

**Communication of the Commission to the European Parliament, the Council,
the European Economic and Social Committee and the Committee of the Regions**

on online creative contents in the Single Market



COMMENTS OF THE INTERNATIONAL FEDERATION OF MUSICIANS

The International Federation of Musicians (FIM) is a non-governmental organisation representing musicians' unions, guilds and associations in over 70 countries throughout all regions of the world, totalling several hundred thousand musicians. The FIM European Group brings together musicians' unions from most Member States of the European Union, the European Economic Area and Switzerland, operating both in the performing arts and recording sectors.

Introduction

The musicians represented by FIM and its members are the creative source which enables the industry, when committed to and investing in talent, to supply the market with quality recordings that match public expectations. Through their creative wealth as performers, they make it possible to communicate to a now global public a daily-growing number of music works that reflect an exceptional diversity.

The new backdrop which has gradually emerged since the web has opened out to a vast audience is constantly changing, and this makes it difficult both to analyse and diagnose, since the pace at which the issue under study evolves outstrips the speed of those who are analysing it.

There is also an additional factor which adds to the still prevalent confusion in attempts to decipher the digital world. Those involved in the market tend to exploit figures collected (often difficult to check) exclusively to defend outdated economic models which were successful in the past and try to play on pity with regards to the temporarily tricky situation resulting from their difficulties to adapt to new consumer expectations and practices.

Certain symptoms raise doubt as to the desire of the phonographic industry to play its role where diversity is concerned. While it threatens to cease investing in seeking out and promoting fresh talent unless it benefits from an extension of the duration of protection for related rights, it is at the same time engaging in so-called "360°" contractual relationships with artists. This concept, which aims at exploiting all aspects of an artist's image and all by-products, is a pure marketing product and is diametrically opposed to the approach towards innovation and renewing catalogues in line with public expectations. The fact that the phonographic industry is panic-struck at the thought of seeing one of the most lucrative parts of its catalogue pass out of copyright clearly shows the extent to which its aim is focused much more on overexposing a limited number of artists than it is on developing new catalogues.

The EU music sector makes both a significant contribution to the creation of wealth and is a key element of the cultural diversity to which it aspires and on which it is widely based. For this reason, we consider that it is absolutely fundamental to place creators -in particular performers- at the core of any initiative affecting the sector. The following question should also be asked before coming to any decision: *would the decision we envisage enable all rightholders, in particular performers with the weakest contractual position, to derive reasonable benefit from the exploitation of their work?*

The consultation undertaken by the Commission is, in our opinion, essential and, via the platforms for thought put forward, should make it possible to work out approaches for better understanding the challenges of the digital world which will shape the future for music performers.

Digital Rights Management (DRM)

1. Do you think that by encouraging adoption of open DRM systems, this fosters development of online creative contents services in the internal market? What are the main hurdles to completely open DRM systems? What practices do you recommend where DRM interoperability is concerned?

The public did not take long to reject proprietary DRM-associated Technical Protection Measures (TPMs). Their non-interoperability is still today one of the prime arguments put forward by consumer organisations to justify getting round them.

Afraid that their image would be too closely associated with that of the industry, (rightly) accused for a time of trying to take remote control of private computers (cf. Sony rootkit), a majority of performers has been extremely dissatisfied with this situation. Today it seems that, on this score, consumers and their organisations differentiate between producers and artists, since they explicitly recognise that the latter have a right to decent remuneration which the industry often refuses to give them.

If one considers that the development of online creative contents services depends on the attitude of consumers towards the quality and diversity of what is proposed on the one hand and, on the other, on the flexibility of use of the services purchased, it is clear that interoperability can be seen as an item that has a strong bearing on the act of purchasing.

The hurdles to interoperability lie essentially in the outmoded conception of the market which a certain number of operators still have. The myth of a market controlled from the top must be abandoned. Purely and simply transposing the market of material supports to the digital world is clearly attractive for industry since it offers huge growth perspectives. But it is clearly out of phase with the technical and sociological reality of the web.

The top-down concentrations which still continue to emerge, particularly where telecommunications operators are concerned, make it even more necessary to develop and make open standards more widespread, so as to prevent the risk of proprietary systems hindering cultural diversity in the emerging market of the digital era.

The standards wars we experienced with videocassettes, digital recording supports (MiniDisc/DCC) or more recently high definition (BlueRay/HD-DVD) are costly for all -industrialists and consumers alike- and run counter to swift market development. It would be suicidal to introduce a new war of this type for adopting an open DRM standard. Moreover, it would appear that, at least as far as sound is concerned, the TPM issue seems to have been settled, as is shown by the fact that they are being gradually abandoned by major market players. It is difficult at this stage to forecast the extent to which the audiovisual field can avoid the difficulties that the phonographic industry continues to encounter with regards to file-sharing between users. Whatever the case may be, it would seem that, given the specific operating modes in this sector, reasonable use of TPMs in the audiovisual field can at least for some time still remain a tool capable of both structuring the market and making it possible to meet consumer expectations.

