



29 February 2008

European Commission  
Directorate-General Information Society and Media  
Audiovisual and Media Policies Unit  
B-1160 Brussels  
BELGIUM

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**RE: Creative Content Online – Policy/Regulatory issues for consultation**

Dear Sir/Madam,

The Global Entertainment Retail Association – Europe, hereinafter referred to as ‘GERA-Europe’, wishes to submit its comments on the public consultation on Creative Content Online.

GERA-Europe is composed of national associations from Austria, Belgium, France, Germany, the Netherlands and the UK, representing the entertainment retailing market. The association represents thousands of small and large companies which employ tens of thousands of part- and full-time employees and generate revenues of several billion euros. These include companies such as Fnac, Virgin, Free Record Shop, Woolworths, Amazon and HMV that sell a variety of products including music, books, video, software and electronic goods.

GERA-Europe contributes to European Commission consultations relevant to the entertainment sector on a regular basis. For example, it contributed to the consultation on Content Online in the Single Market launched in July 2006. GERA-Europe appreciates the opportunity to contribute its expertise and experience to this consultation as it considers the Communication on Creative Content Online particularly relevant to its members’ business model. In fact, many of GERA-Europe’s members offer digital distribution of entertainment products and thus are highly interested in the distribution of content online. GERA-Europe’s response is divided into two sections: section A provides the responses to the questionnaire and section B sets out GERA-Europe’s concluding comments and recommendations to the European Commission.

**A. Responses to the European Commission questionnaire**

Please note that, in certain cases, answers to different questions have been grouped together. The text of the questions is followed by the relevant answer. GERA-Europe’s positions on key policy issues are in bold.

**Digital Rights Management**

***1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?***

*2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?*

*3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?*

*4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?*

As a preliminary remark, GERA-Europe would like to draw the European Commission's attention to the broad context of protection and monitoring requirements associated with the deployment of copyright protected content online.

GERA-Europe believes that the European Commission must be made aware that recent initiatives in music online business models have shown that DRM-free offerings do not necessarily result in total lack of identification or monitoring. Digital fingerprinting, watermarking, Internet monitoring or filtering technologies can also provide a safe technical environment and a sound business model.

**GERA-Europe believes that there is a need to distinguish between the video and music markets in order to examine the DRM issues.** DRMs are generic technologies operating over an IT architecture which separates content hosting servers, decryption key distribution servers and end user's devices. Therefore, these technologies can provide mechanisms to control usage, restrict copying or transfers and also enclose content applications within a particular architecture. This is precisely where the issue of interoperability comes in. Interoperability has been strongly advocated for the benefit of consumers in order to give them the freedom of using acquired content on any chosen device and GERA-Europe is still very much in favour of interoperability.

Yet another notable aspect of DRMs is precisely that they can hinder competition by preventing access to markets that are technically designed as closed IT architectures. Certain portable music devices and internet sites, mobile telephone music offerings and ISP music subscription models are examples of closed environments. Digital retailers rarely enjoy the opportunity to compete in these markets. Finally, DRMs have had negative effects on consumers' satisfaction with digital products. First time use of EULAs is often deemed cumbersome by consumers and it often requires updating the player software, restarting the software or the computer, sometimes with no effective help from instructions or guidelines. What is more, a lot of consumers are frustrated with legal downloads protected by DRMs because they simply offer fewer usage possibilities than pirated MP3 downloads, which are entirely interoperable. This latter aspect is obviously a big hindrance to market growth.

For all the above-mentioned reasons, **GERA Europe does not support the use of DRMs for digital music offerings.**

The video market is different from the music market in many respects. Even if figures must be interpreted cautiously in nascent markets, early trends show that the video-on-demand market is likely to focus more on rental than on sell-through. If this trend is confirmed, it would be fair to say that DRM technologies would be necessary to enable a rental market for online videos. Internet based video-on-demand offerings run over streaming or progressive download

protocols. DRMs are therefore necessary to allow for a pay-per-view pricing model or a subscription over a given period of time. Without such technology, consumers would be able to keep acquired files and use them outside the scope of the end user licence and therefore make unauthorised use of such files. TV-, cable- or satellite-based video-on-demand offerings run over broadcast protocols, which do not require DRM technology. The video market exploits audiovisual content ranging from cinema and theatre to free television releases. This content must comply with release windows, meaning that the release of audiovisual content is contractually or legally constrained within these windows. DRMs can provide the technological tools necessary to translate release windows to the online arena.

For the above-mentioned reasons, **GERA Europe supports the use of DRMs as an enabler of business models to the consumers of video content.** Nevertheless, GERA Europe believes that DRMs should be interoperable in order to provide European consumers with the widest possible choice in playback devices.

