paragraph 4 above, CISAC and its members do not share this approach. Indeed, the policy and wish of CISAC’S members have always been to ensure maximum and widespread exploitation of creative content since such

developments increase the opportunities for the creator to receive the remuneration to which he is morally and legally entitled.

CISAC and its members accept that multi-territorial licensing should, in a manner that is likely to vary depending on Repertoires, equate to greater exploitation of a creator's works. However CISAC simply urges that such developments should take place within the context of a properly regulated regime and with appropriate consideration given to the specifics of the exploitation of various categories of creative works. Whilst the continuing technological revolution directly impacts on the consumer; whilst the interests of the consumer must naturally be safeguarded; and whilst CISAC has no desire to "criminalise the consumer", the establishment of a properly regulated European copyright regime must be done in a way which simultaneously recognises the central position of the creator in that technological revolution and the critical role played by creators in the digital economy.

6 - Conclusion

As the Commission rightly suggests in the Staff Document, technological changes are irreversibly altering the entertainment industries, with such changes inevitably affecting the ways in which copyright works are created, licensed, produced and disseminated. New platforms – wholly dependent upon copyright works - are multiplying with breath-taking speed. Many of these platforms share one characteristic in common – namely the ability to transfer digitised copyright works from one corner of the world to the other.

In a multi-territorial entertainment world, CISAC accepts that appropriate multi-territorial solutions are necessary. In the search for those solutions, it must be borne in mind that creative content undoubtedly brings added value to a financially lucrative market. It is therefore only equitable that the creator receives his fair share of this market. The audio-visual creator cannot receive this equitable share until there is at least a minimum harmonisation of his rights across the European Union.

With its groundbreaking RMI projects, CISAC is playing its part in ensuring that creators receive their due. Spurning the "inevitability of piracy" sentiment which has gripped some sections of the entertainment industry and which has led those sections to lock up creative content, CISAC's policy has always been to encourage maximum exploitation of maximum content. CISAC looks forward to its continuing discussions with the Commission on how this policy might be realised whilst still preserving the fruits of the creator's labour. The preservation of those fruits naturally has an economic dimension – but it also has a cultural dimension. In moving forward with its worthy on-line initiative, CISAC therefore hopes that the Commission will have at the forefront of its mind, not just the creation of a single European market – but also the protection of a diverse European culture.