

GIART response to the European Commission Questionnaire on Creative Content Online – Policy/Regulatory issues for consultation

INTRODUCTION

GIART, the International Organisation representing the EU performers' Collective Management Societies, thanks the Commission for its initiative of concerning creative content Online.

However we esteem that this new initiative can provoke a certain level of confusion and uncertainty as its relation with the October 2005 Recommendation on music online is not clear.

Furthermore and preliminarily we think that there is no need to adopt binding rules as concerns the issues treated by draft Communication and that the previous intervention of the Commission in 2005 has proven to have been negative on the Market as it altered the fragile equilibrium strenuously built up to then by the different stakeholders. To adopt an easy metaphor, it has had the same impact of an elephant in a shop of bone china.

Finally we also deeply regret the total absence of any reference in the draft to the need to preserve European cultural diversity and to UNESCO Convention, according to the answer given to Mrs Ruth Hieronymi's written question (P-5554/07) on the legal status of the UNESCO-Convention by Commissioner for Culture Ján Figel last 3 December 2007:

".....The Community is duty-bound to implement the UNESCO Convention when exercising the competences it enjoys in policy areas which are covered by the Convention. According to Annex I(b) to the Council Decision, these areas are: free movement of goods, persons, services and capital, competition, and the internal market, including intellectual property.....";

Therefore we esteem that any future legislation on creative content online needs respect the delicate balance between cultural and economic requirements, as it has been enhanced by the Lévai Report of the Legal Committee of the European Parliament on the Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services. Up to now, culture fell within the competences of the Member States and was firmly separated from EU single market law and international trade law.

Even if the economic importance of the creative content on the Internet is pushing some stakeholders to put pressure on the EU to consider creative content as an economic good, we do not agree and esteem that cultural goods are not like any other good and that if we want that European content flourish we have to preserve and defend the European cultural diversity which is a fundamental principle of the European construction.

Besides, GIART members consider that any legislative initiative should be undertaken by a co decision procedure from the Commission and the Parliament altogether, as it has been underlined by the Lévai Report, because this is the better way to ensure the legal certainty and the best participation of all the stakeholders involved and the most democratic one.

Digital Rights Management

GIART believes that there should be no binding rules imposed at EU level but that the market should find its own equilibrium and solutions as it is currently doing. Some of the main majors are abandoning the DRMs and exploring other solutions so any intervention at the moment would be premature and damaging. Other alternatives are being also offered by CRMs.

GIART furthermore esteem that there will never be DRMs which will be 100% unbreakable and that for this reason the current systems of private copying remunerations should remain in place as according with the 2001 Directive for every act of copy, independently from the source, there should be a remuneration in favour of rightholders.

We considerer that through the making available right the individuals are allowed technically to the subsequent interactive uses of a performance in a digital environment, network or internet for the reproduction, download, including any communication interactive to the public, such as the interactive streaming and any manner of public interactive communication over the Internet or in a digital medium, including mobiles phone or performances that are delivered over a wide variety of digital devices, allowing users to access them, whether in a PC, laptop, mobile phone or other digital devices.

So, at the moment, it is extremely important to enforce the intellectual propriety rights in order to give right holders more efficient instruments against illegal acts in the internet such as P2P.

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?

As we have explained the interoperability of DRMs must be encouraged as beneficial for all the stakeholders involved specially for the consumers. Nevertheless all the improvements related to DRM solutions should not harm or weak the performers' rights and the cultural diversity that have to be protected in every case. Although the current state of the digital market is highly fragmented with different systems in place that are mutually incompatible,

we are of the opinion that any future developments in the field of DRM will have to consider the issue of interoperability as a priority. We believe that open standards represent the most appropriate way to ensure acceptance of DRM systems for all the stakeholders involved including content creators, users and consumers.

In addition to that, DRM systems must ensure the necessary flexibility to adapt themselves to the needs and practices of both content owners and consumers. Consumer acceptance of DRM is the cornerstone of any strategy aiming at developing a viable and successful digital market for any kind of creative content. GIART believes that DRM standards should take into account the degree of consumer satisfaction in order to avoid DRM being associated with unacceptable restrictions and limitations to the use of digital content.

GIART believes that DRM-based systems should also cater for fair representation of all the stakeholders involved and for the defence and promotion of basic public interest objectives such as pluralism and cultural diversity.

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?

