GSM Europe Response to the European Commission consultation on "Creative Content Online in the Single Market"

29 February 2008

GSM Europe
Herman Schepers, Director GSME
Diamant building
Bd. Reyers 80
B- 1030 Brussels
Tel: +32 2 706 81 06
GSM: + 32 497 37 88 33
E-mail: hschepers@gsm.org
www.gsmeurope.org

GSM Europe Response to the European Commission consultation on "Creative Content Online in the Single Market"

29 February 2008

This paper sets out the response of GSM Europe (*"GSME"*) to the Commission consultation on "Creative Content Online in the Single Market".

Mobile operators are forerunners in offering innovative content services in Europe. Whether in the form of Mobile TV, internet browsing, instant messaging, user generated content, music or videos, we are aiming at offering a much greater range of content services to satisfy the growing consumer demand. As such we welcome this initiative to tackle some very important issues around the dissemination and protection of content online.

As the communication rightly states, **access to creative content** is the cornerstone to achieving the full potential of content online and contributing to European competitiveness. An area of concern though, for mobile operators, is that valuable mobile content may become monopolized by long-term exclusive licenses as has happened with other distribution channels, notably pay TV. An example which illustrates this problem is related to sports rights. The Commission's sports sector inquiry was welcome and timely, but we remain concerned that mobile sports rights are being concentrated in a few hands, with the risk that this will lead to the content being used in an exclusionary or exploitative (monopoly pricing) manner. We see consumer demand growing rapidly and we share the Commission's concern over the reluctance of rights-holders in Europe to make widely available their content in the online world. To this end we look forward to cooperating with the Commission and other stakeholders in achieving balanced and transparent access to content that promotes consumer welfare through the Content Online Platform.

GSME supports the Commission's efforts to introduce greater transparency into collecting societies, notably the 2005 Recommendation on **cross-border licensing**[1]. The fact however remains that the current status of collecting societies continues to present problems. The monopoly position that they hold means they can be inflexible, which is an obstacle when mobile operators are trying to develop new services and are experimenting with content and payment mechanisms and new business models. These monopolies resulting from the provisions of the reciprocal representation agreements between EU collecting societies mean (i) a composer/lyricist/publisher can only mandate one collecting society – his/her own local one (despite the provisions in the recommendation) and (ii) mobile operators are obliged to negotiate a license with each collecting society on a territory-by-territory basis across the 27 Member States in order to obtain clearance across the EU.

The result is that there is **no competition** between EU collecting societies to attract the business of composers, lyricists and publishers –it is not even clear whether rights-holders are receiving good deals, and there is no competition between collecting societies to attract the business of mobile operators – so mobile operators (and their customers) pay more than they

[1] Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services

would in a competitive market. We agree with the Commission that the solution is to end the monopoly position of collecting societies and to introduce greater transparency into their activities. As commercial users we need a mechanism by which, through pan-European licensing, we will be able to obtain pan-European clearance of rights from any collecting society in Europe. This will establish true competition between collecting societies and rights-users will be placed in a better bargaining position.

In its response to the Commission consultation on cross-border licensing[2] GSME recommended an alternative solution whereby national collecting societies are encouraged to form alliances. It is then these alliances – linked through reciprocal representation agreements – which will offer licences to commercial users. The existence of **reciprocal representation agreements** between the proposed alliances is fundamental to the success of GSME's proposal, and such agreements should be devoid of territorial exclusivity clauses that might restrict a commercial users' ability to address the alliance of its choice. In such a scenario, commercial users will enjoy a measure of competition between perhaps three or four licensors, while right-holders will be protected from the risk that a weak collecting society might make inappropriate concessions.

