IMAIE - Italian Performers Rights' Organization –

COMMENTS ON THE COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on Creative Content Online in the Single Market

INTRODUCTION

IMAIE - the Italian Performers' Rights Collecting Society - was established, as an association, in 1977 by the trade unions organizations of performing artists categories. Since 1992, IMAIE collects and distributes performers' rights according to Italian Copyright Laws.

IMAIE distributes the equitable remuneration due to both music and audiovisual performers, almost 70.000 artists, identified as right holders regardless of their being our members.

Since 1992 IMAIE manages and distributes the equitable remuneration due to music artists when their performances fixed on phonograms are communicated to the public and broadcasted through radio, TV networks, wireless means or by any other user.

IMAIE distributes music rights accrued since 1976, following Italy's signature of the Rome Convention.

Since 1997, IMAIE collects and distributes the remuneration due to audiovisual artists when their performance fixed on cinematographic works are broadcasted, rented or exploited in any single mode.

IMAIE distributes to all performers artists the audio and video private copying remuneration.

IMAIE is a supporting member of F.P.M. the Italian Federation against Music Piracy

IMAIE is founding member of E.M.C.A – European Music Copyright Alliance – founded in 2004 with the aim of promoting awareness campaigns on the respect of intellectual property rights.

Since 1998 IMAIE has signed the following **19 Type A** reciprocal agreements:

ADAMI, France (1998); AIE, Spain (1998); AISGE, Spain (1998); BECS, UK (2002); CPRA-GEIDANKYO, Japan (1998); PAMRA, U.K. (2001); PPL, U.K. (2007); RAAP, Ireland (2003); SAMI, Sweden (2006); SENA, The Netherlands (2000); SWISSPERFORM, Switzerland (2002); VDFS, Austria (2003); ASTERAS, Cyprus (2007); DIONYSOS, Greece (2000); ERATO-APOLLON, Greece (2000); GDA, Portugal (2000); ROUPI, Russia (2005); STOART, Poland (1998); URADEX, Belgium (2002).

Total Revenue exchanged
Total Revenue paid by IMAIE since 1998: **€ 6.897.060,44**
Total Revenue received by IMAIE since 1998: **€ 4.524.936,16**

IMAIE protects performers rights in Italy and abroad by fostering the adoption of policies and legislative initiatives aiming at supporting European artists and creativity.

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IMAIE - as collecting society of neighboring rights of both music and audiovisual performers - welcomes the Commission's consultation and efforts in the process of setting policies and strategies to enhance the cultural online content industry and value. In particular, we wish to express our interest to the proposal of setting-up of a Content Online Platform as an open framework for the discussion of topics and issues to which we think we can give valuable contributions as relevant stakeholder.

Therefore, in answering to the Consultation's questionnaire, we mainly focus on the points that have an impact on the management of performers rights.

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?

As a general observation, we think that the adoption of interoperable DRM systems would represent a benefit both for right holders and for consumers, if it contributes to support the availability of online protected content and facilitates their access and use to final users. However, we want to underline that when analyzing the implications of DRM technologies in the content industry, the complexity of the European legal framework of performers related (or neighboring) rights must be duly taken into consideration.

According to the outcome of relevant studies, a common definition of DRM interoperability concept has not yet been reached. Arguably, this depends on the complexity of DRM architecture whose full interoperability encompasses the interaction and implementation of several elements and components, not only those concerning the flexibility for consumers to enjoy their content through different services and devices. From our perspective, one of the key aspects of DRM systems is that they are designed to enforce the management of rights related to a digital file, by describing authorized uses, monitoring rights' usage and preventing any illegal use of the content. Therefore, a major requirement for a fully interoperable DRM system is the uniformity and interaction of the languages used by DRM systems to grant license and the rights as well as the standardization of the metadata associated to the content and of the terms expressing rights, provided that each individual digital content and their right holders are clearly identified as such. As the collective management remains the unique form for assuring remuneration rights to the majority of artists, DRM systems represent an important tool also for collecting societies allowing them to provide more efficient and analytic collection and distribution of rights and more effective fight against any unauthorized use.

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 labeling of digital products and services?

Interoperable DRM systems will increase the development of new business models and promote legitimate services online. However, to reach this result, it is essential to improve consumers awareness on the benefit of interoperable systems and to encourage users friendly services.
Proper and transparent Information about content availability, rights granted, usage rules, exploitable devices and any additional requirement would enhance both interoperability and consumers' choice and flexibility. Information through labeling of protected content could be a way to promote this process. DRMs must be user friendly and suit consumers demand by also promoting the benefit and advantages associated to interoperable networks. With regard to personal data and privacy, this is not a real issue, as DRM have to follow existing legislation in this area. Major privacy concerns mainly arise from systems, as the illegal file sharing networks, that are capable to get and share consumers data.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user license 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, for online creative content services to be successful it is essential to provide end-user with license agreements having clear, easy and transparent information about content usage rules, restrictions and conditions. In addition, simple and easy glossary on rights and license's conditions "meaning" should always be provided by online services adopting DRM, as consumers' awareness on these topics is fairly low.

