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ICMP
INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS
CONFEDERATION INTERNATIONALE DES EDITEURS DE MUSIQUE

29 February 2008

COMMUNICATION ON CREATIVE CONTENT ONLINE IN THE SINGLE MARKET
{SEC(2007) 1710}
PUBLIC CONSULTATION FOR THE PREPARATION OF
A RECOMMENDATION OF THE PARLIAMENT AND THE COUNCIL
ON CREATIVE CONTENT ONLINE MID-2008

ICMP is the global trade organisation representing music publishing. Its members are national, regional and international music publishers associations. Its Board is comprised of active music publishers and of executives of national trade organisations.

In 2006, Commissioner Reding set forth her policy to ICMP at its *21st Century Music Publishing EU Congress* and ICMP contributed to the Public Consultation on the Communication on Content Online in the Single Market.

Today, ICMP congratulates the Commission for its Communication adopted on 3 January 2008 and welcomes the setting-up of a “Content Online Platform” to pursue a dialogue between stakeholders and the opportunity of contributing to the preparation of a Recommendation on Creative Content through a public consultation.

This submission is an opportunity for ICMP (i) to confirm its request that ICMP delegates should be invited to represent music publishing on the Content Online Platform, (ii) to underline certain issues that arise from the Communication and the related Staff Working Paper, and (iii) to update DG Information Society on progress made in respect to multi-territory licensing in the music sector.

The answers to the specific questions posed by DG Information Society are attached.

1. *Content Online Platform (please see letter to Commissioner sent separately):*

ICMP calls on DG Information Society to make sure that the dialogue which seems promising indeed develops in a way to ensure consensus building in each sector from the outset on the wide range of issues to be addressed.

ICMP delegates should therefore be invited to fully contribute to the Platform and to pertinent working groups on behalf of the music publishing sector at large.

- Indeed, the Platform should encompass all stakeholders and allow for an effective representation of the diversity of each group of rights holders. Each sector, each category of rights holders and, within each category, each group of constituents can be impacted differently, depending for example on size, on the nature of the rights and of the content, and on their position in the digital value chain (creator, publisher, producer, aggregator, distributor, etc...).

ICMP delegates are not only well versed on the subjects at issue, they are also company executives actively involved in working on pragmatic solutions for the online and mobile markets in companies which are drivers on the market. They have in addition been chosen by their peers to legitimately speak for the sector and report to it. The Commission would thus benefit from the consensus building within ICMP.

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- The Platform is to address four issues identified in the Communication as the most pressing challenges related to online distribution: availability of creative content online, improvement of rights clearance mechanisms and development of multi-territory licensing, management of copyright online (which we assume includes the issue of interoperability and transparency of DRMs), cooperation mechanisms to improve respect of copyright in the online environment (which we assume will extend to issues relating to legal offers and piracy).

It is anticipated that other issues which are not yet identified may be added. The work of the Platform is also to contribute to a guide for consumers and users.

These many issues relate to each other. Therefore, ICMP assumes that the Platform's working programme and its progress will be sufficiently transparent to allow for further and fully informed contributions by music publishers as the process moves forward. ICMP's expectancy is that it would be invited to contribute in respect to all pertinent subjects.

Among these issues, the Platform might want to draw on music publishers' particular expertise in respect to licensing, as they are one of the sectors at the forefront of multi-territory licensing.

Music publishers also have some experience in respect to achieving cooperation with the ISPs. For example, they have been active contributors to the agreements in France (see the "Charte d'engagement pour le développement de l'offre légale de musique en ligne, le respect de la Propriété Intellectuelle et la Lutte contre la piraterie numérique", dated 28 July 2004, signed between the ISPs, music publishers and other music rights holders, and the three French Ministers of Economy, Industry and Culture & see, also in France, the more recent Memorandum of Understanding, dated 23 November 2007).

2. Certain issues arising from the Communication and the related Staff Working Paper:

- Music belongs to each of the categories of creative content identified by the Commission in its Communication: media online, games, publishing, educational, user-generated. Hence, music publishers should be involved in respect to each category of creative content.

- The Communication seems somewhat confused in respect to "users" and "consumers". Differentiating B to B on the one hand and B to C on the other hand is crucial. Indeed, consumers' concerns about the Information Society are of a different nature than the claims of users (commercial users of creative content). The responses to be legitimately given to the consumers in a proposed guide (within the ambit of consumers laws' philosophy) are quite unrelated to issues raised by users of creative content which are subject to commercial and competition laws.