We recognise that recent initiatives, such as those by the MCPS-PRS Alliance[3], EMI Publishing[4] and France's SACEM/SDRM, Italy's SIAE and Spain's SGAE[5] attempt to create a new regime for users. However, when experiencing their practical implementation we are concerned that they seem to be going in the opposite direction of what was aimed by the recommendation and risk fragmenting the market even further. In particular we have seen some rights holders withdrawing their rights from these alliances making it more complicated for rights users to obtain clearance. EMI Publishing decided in 2007 to terminate the representation of its Anglo-Saxon catalogue by all collecting societies in Europe, and to assign exclusive management of its online and mobile rights to CELAS. CELAS, in certain markets, is not recognized as a collecting society under national law therefore unlike regulated collecting societies it may refuse to grant licenses. Furthermore, although CELAS was intended to be a one-stop-shop it only represents the rights of one major publisher. As a result a rights user is now obliged to obtain rights from more than one body within one territory in order to offer an attractive repertoire and in effect this generates more costs and more reporting obligations. We call on the Commission to take into account the results of the 2005 recommendation and come up with a true one-stop-shop solution that can benefit rights-holders and rights-users in an equal manner.

---

[2] GSME Response to the EC Call for Comments dated 17 January 2007 (submitted on 29 June 2007)

[3] As of January 2007, offered "*to license [its members'] music for online and mobile access across the whole of Europe, not just for the UK*". This is a "*one-stop shop for the representation of [its members'] rights across Europe*". www.mcps-prs-alliance.co.uk

[4] In 2007 decided to terminate the representation of its Anglo-Saxon catalogue by all collecting societies in Europe, and to assign exclusively to one new and unique collecting society, called CELAS, the management of its online and mobile rights across Europe. CELAS is jointly owned by MCPS/PRS (UK) and GEMA (Germany).

[5] In a press release dated 22 January 2007, SACEM explains that the alliance creates " *une structure qui sera mandatée pour administrer les droits de reproduction mécanique et d'exécution publique pour l'exploitation en ligne et sur mobiles des oeuvres de leurs répertoires, dans le territoire de l'Union européenne*".26 The objective of the alliance is "*d'autoriser l'utilisation de trois répertoires majeurs (Sacem, Sgae, Siae) sous une seule licence en Europe pour les droits en ligne et la téléphonie mobile… La Sacem et la Sgae développent, dans ce cadre, un système automatisé capable d'identifier chaque oeuvre musicale du répertoire concerné et sa société d'auteurs d'origine. Un site web est en cours d'élaboration ; celui-ci proposera des informations sur l'accord et permettra de consulter l'ensemble des oeuvres concernées.*"

As far as the **management of online rights** is concerned GSME members, as responsible companies, are committed to their responsibilities under the current legal obligations in place i.e. the e-Commerce Directive and the Copyright legislation and respect rights-holder interests. Instead of sanctioning users, we believe that the best way to fight illegal file sharing is to make available legitimate attractive offers both in terms of pricing and choice. In our view a sound business model would need to capture 6 elements namely: wide variety of choice to meet consumer demand, easy access, mobility, convenience, clarity of the offer and control over which device the content will be consumed on.

It is important to bear in mind that illegal file sharing is not a widespread problem on mobile networks. The key differences compared to the fixed Internet are (i) that mobile operators and content owners were quicker to make available legal content offers, thus satisfying the demand that might otherwise have sought illegal content; (ii) customers are in fact used to paying for content obtained on the mobile and; (iii) mobile operators are investing in digital rights management systems. We believe that the combination of these three factors will ensure that it does not become a major problem on mobile networks.

Digital Rights Management systems (DRMs) are an efficient method of remunerating rights-holders as opposed to the outdated system of copyright levies currently deployed in several Member States. They avoid the inefficiencies in collection and distribution that arise when dealing with collecting societies. They also ensure that the rights' holder whose content is consumed is the one who gets to be remunerated. Similarly, it is the consumers of content that pay the appropriate fee for the rights they consume. DRM systems are deployed to offer a high level of protection to rights-holders against unauthorised distribution of their copyright protected content and to enable them to offer controlled right access. Like the Commission, GSME would like to see greater interoperability between DRM systems, but we believe this cannot be mandated but should be achieved through industry led initiatives. The technical aspects achieving interoperability between DRM systems are difficult and are not to be underestimated. GSME also agrees with the Commission that, in the area of DRM, transparency is of paramount importance and encourages it to focus more on this area. Transparency will help consumers take informed choices and it will therefore enhance their confidence in such systems.