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 well know, the use of DRM systems for the development of the digital content market is subject to strong debates and disputes especially with regards to the relation between DRM and private copying levies and to the lack of consumers devices interoperability. Actual proprietary DRM systems have not reached expected results in terms of consumers acceptance and in the promotion of new viable business models. In this scenario, major record companies have recently decided to abandon DRM and they are evaluating new practices such as ad - supported services where consumers get unprotected MP3s either for sale or for free as part of a service supported by advertisement. No doubt that this kind of models could enhance consumers' confidence in new legal services but, on the other side, it can increase, even more than now, the market concentration and marginalize, even more than now, the small players and less "famous" artists. We, therefore, believe that the process leading to provide interoperable DRM has to be fostered and encouraged as a mean to respect and preserve cultural diversity.

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?

DRM is ideally suited to enable innovative business models that could bring value to consumers, rights holders and content providers. DRM should foster digital market competition by allowing non discriminatory access to all entities actively engaged in the management, production and exploitation of content. This would enhance the overall availability of, and accessibility to, creative works and contribute to the diffusion of knowledge and innovation.

To end with, we do believe that coordinating the interests of so many stakeholders and having them to agree on interoperability and standards is exceedingly difficult especially when a common definition of DRM is not agreed on. In consideration of the complex relation among the legal landscape, the position of different stakeholders and the online market structure, we conclude that an important way to verify the level of DRM interoperability and of the means of achieving it is to rely upon an economic and legal assessment on a case-by-case basis involving all relevant stakeholders.

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?

In the digital context, the management and licensing of rights must guarantee the respect of the principle of plurality and of all rights holders involved.
The analysis of the European performers rights legal framework and of how collecting societies do collect and administrate these rights show that it is practically impossible to foster the adoption of multi-territory right licensing systems for the clearance of performers rights, unless a revision or an updating of the current legislation will harmonize the level of performers' protection and remove some of the major issues that still hamper a proper collection of performers' rights. We here below point out some of the issues that IMAIE would like to bring to the attention of the Commission.

- **Users data and right holders identification**

A major problem faced by collecting societies and already stressed by artists' rights organizations, is the difficulty to obtain from users homogenous and detailed data for the identification of the used recording and of the performers that have taken part in each recording for which a remuneration is due. The task of rights distribution is extremely difficult and expensive in absence of any obligation for the users and in absence of compulsory rules that oblige the incorporation in the recordings of data necessary for identifying performers. Therefore, national legislation should include such provisions with relevant penalties for users in case of their violation. In addition, to overcome this issues, a starting point could be to foster the development of a European online archive and database for the digital content through the already developed codes (such as ISRC, ISAN etc).

- **Reciprocal agreements**

There is no harmonization, at EU level, in the contractual relationship between performers collecting societies. A detailed analysis of the level of cooperation among European performers collecting societies would show how, in practice, a real reciprocity is often impossible as right holders themselves are treated in a different way depending on the nation where their fixed performances have been exploited. First of all, differently from authors' societies, a network of appropriate bilateral agreements between collective management organizations has not been fully established. Secondly, some collecting societies do not sign type A reciprocal representation agreements and consequently keep in their country all the income collected thus having low administrative costs. As a paradox, in a context in which competition among societies is fostered, these entities, whose distribution system is not based on the reciprocal exchange of remuneration, would be benefited. Therefore, for a multi territorial licensing system to be adopted, it is a priority to harmonize the remuneration distribution systems among collecting societies and enforce the compulsory adoption of type A reciprocal agreements.

- **Performers right of making available**

For certain exploitations of performances, the law does not grant performers an exclusive right but only a right to remuneration that has to be subject to collective management. Under the WIPO Treaty and the EU Directive 2001/29, performers were granted a new type of exclusive right being the "right of making available" to the public concerning situations, within the digital networks, where members of public can access fixed performances through cable or wireless means "from a place and at a time individually chosen by them". However, performers have not yet benefited from the introduction of this new right as in most countries the making available right follows under an exclusive right not collectively managed and generally transferred by performers to the phonographic producers. As a consequence, since the contractual position of the performer vis-à-vis the producer is weak, most performers are not getting royalties for the exploitation of their performance through on demand services. To try to overcome this situation, other countries have implemented the making available right either as subset of the communication right or as an exclusive right subject to the collective management. This is the case of Spain where the law states that in case of transfer of the making available right, the performers should be guaranteed with an unwaivable remuneration right obligatorily exercised by the collecting society.
It is clear that it's quite impossible to issue multi territorial licensing systems for performers rights if such divergence in the management of a right specifically related to the digital context still persists. In order to assure that performers receive their remuneration for the making available of their fixed performances, all national legislations should follow the Spanish model.