- In the Staff Working Document, the description of music online by the Commission does not identify musical works, nor does it address an issue raised by the digital shift which is the change of those controlling the online distribution of music.

3. Update on progress made in respect to multi-territory licensing in the music sector:

The October 2005 Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services has demonstrated its positive impact on the market both in

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respect to collective online licenses and governance in societies (another crucial element to better licensing regimes). Hence, there is no need for any further legislative step.

The market has moved towards the construction of one-stop shops between publishers (larger and smaller) and societies/platforms (also larger and smaller) to promote multi-territory online licenses.

Please refer to the Report by DG MARKT on the implementation of the 2005 Recommendation on cross-border licensing in the music sector, dated 7 February 2008, which gives a comprehensive description of agreements having moved forward between publishers and societies and new licensing platforms in compliance with the guidelines of the Commission in its Recommendation, *i.e. promoting the grant of multi-territory licences for online use of musical works through the entrustment by rights holders of the management of their online rights to a collective rights manager of their choice AND on a territorial scope of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right holder.*

The 2008 Report by DG MARKT also encompasses a comprehensive description of the way forward further to the ICMP-GESAC Common Declaration, dated 7 July 2006, which provides for an agreed definition of online exploitation categories. This facilitates the streamlining of collective online licenses by rights holders. It also provides for agreed governance standards in societies, which is crucial.

These achievements are quite spectacular taking into account the time frame in which all of this restructuring has taken place in order to allow for effective collective cross-border licensing.

In addition, publishers and societies are continuing to promote ways forward to improve the streamlining for the grant of multi-territory online licences:

- see the attached CISAC, ICMP, IMPA press release, dated 1 February 2008, and
- see the ICMP Pan-European Portal “PEP” project on which information can be supplied by ICMP.

Please see attached, ICMP's specific answers to the questions posed by DG Information Society.

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Creative Content Online - 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?

ICMP is of the opinion that the development of a robust creative content market online requires that online and mobile access conditions must be consumer-friendly while they should guarantee the implementation of the licensing terms agreed for the use of copyrighted content.

Interoperability is one of the ways forward which should facilitate consumer-access to content while making sure that it allows that the adequate safeguards to remunerate the rights holders remain enforceable.

Therefore, device manufacturers and platforms should be committed to develop flexible inter-industry standards to improve the interoperability of DRMs (bearing in mind the use, as required, of identifiers, metadata, tracking tools, etc... & of TPMs).

Simultaneously, they should be committed to keeping a dialogue open with each content sector in order to work on supporting diverse business models intended, in compliance with the terms and conditions of the licenses granted, to respond to consumers' expectations.

- 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?

Consumer information, as already provided in existing consumers' laws, should indeed be transparent and clear. Thus, interoperability and personal data protection features of DRM systems should be easy to understand for the layman. This ties in to making the online and mobile environment more consumer-friendly. Labelling (as appropriate on product and services) is welcomed. However, the market should be able to define how to deliver such information online, as the strict physical labelling format may no longer be adapted.

- 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 already mentioned, transparency and legibility of the information, and in this case of the EULAs' terms and conditions should help develop consumer confidence online. EULAs will certainly increase as a result of the contractual solutions which will develop governing the usage of creative content online.

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- 4) Do you agree that alternative dispute resolutions 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?

Alternative dispute resolutions mechanisms in relation to the application and administration of DRM systems may possibly enhance consumers' confidence in new products and services, if alternative dispute mechanisms are reliable, neutral, effective, competent, prompt to deliver, informal, transparent, cheap, near-to-consumer, and subject to appeal.

If they only result in adding another layer of jurisdiction, they may not help and will rather complicate matters. In addition, they may overlap with national alternative dispute resolutions mechanisms which have been established to address possible conflicts between DRMs and certain exceptions.

- 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?

SMEs do need particular attention to successfully embrace the digital shift. Non-discriminatory access to DRMs could be helpful to them and contribute to developing competition in online and mobile markets for creative content.

Simultaneously however, there should remain sufficient incentive to ensure innovation in respect to DRMs.

Solutions may encompass promoting the voluntary development and offer of open standards upon reasonable and non-discriminatory terms.

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?

ICMP is supportive of the multi-territorial vision of the Commission for licensing for online and mobile purposes. Simultaneously, ICMP cautions the Commission from addressing these issues in a horizontal manner and indeed commends the Commission for taking a sector-approach.

Hence, ICMP recommends that if the Commission confirms its intent to move a Recommendation on Creative Content Online forward, such Recommendation should not address licensing in the music sector.