However, it is important to bear in mind that business models are changing in the online world to meet consumer demand. In particular there have been some recent initiatives by major record companies and hardware manufacturers to phase out DRMs and base their business model on advertising revenues in exchange for easy to access and free of charge content. Several important deals have been made between rights-holders, major social networking and user generated content service providers in this respect. Any such initiative that satisfies consumer demand, enhances consumer welfare and promotes accessibility to legitimate online content is largely supported and applauded by mobile operators.

We remain at your disposal for further discussion on the points raised above and we look forward to our active participation on the Platform on Creative Content Online where as forerunners of content online we will also be at the forefront of this pan-industry dialogue that aims in making the European content economy prosper and flourish.

GSME Response to the Policy/Regulatory issues for consultation

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?

GSME shares the Commission's view that a level of interoperability in DRMs should ideally be achieved. As far as the standardization process is concerned, mobile operators are actively participating in such efforts. However we believe that this should be an industry led initiative and that a one-size-fits-all approach is not appropriate. Technical aspects achieving interoperability are difficult and are not to be underestimated. We do not believe that there exists a simple and cost-effective technical solution to achieve interoperability of DRM. One also has to bear in mind that there is no widely acceptable DRM standard available today and there are many DRM patents that would limit the possibility of creating a new cheap DRM solution.

We would like to encourage the Commission to focus on the 'packaging' of digital rights. What is required is more transparency such that the consumer clearly understands what they are about to purchase. Indeed, when purchasing content, the consumer is not always aware of the limitations entailed in terms of number of copies, format shifting etc. Consumers need to be properly informed of any usage restrictions placed on downloaded content.

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?

As stated in our response to question 1, we believe that there is scope for improvement of the packaging of digital goods on the proviso that this does not stifle innovation in developing new business models. We encourage transparency and certainty in DRM systems that will enhance consumer confidence.

However, the Commission has to keep in mind the specificity of m-commerce and the difficulties to provide long information on a small screen. To that respect, the Commission should encourage solutions where consumers are directed to information about interoperability (via hyperlinks or phone number) instead of stretching the list of information to be displayed in the offer.

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?

As stated in our response to question 1, we believe that it is important to establish transparency in DRM systems. This will allow the consumer to make informed choices about the platform used to purchase content. The consumer is entitled, whether via the EULAs or other means, to know the number of copies he/she can make, whether format shifting is possible and the amount of time the content is available for consumption.

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?

GSME welcomes a harmonized system of dispute resolutions across the EU. Access to redress mechanisms is essential in enhancing consumer confidence.

Our French members tell us that an alternative procedure has been created in France whereby a special Authority can require DRM's rights-holders to provide information about their technology to others wishing to create interoperable systems unless it can be shown that it would compromise the security of their system.

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?

If the question is referring to non-discriminatory access to DRM technology then we agree with the statement. Content is increasingly becoming a major offering of our service and in order to secure that this content is protected from copyright infringements in many occasions we are requested by our content providers to deploy DRM systems. DRM systems are usually purchased via third parties and as they are often under legal patents they are usually subject to costly remuneration. It is important that DRMs are accessible in a clear fashion, without complex patent claims behind them. Otherwise SMEs will not risk using DRMs, further narrowing the scope for content distribution, particularly at local level.

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?

GSME believes that the Commission should not be focusing on the instrument to deploy to solve the issues arising in respect of multi-territory licensing. The focus rather, should be what those solutions might be. The Commission should also be reminded that the Recommendation on cross-border licencing on online music did not unfortunately produce fruitful results (see main body of response).

We would suggest that rules are required in respect of transparency, governance and dispute resolution. To illustrate, transparency from collecting societies would be useful for commercial users in respect of the terms and conditions applicable to digital music services. For example, the terms and conditions for all services are not always publicly communicated, and one has to request the communication of the licence contract from the collecting society, which is sometimes only possible after giving out detailed information about the activity and

company concerned. This, in turn would also help rights holders make informed choices and ensure that their rights are effectively managed.