- **The collective management of performers' rights in the music sector: the Italian system**

In the music sector, the equitable remuneration right is subject to collective management and generally carried out in common by performers and phonographic producers. However, in Italy neighboring rights are, by law, collected only by producers' collecting societies that have to allocate to IMAIE 50% of the income they receive from users. Therefore, IMAIE is not negotiating licensing conditions for the clearance of music performers remuneration rights for which the users have to deal only with the phonographic producers that act on behalf of performers. Following the data received by producers, IMAIE distributes the equitable remuneration to all performers identified as right holders. As a consequence of this system, IMAIE cannot be involved in the issuing of multi territorial licensing schemes while, instead, IMAIE can be affected by multi territorial license systems issued by phonographic producers.

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 licenses 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?

The legal framework of performers rights in the audiovisual sector is even more complex.
Most countries have introduced the presumption of transfer of all audiovisual exploitation rights to the producer; some countries have granted performers with a right to a remuneration for each single exploitation while other countries only for the rental right; in most countries the remuneration due to the artists for the exploitation of their audiovisual works is not managed by collecting societies.

In addition, the type of work relevant for performers rights also differs country by country: in some countries it concerns all kinds of audiovisual fixations, in other countries it practically refers only to music video clips and in others, like in Italy only to cinematographic works and/or assimilated.

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These are some of the issues that clearly shows that without an updating of the current legislation aiming at harmonizing the level of protection of audiovisual performers and at providing common rules for the collection of their remuneration,
it is impossible for the collecting societies of performers rights' to issue any multi territorial license system.
Regarding the second part of the question, the meaning of primary and secondary market is not clear. If it means a different treatment in the management of the rights based on the economical value of the content, we strongly oppose any of such proposals which would undermine cultural diversity and discriminate less famous audiovisual works and less famous artists. As regard to this, we completely agree with the position recently expressed by MEP, Mrs Ruth Yeronymi, (SOS call Cultural Diversity - Only an Obstacle to the EU Single Market ? - 7 February 2008) that "*cultural and creative content is both cultural and economic good and that the creative and cultural good can only flourish and maintain their high and diverse quality if cultural diversity is expressively respected. If cultural diversity were to fall exclusively under commercial law, the legal framework of the protection of cultural diversity could be regarded as an obstacle to the single market*"

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)?

For the answer we refer to the issues already outlined. In addition this topic concerns selling and distribution licenses that are out of our activities.

Legal offers and piracy

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

Stakeholders should foster a cooperation to promote awareness initiatives on the respect of copyright and of the creators it protects through educational initiatives.
In Italy, **IMAIE** is concretely committed to this aim through a joint initiative together with **AFI** (Italian Association of Independent Phonographic Producers) and **SIAE** (Italian Authors and Publishers Society) . The three organizations, as Italian partners of EMCA – European Music Copyright Alliance – have launched the campaign "*Respect Creativity*" targeted to middle schools. Through games, quiz, creative activities and supporting guides for teaches, the project introduces to 10–14 year-olds and their teachers the importance of intellectual property in music and its role in protecting creativity and innovation in the music industry. The overall intentions of and outcomes from this initiative are to give an understanding that people can be rewarded and recognized for their creations via intellectual property rights; to allow students to make informed decisions about how they create and consume music and to raise awareness of the value of music to society and the economy.
IMAE believes that besides the legal actions against piracy, now more than ever, familiarity with copyright and neighboring rights plays a crucial role in maintaining and promoting the vitality of the arts in Europe. (www.emcaweb.net)

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

IMAIE fully supports the French initiative aiming at ensuring that ISPs play a major role in the fight against online piracy, initiative that has been recently followed by UK. Within the coming weeks, UK Government should submit a legislation that would require ISPs to send notices to subscribers using their accounts for illegal file-sharing and shut down consumers connections in case of repeated abuses. These initiatives must be considered as an example to follow in view of a concrete cooperation between Governments, ISPs and content industries aiming at protecting creative content against persistent copyright infringers.

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

This issue is raising many concerns and music and film industry are asking European ISPs to filter the content transferred by their networks. In November 2007, the European Parliament's Committee on Industry, Research and Energy (ITRE) handed to the Parliament a report calling ISPs "to apply filtering measures to prevent copyright infringements". Recently the Brussels Court of First Instance has ruled that Belgian Internet service provider (ISP) Scarlet Extended Ltd. must filter infringing music downloads. The decision, the first of its kind in Europe, could generate more of such lawsuits and disputes according to representatives of the creators and publishers. In our opinion, effective ways to prevent online copyright infringement can be achieved with the adoption of user friendly interoperable DRM systems together with the promotion of awareness campaign on their benefit and with a strong cooperation between Governments, ISP and content owners.

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