The reply to this question would not be complete without recalling that control of the use made of protected contents is only of value to performers if, in practice, they are able to benefit from the rights provided by national and international instruments covering intellectual property. The global and lump sum transfers of rights to which they are contractually bound considerably reduce the interest of devices for increasing revenues on which they miss out to a wide extent. Consumers seem to have understood this point without any problem.

Finally, the interest of DRMs can be underlined independently of TPMs, insofar as they enable efficacy in tracing recordings, and consequently rightholders to be identified for a more efficient distribution of revenues collected. It should also be added that the concept of DRM (without TPMs) is compatible with all economic models.

2. Do you feel that information for consumers regarding DRM system interoperability and characteristics concerning personal data should be improved? In your opinion, what would be the most suitable means and procedures for enhancing consumer information regarding DRM systems? What practices do you recommend where labelling of products and digital services are concerned?

If we admit that TPM policy is one of the keys for consumers subscribing to new online contents services and, on these bases, the prior requisite for the much awaited take-off of commercial offers on the web, the question answers itself.

Clearly, no one would contest that those who purchase a product have a right to know what they are purchasing, but such is not always the case today where music is concerned. When consumers discover what they have purchased on online services, they might even have the feeling of having been taken for a ride. When purchasers click to download a piece of music protected by a TPM, they generally think they have carried out a conventional act of purchasing as in a shop when they choose a record or a CD. In fact, there are many differences which are not obvious at first sight. Far from it.

- since the TPM is not interoperable, users cannot enjoy purchase on the equipment of their choice;
- since sound encoding is not necessarily itself interoperable, this underpins the previous limitation;
- sound encoding diminishes recording quality to a significant degree, even if real impact can vary depending on the type of music;
- users who do not like or no longer like the music purchased are unable to resell it (on any material medium whatsoever);
- a user can only carry out one single download, whereas the sales service can check that such user is indeed the person who has carried out purchase of the service. In case of loss, damage to the computer or drive or simply when the user re-sells the equipment, he/she has to repurchase the same music in order to continue enjoying his/her purchase.

In order to encourage consumers to take out commercial offers, there is a need to opt for rules of enhanced transparency making it possible to identify both essential limitations and, if needs be, lack of such.

3. Do you feel that reducing the complexity and improving the transparency of end-user licence agreements (EULA) foster the development of online creative contents services in the internal market? What practices do you recommend where licence agreements are concerned? Are there any specific points concerning licence agreements that you think should be addressed in greater depth?

Asking end-users to simply tick a box to indicate that they agree to three pages of contract goes against the need to encourage consumers to subscribe more spontaneously to online commercial contents services. From consumers' point of view, it is difficult to admit to such complexity, whereas purchasing in a shop provides them with a product of better quality, tied with less restrictive strings and without having to go through a licence agreement which they will probably never read anyway.

A distinction should, of course, be made between licence agreements affecting TPM-protected contents and contents containing simple DRMs.

Since by nature TPMs are intended to force users only to exercise purchase within a strictly restricted framework, it is essential to inform purchasers of such restrictions prior to purchasing. The more restrictions there are and the more complex they are, the more complex the licence agreement itself. The search for simplicity doubtless goes hand in hand with introducing a reasonable framework to restrictions brought about by TPMs.

When the DRM does not have a TPM, the end user's licence agreement can, if needs be, simply remind the user of the rules applicable to all under current legislation, in particular with regards to the extent of exception for private copying.

Finally, we should like to recall the crucial importance of private copying remuneration schemes regardless of the devices chosen by the industry (TPM and/or DRM). The attempts of industry to promote widespread usage of TPMs and thereby limit the benefit of exception for private copying run up against either those who try to get round these measures or the process of abandoning commercial distribution channels in favour of file-sharing networks between private individuals. The idea that efficient TPMs spell death for the exception of private copying and associated systems of remuneration, does not really hold water any more. For one thing, it should be noted that consumers are attached to the notion of exception for private copying and, for another, the reality of practices covered by such exception should be recognised, including in those countries which have not implemented it, particularly the United Kingdom.

4. Do you consider that alternative mechanisms for resolving litigation, with regards to implementation and management of DRM systems, would boost user trust in new products and services? What practices do you recommend in this area?

Initially, we feel that mechanisms for resolving litigation would make it possible to avoid having recourse to drawn-out proceedings that are both costly and of little formative value since they are always likely to heighten consumer mistrust and resentment.

To be efficient, such mechanisms need for the most part to be accepted by all parties involved, consumers in particular. It is essential to have as wide a consensus as possible on principle and implementation.

5. Do you consider it to be necessary to guarantee non-discriminatory access (e.g. for SMBs) for DRM solutions so as to maintain and foster competition on the digital contents circulation market?

While noting that catalogue innovation is mainly driven by independent, small-size labels, it would be a serious mistake to force them out into the fringe of the market by prohibiting access for them to open-system DRM standards. Competition on the cultural product market must in no way be artificially created or maintained by actually prohibiting access for independent labels to a standardised open DRM system.