***5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?***

GERA Europe agrees that non-discriminatory access to DRM solutions for SMEs would help preserve competition. Nevertheless, stronger measures are needed if the European Commission truly wishes to foster competition. DRMs have been strongly advocated and implemented by most major companies in early stages of the digital music market and particularly those majors who have capitalistic bonds with mobile telephone, TV or ISPs. Their preference for DRMs is linked not so much to concerns of copyright protection, but rather to marketing strategies aimed at developing digital markets within closed systems (e.g. a major music catalogue licensed to a mobile telephone company, for a subscription model). This type of business model resembles the interactive video games market where competition applies to integrated hardware-software products. GERA-Europe wishes to emphasise that this vision does not suit the music and video markets. Therefore, fostering competition would require that access to new markets remains as open as possible for all sizes of enterprise. A pro-competition policy would thus benefit from understanding DRMs in their two dimensions: 1) enablers of business models and 2) anti-competitive market protection solutions. GERA-Europe concedes that dimension 1 is useful for the development of new markets and models; however dimension 2 is unacceptable for anti-competitive reasons.

### **Multi-territory rights licensing**

***6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?***

GERA-Europe agrees that the issue of multi-territory rights licensing must be addressed in the context of the wider aim of promoting content online across Europe. GERA-Europe does not agree that a Recommendation would suffice to address the existing obstacles in the rights procurement market. Recommendation 2005/737/CE has, in fact, had a negative impact on the online entertainment retail market for the following reasons: 1) it has created legal uncertainty for the licensees/users, 2) it has added complexity by creating, yet again, a new rights-holder entity and 3) this new body has not been able to licence representative users for lack of applicable and workable models for its repertoire licensing operations.

***7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?***

GERA-Europe believes that the European Commission must consider two options: 1) either it

goes back to 'Option III' of Recommendation 2005/737/CE or 2) it puts forward a binding legislative proposal, for example in the form of a Directive. Such legislation would be all the more conclusive since it would encompass solutions in the pending competition case with CISAC and would properly take into account the users'/licensees' requirements for what they are, i.e. it would not be a wish list, but rather a set of functional requirements with the aim of making new licensing models actually workable.

GERA-Europe believes that the European Commission should not be prejudiced as to which rights administration system is deployed and cautions the European Commission against added layers of complexity in a rights administration environment which is already confusing for most new technology industries. The notion of primary and secondary multi-territory markets may create confusion with old fashioned notions of primary and secondary rights. Additionally, it is unclear from a user's perspective whether this two tier system would actually translate into proper clearances for all European territories. The European Commission ought to bear in mind that proper clearances across Europe are the only way forward for a true deployment of content online in the Single Market. Another suggestion would be to address the issue of rights definitions in the light of new technology usages. Finally, the notion of exhaustion of some types of rights – if only these could be tightly related to these new usages, e.g. a music download and its associated and *renamed* 'making available and reproduction right' for all territories inside the Single Market – would ensure multi-territory deployment of content. These exhaustion mechanisms combined with compulsory multi-territory licensing mechanisms for collectively administered rights would undoubtedly make the Single Market for content online a reality.

***8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?***

GERA-Europe notes that the 'long tail' theory does not yet translate into tangible figures in the legal and payable markets of music download and video-on-demand. Although digital and specialist retailers are in favour of promoting back catalogue material, they wonder if the territorial issue represents the major obstacle to the 'long tail' theory. The more 'niche' the catalogue, the less international it is usually, particularly if one takes European folk music or more generally world music into consideration. This would therefore establish that the main obstacle towards exploitation of 'long tail' catalogue is not a territorial one. There could be more priority solutions in the transparency of rights ownership and clearance procedure for orphan works. GERA-Europe emphasises the need for the entire licensing chain to be addressed, otherwise the multi-territory dimension alone will not suffice.

#### **Legal offers and piracy**

***9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?***

***10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?***

GERA-Europe believes that effective anti-piracy campaigns must balance prevention and repression. In this respect, the French Memorandum of Understanding (MOU) provides a good example of how deterring messages can be sent to infringers prior to escalating sanctions. GERA-Europe notes that no measures have yet been implemented, since new legislation must be passed in France prior to enforcement of the MOU measures. It is desirable that ISPs take responsibility, with the content owners, in order to tackle piracy.

GERA-Europe would like to promote prevention measures at an information level. Whether such measures should be forced upon ISPs requires detailed discussions with such providers to (a) establish how feasible such measures are and (b) ensure such measures do not hinder new

business models which ISPs are creating and fostering. Ideally, piracy at source should be prevented but not at the risk of hindering potentially legitimate models. Nevertheless, these types of measures are technically complex and, even though GERA-Europe supports exploring such an option, it also believes that trials ought to be run prior to full implementation.

***11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?***

The issue of filtering indeed requires considerable standardisation efforts on various levels. Firstly, the copyright industries must show that the identification technologies are robust, flawless, secure and available on a non-discriminatory basis. Secondly, identification technologies must refer to transparent and accessible registration databases so that the ownership of protected material is not questioned. Thirdly, the filtering process must be effective in the high bandwidth internet environment.

Therefore, GERA-Europe would recommend that a number of stakeholders come together voluntarily in order to run some technical trials with results assessment by independent experts at the end of the process.

**B. Concluding remarks and recommendations**

Finally, GERA-Europe understands that the European Commission intends to establish a Content Online Platform to enhance co-operation amongst industry stakeholders and facilitate cross-industry agreements. GERA-Europe would like to contribute its expertise in the entertainment retail sector online and be considered for participation in the above mentioned platform.

GERA-Europe looks forward to the next step in the consultation process and remains open to any questions or comments you may have on the above issues.

Kind regards,



Martin De Wilde  
GERA-Europe President