We think that there should be a clear and transparent labelling about the DRMs put in place to protect digital products and services in order to ensure a proper information of the consumers.

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?

No we do not think that this is a real problem to address.

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?

This question should be answered by consumers' organisations.

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?

Yes it is very important.

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?

As previously said we do not think that binding rules should be set up on this issue.

We strongly believe that the existing system of reciprocal agreements should be preserved and maintained as it ensures that the users without discrimination can have access to a world-wide repertoire and make it possible a better protection for the rightholders in the respect of the cultural diversity and fair competition within the Internal Market. In this sense we fully support the position of the EP as expressed in the Lévai Report.

GIART members agree with Mrs Lévai opinion contained in the report of the Legal Committee of the European Parliament according to which «...*whereas, in order to maintain a one-stop-shop, the existing system of reciprocal collection of royalties should be preserved, in combination with a degree of protection of right-holders to avoid downward pressure on revenues...*» and that that “*national CRMs should continue to play an important role in providing support for the promotion of cultural diversity, creativity and local repertoires*“

Furthermore performers' CMS are involved in a very limited way in the multiterritory-licensing of on-line performers' rights. In fact, due to the national transposition of the making available right introduced by the 2001 Directive in most of the countries as an exclusive right which is transferred to producers by contract, the performers most of the times do not receive any remuneration for it. This situation makes also impossible for the CMS to manage such right.

GIART calls therefore the EU legislator to change this situation and to adopt a system where the making available right is considered as a remuneration right submitted to collective management as it is the only way to make this right effective. This is the way how the making available right was transposed in Spain (the system is explained in detail below) Another system would be like in Portugal (the way of exercise this right in Portuguese law is explained below)

We would also like to draw the Commission attention that it is important to avoid the risk of the centralisation of the market and repertoires in the hands of a few CMS and that the major rightholders, according to the 2005 Recommendation, could give their mandate to some CMS to collect their rights all over the world as this would lead to the weakening and consequent extinction of the smaller national CMS and would also damage the position of the minority repertoires and cultural diversity in Europe.

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?

On the question of the audiovisual rights area we should make a distinction between the music incorporated to images where the music performers are also granted rights in different ranges in the European legislation and the audiovisual rights for actors and dancers.

In the case of the audiovisual rights on the music incorporated to images for the music performers the online management should be dealt in the same way than for the collective cross-border management of copyright and related rights referring to legitimate online music services. As to how to put into practice the collective management in this area, GIART defends two possibilities that are already implemented in European countries that can ensure

a better protection for performers of the making available right, because they focus on the collective exercise:

- According to the Spanish Intellectual Property Law (Consolidated Text, RLD 1/1996, as amended by the Law 23/2006), although making available right is an exclusive right for audio and audiovisual performers, it can be presumably assigned to the audio or audiovisual producer. In that case the performer is granted an unwaivable remuneration right to be paid from the person who makes available the subject-matter. Such remuneration will be obtained by the performer obligatorily through the performers' collective management society.
- According to the Portuguese Intellectual Property Law, as amended to implement the Infosoc Directive 2001/29 (Law 50/2004 -(implementation of Information Society Directive 2001/29/EC, of May 22)), the making available right was excluded from the equitable remuneration and is treated as an exclusive right (number 1.d and n 4 of art. 178), though subject to mandatory collective exercise by a performers collecting society.

So, the making available right only for the performers (not for the others right holders, as authors or producers) is an exclusive right subject to collective mandatory management, as the cable retransmission right of the EU Directive. Moreover, in this case, the Law mandates directly a collecting management society of performers rights to prohibit or to authorise and also to negotiate the remuneration.,

The article 178^o is a great victory of Portuguese performers for the making available right, and it is a good solution for the management of this on-line rights (audiovisual and music).

These two ways of exercise present positive and adequate options for the management of the Internet rights and for the protection of performers rights allowing them to receive a proper remuneration. In that way performers would receive a payment for the use of their performances in the on-line environment, without losing the making available right because of an assignment to producers and performers would count with the structure and resources of their collecting society for that purpose.

We must not forget that the on-line rights are the future for performers because it is in such scope where their performances are going to be mainly spread. Performers should benefit of it, not to be damaged because of their individually weaker position to operate in the on-line scope which is quite uncertain, especially for them.