The regime applicable to licensing in the music sector should remain that of the Recommendation of the Commission of October 2005.

The 2005 Recommendation of the Commission dealing with the sector of music has been effective and should continue to provide an appropriate and flexible framework for the online licensing of musical works.

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As comprehensively summarised by DG MARKT in its Report, dated 7 February 2008, on the implementation of the 2005 Recommendation, the music market has moved satisfactorily with the construction of one-stop shops between publishers, larger and smaller, and societies/platforms, to promote multi-territory online licensing. In addition, publishers and societies are continuing to promote ways forward to improve the streamlining of online licences (see attached press release and further details can be provided by ICMP on the ICMP project of a voluntary Pan-European Portal “PEP”).

If this question 6) of DG Information Society is targeted at the audiovisual sector only, then it is not applicable to ICMP.

- 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?

n/a

- 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)?

n/a

Legal offers and piracy

ICMP is entirely supportive of the promotion of legal offers in a way that provides adequate remuneration to the rights holders and of initiatives to curb piracy and P2P. It is ICMP’s policy to consider that legal offer online is a pre-requisite to enforcement online. Furthermore, ICMP is also supportive and its members have actively contributed to voluntary initiatives to help curb piracy and P2P, i.e. education (see initiatives in several Member States), awareness (see national cross-sector efforts), cooperative agreements with ISPs (in France).

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

Clearly those controlling the Internet and mobile distribution are in a position to help curb piracy and P2P which are both detrimental to the value of content, to consumer-confidence, and to the development of a secure E market. In addition, they have reasons to do so now as the volume of illegal content has begun clogging the conduits and generating a cost as it threatens the quality of their service. However, political pressure still seems crucial to reach an agreement.

Cooperation with telecommunication operators, access providers and service providers should target a variety of options: promoting education about respect of copyright online among the subscribers (particularly youth), promoting awareness about legal and illegal activities on the Internet among the subscribers, advising of the subscribers’ obligation to comply with copyright

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laws, including an obligation for subscribers to commit to comply with copyright laws in subscriber contracts, providing for processes to advise subscribers of infringements and of potential suspension/termination of service if infringements continue, this further to a graduated response process, option to suspend/terminate service, etc...

Such cooperation should strive to establish effective inter-industry guidelines, through voluntary agreements, which may or may not require legislative implementation, in order to create the environment required to develop an online market for creative content based on security for all parties, including the consumers.

In ICMP's experience, the governmental drive is crucial to reach an agreement with ISPs. For example, the drive of the French government was essential in succeeding both in 2004 and recently in 2007.

The initiative now taken by the UK government to promote cooperation with ISPs (and possibly legislative initiative) in the fight against online copyright infringements, further to the Gowers Review recommendation, is another step in that direction. The Commission may want to consider how to prompt and move this kind of cooperation forward and provide the appropriate institutional support at an EU-wide scale. The details of potential cooperation would have to be adjusted to the specifics of the negotiation.

Such cooperation should come in addition to the existing enforcement measures and rely on appropriate technological tools.

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

ICMP is supportive of the French MOU signed on 23 November 2007. Its French members contributed to its shaping. The French MOU demonstrates that the support of the ISPs is crucial to send the appropriate signal and to ensure implementation. It also shows that the state drive is crucial. In fact, ICMP had already indicated that it was supportive of this way forward in its 2006 Submission. Music publishers had indeed already contributed to the negotiation and signing of a first accord for the music sector in France with ISPs in 2004.

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

ICMP French music publishers members took the position in the discussions on the 2007 MOU that applying filtering measures is crucial and one effective way to control online copyright infringement. They insisted that the application of filtering measures should be included in the Olivennes MOU as part of the overall plan to curb illegal practices online.

These filtering technologies are based on the ability to recognise content. They exist, are already used on commercially reasonable terms by ISPs and are becoming more effective (see the 24 June 2004, decision SABAM v. Scarlet-ex Tiscali, under appeal, which required Scarlet to install tools, such as filtering software, to prevent illegal P2P). In addition, these technologies can help redirect consumers to legal offerings.

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ICMP members are now contributing to the legislative implementation in France of the MOU. Admittedly, filtering measures may raise certain issues which will have to be addressed taking into account the legitimate concerns of each, at national and possibly at EU level.

12) Additional point:

ICMP points out that it supports the proposal of working towards the application of reduced VAT rates to all cultural services online, as this would have a direct positive impact on the online market. By extension, these reduced rates should also apply to cultural goods offline.

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