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?

We are not entirely clear on what is proposed by this model and therefore cannot, without seeking further clarification, consider it at this stage. If the secondary licence would give access to less rights then we would be reluctant to support it.

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)?

The long-tail theory as applied to the Amazon and iTunes business model is very successful and we would consider that it would benefit from multi-territory licences. For such model to be successful the pricing has to be right. For the pricing to be right economies of scale must be developed. A system of multi-territory licencing would eliminate the costly territory-by-territory negotiations and platforms deploying this business model can focus, instead, on making attractive commercial offers to the customer.

Legal offers and piracy

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

Stakeholder cooperation in the context of commercial negotiations is of paramount importance in order to achieve an online environment with content offers apt to meet the increasing consumer demand. Indeed in the last few months we have seen important initiatives from major record companies, social networking and user generated content platforms striking deals for the dissemination of content based on an advertising revenue business model. As providers of mobile broadband services we welcome such initiatives that aim at enhancing customer experience and are slowly phasing out outdated business models.

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

The French Memorandum of Understanding (“*MoU*”) has been the subject of mixed criticism since its signature in November 2007. As expected, it was largely applauded by the rights-holders and seen as a step in the right direction for combating online illegal file sharing. However, the MoU in several ways seems irrational and not thoroughly thought through. Sanctions towards the subscriber will not necessarily address the real infringer - for example the teenager in the household who has been downloading copyrighted material - but the disconnection of the household broadband connection will primarily affect the actual subscriber.

From the point of view of an ISP, the provisions of the MoU are not well-balanced. Whereas ISPs have to apply restrictions to customers' access, the MoU does not provide a binding obligation for right holders to create in the meantime acceptable legal offers. However, a lot of questions remain unsolved in terms of financial compensation for the ISP' costs resulting from the application of the MoU (remuneration of request for identification, technical cost to shutdown internet access etc.). In addition, not to deprive customers of all services and in particular the telephony service which is part of universal service, ISPs would have to develop, if it is technically possible, a way to shutdown only public communication services and to maintain VOIP and television services. Another situation that needs to be addressed is that of unsecured wireless connections or Hot Spots where it is not always possible to identify a physical person within the IP address. Taking it a step further, one would also need to consider the undergoing discussion of including broadband under the Universal Service obligation. It therefore seems quite premature to engage into a discussion on whether this example should be followed. Indeed once the important questions regarding enforcement are resolved and the MoU is implemented into existing laws it can be an example to be added in a long list of best practices concerning legal offers and illegal file sharing. It is of course up to each Member State, based on the conditions in its market, to come up with appropriate solutions to tackle copyright infringement. These solutions cannot be a blueprint for a European solution.

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

Filtering is commonly used in the industry to block websites depicting child abuse. It has never been used for copyright infringement as it is considered as an arbitrary and intrusive method of combating illegal conduct, and because the technology is useless against file-sharing applications due to technical reasons. It would seem to run contrary to the principle of proportionality. In the case of user-generated content, in particular, filtering measures would risk being a limitation to the fundamental rights of freedom of speech and expression. Filtering measures are based on filtering technologies. With such assumption, we consider that use of technologies should not be punished but the copyright infringement related to the access and use of the content.

As far as filtering technologies are concerned, it has to be taken into account that such systems are effective in a way that it could not even remotely justify the required investments in necessary hardware and software. Filtering would require huge investments by broadband network operators that would substantially increase the cost of production, thus increasing cost for broadband services, which eventually could increase the digital divide. Liability claims arising from incidental blocking of legal content would further increase costs.

GSME believes the best way to fight illegal file sharing is to make available legitimate attractive offers both in terms of pricing and choice. In our view a sound business model would need to capture 6 elements namely, wide variety of choice to meet consumer demand, easy access, mobility, convenience, clarity of the offer and control over which device the content will be consumed on.