Regarding the audiovisual rights for actors we can make the same proposal for the online management through the collecting societies by means of the ways foreseen in the Spanish and Portuguese Intellectual Property Laws'. Nevertheless certain options for the individual negotiation must be granted to the performers (actors in the present case) regarding the secondary markets. Here we can consider that even on the secondary markets for audiovisual or films productions, performers must be protected and paid for any individual use of their performances, as it is already on the on-line music sector.

We would like to have a clarification about what is considered by the Commission a primary and a secondary market use because there is no mention to such distinction neither in the Document accompanying the Communication nor in the Communication itself to that.

Anyway, if the Commission is referring to the fact that there are different coexisting business models that can allow the spread of performances in different markets simultaneously or in different periods, GIART view is to consider that such use of the performances should be remunerated in all the cases to the performers, through the corresponding collecting society

by means of a remuneration right in such a way that the use of the performances could be controlled by them in all the cases. Accordingly a first launch of their performances in the on line environment for a certain business model can't imply that a performer will be paid once and will not be able to benefit for posterior launches in other platforms or under other business models in other periods. In a few words, the performer must be able to control through his/her collecting society any use of his/her performance in the online environment and to be paid for such use and each and different use or new business models.

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)?

Cultural diversity must be ensured as a purpose of the Intellectual Property protection. In that sense GIART agrees with the Lévai report of the Legal Committee of the European Parliament according to which *«...national CRMs should continue to play an important role in providing support for the promotion of cultural diversity, creativity and local repertoires, which presupposes that National CRMs should retain the right to charge cultural deductions.» and that“ the existing system of reciprocal collection of royalties should be preserved, in combination with a degree of protection of right-holders to avoid downward pressure on revenues»*

For GIART members this is the real way to promote Cultural Diversity; in addition to that perhaps performers could benefit of the "Long tail" theory, if their performances are put together with others that are more popular or have been recently launched. In any case performers must be protected and paid for any use of their performances even if such are considered back-catalogue performances as it already exist for the music.

It must be clear also that the "Long tail" theory cannot substitute the Cultural Diversity promotion as it is done at the present time and under the principles taken into account by the Lévai report .

Legal offers and piracy

In a general way we think that content owners are investing a lot of energies in order to find a system which would remunerate creators and producers and at the same time would be welcomed by consumers. The last weeks initiatives at different levels and in different countries to have portals where consumers can access a big repertoire for free and the content owners would be remunerated by the advertisement are just the most recent examples.

The respect of the copyright and in general the intellectual property rights is an issue that has to be ensured by the governments of each EU country and the EU institutions, as the creative content constitutes the raw material, the basis of the so called "creative industry" and the business models involved. If the creative contents are not protected, such business models will not be viable.

We have also to take into account the importance of the said industry for the EU economy that has been enhanced in many different studies. Besides, the protection of the Intellectual Property in the EU countries is one of the supports for the development of the European culture and diversity and accordingly of the identity of our countries.

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

Yes we think that it can help even if it is also a question to educate the consumers from the youngest age to respect the intellectual property rights which are, as their name says, “a property” rights. These reasons are important enough for our governments and European institutions to take the lead in putting in practice measures that will improve the respect of copyright in the online environment. Of course the stakeholders agreements and cooperation would be a good influence.

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

Yes we think that recent solutions as the Memorandum of Understanding adopted in France are certainly positive and a very interesting solution and so similar solutions should be extended to all EU countries. What is important of this concrete case is that in France there is a clear distinction between private copying levies and piracy; so that consumers are allowed to copy from legal sources but not to download illegally, because in such case they will be warned about their illegal behaviour and if they reiterate the same behaviour they will not be able to keep an Internet connection (this will be a internet control system that we should follow up in its application and development in France in order to see if it is efficient and a quick solution to piracy) . Besides, this solution shows that both issues: levies as far as the legal copies are made (together with the interoperability of DRMs) and enforcement measures forbidding piracy, can coexist without any possible misunderstanding. UK is also following the same line.

Moreover, as we already mentioned, it is important to enforce the intellectual propriety rights in order to give right holders more efficient instruments (civil and criminal sanctions) against illegal acts in the internet or trough digital means in case of infringement, because in practice, intellectual property is weakly protected against all the internet illegal uses of the protected content.

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

GIART is in favour of s putting in place filtering measures. Such systems involve ISPs examining all information transmitted on their network to identify and block protected content in case it is being used improperly. It should be necessary to reinforce perhaps or to put in practice the “notice & take down” procedures in European national legislations.

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