Licences for several territories

When addressing the specific issue of multi-territorial licences, we shall limit ourselves to a few comments.

Multi-territoriality is a reality to which the emergence of the web has given major impetus. However, this should not act as a pretext for dismantling national collecting societies which would be unable to keep up with the breakneck pace of competition, which is not their natural domain.

A collecting society is a simple, technical instrument which must remain in the hands of artists who are its principals. In our eyes, it is essential for there to be a close relation linking artists to their society, if, once again, we are to guarantee that the aims behind cultural diversity be respected, aims which the EU set itself by supporting then ratifying the Unesco convention on the protection and promotion of the diversity of cultural expressions.

The merging of societies or the disappearance of small societies folded into the biggest entities does not constitute a process of healthy competition. For artists who are not very well known, this represents significant and real risk for their interests that are overshadowed by high revenue-earning rightholders. The criterion which is often put forward -that such competition checks the level of administrative costs- takes into account neither the specific problems that newly created collecting societies have to face during the start-up phase, nor the issues of scale which, at this level, penalise societies set up in small countries.

We consider that any device which would not guarantee the possibility for an artist to be represented with regards to collective management of his/her intellectual property rights by a national society in which he/she could personally intervene (e.g. by participating in general assemblies or being elected to the board of directors) could not be considered as satisfactory. Finally, the social and cultural actions carried out by national collecting societies constitute a valuable asset for artists and national creations. Subjecting them to European competition could jeopardise them, which we consider as being a serious risk.

Lawful offer and piracy

9. How can an in-depth and efficient collaborative approach between interested parties bring about better respect of copyright in an online environment?

Respecting copyright and related rights in the digital world is based on complex relationships between creators, producers, distributors, users and consumers. Up to fairly recently, ISPs did not want to be stakeholders in the debate. Now they have been brought in, which is logical given the significant revenues which the circulation of protected contents has generated for them since the emergence of broadband Internet.

To begin with, and always assuming that it is the most suitable term to be used, the notion of "piracy" must not be restricted to unauthorised protected content-sharing between Internet users. When old recordings are exploited over the web without the corresponding artists' contracts being reviewed to take these new modes of exploitation into account, this is also an act of piracy, committed this time, however, by the producer to the detriment of the artist.

This example is intended to provide a reminder that the issue of piracy should not be addressed without envisaging the means to guarantee the artist adequate remuneration to live off his/her profession. If, with the exception of a few top of the bills, artists sometimes hesitate when it comes to joining producers in their combat against piracy, it is in no way because they support the principle of free access, but simply because reducing piracy would have relatively little impact on their actual revenues.

Where consumers are concerned, they have already clearly expressed their backing for the principle of suitable remuneration for performers, which is a positive step. What is missing today is a consensual economic model to boost market dynamism, ensure revenues for all rightholders (performers in particular) for all modes of exploitation and earn sufficient consumer trust for them to support it massively.

We are convinced that having a place where dialogue can take place will foster the emergence of the sought-after consensus.

10. Do you feel that the agreement recently signed in France is an example to be followed?

The agreement signed in France has at least brought together sector players under a public authority umbrella with the intention of setting up cooperative procedures between service providers, rightholders and consumers. Despite the worthy character of such a cooperative approach, organisations representing performers have been led to express regrets over the way in which consultations have been carried out as well as contents thereof.

To begin with, performer organisations were not consulted individually and were consequently unable to express their point of view as they wished.

Then, the agreement adopted an exclusively industrial approach, without taking an increasing number of artists into account who choose to use the web in a spirit that is different to that of commercial platforms. For example, some of them place their creations on the web with free access, since they do not subscribe to the economic model on which the commercial offer proposed by the industry is based. It appears, however, that only the industrial offer has been considered as a lawful one by the Olivennes report, which is debatable.

Finally, since this agreement was the opportunity to bring together leading market players and enable them to agree on the joint directions to be taken, it is regrettable that mechanisms were not envisaged that would make it possible to remunerate performers for the exploitation of protected contents.

11. Do you feel that implementation of filtering measures would be an efficient means to prevent online breaches of copyright?

Filtering measures still have to prove their efficacy, which in particular depends on the cost of their implementation and compatibility when it comes to respecting private life. As far as use which could be made of such measures is concerned, there should be a distinction between identifying internet users carrying out unauthorised downloading and, if needs be, measurement of traffic work by work with a view to sharing out revenues collected where ISP levy payment is concerned.

As for the objective in France, i.e. identifying the offending internet user and shutting down his/her access, certain side effects have been mentioned:

- how to shut down an access when this is combined with a triple or quadruple play offer, without at the same time curtailing other services for which the consumer has taken out a simultaneous subscription (telephone in particular)?
- given the considerable number of internet users who carry out free file-sharing, is it reasonable to expect ISPs to cut themselves off from a significant part of their customer base or see clients switch over to a competitor?

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