EU Creative Content Online - February Consultation
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The statement below, written by me in a personal capacity, has been approved for submission by the IMMF, in consultation with Mr David Stopps, and Petri Lunden Chairman of the IMMF.

Our general submission contends that competition in music online needs to be between pieces of music and the services that deliver the music, and that to succeed any service needs to have access to all the music – at least of a type e.g. all the jazz.

We would also like to suggest that nearly all internet traffic is national in its scope, and the majority of it is nationally sourced, i.e. British users use British ISPs, Italians users use Italian ISPs etc. Some services are cross border, but there is still always a national element to delivery of content, even if only in local language instructions and content identification and range (a Greek site will have a lot more Greek content than a French one and vice versa).

In general terms it could be argued that competition issues can be substantially dealt with in national terms, providing we work out ways of paying for content on the download. This implies network licensing of the internet by the rights holders, as all granular payment services have had limited overall impact (iTunes, Rhapsody etc) To illustrate this approach we submit a suggestion from one of our associates as to how network licensing might work for music (see appendix). This is not the policy of the IMMF, but there is a lot of support for the approach, and there are ongoing discussions within the federation.

As to the questions posed:

Digital Rights Management

1. The situation in the Music Market is that DRM as a TPM (Technical Protection Measure) is substantially a dead issue. After more than 10 years of trials supported by the rights owners it is clear that the consumers have overwhelmingly chosen unprotected MP3 files as the preferred protocol. Beyond using DRM as a means to enable more effective accounting of how a song is used, the music industry has largely moved on from this path of maintaining market control in the light of bitter experience.
2. Consumers have already chosen the most interoperable protocol there is for the bulk of their music consumption – the unprotected MP3. Discussing interoperable proprietary DRM systems that offer a usability that is anything unlike that of the unprotected MP3 looks like a very unprofitable use of time, money and energy.
3. EULAs should be absolutely clear and without legal jargon. Users should be told in plain accessible language exactly what they can and cannot do with the music that they consume before they buy any products. The essential commercial, use restrictions and ownership aspects of these EULAs should be clearly displayed as one enters a site in bold type.

4. Yes. Consumers must feel like they have redress for their grievances when it comes to the provision of music online. Trading standards, based on clarity and fairness, are fundamental to the success of the online music marketplace, but it is hard to envisage a dispute resolution system that is practical and accessible and fair, but that is the problem for the service providers and the regulators.

5. Proprietary Technical Protection Measures, of any kind, have been roundly rejected by the consumer in the music market. DRM that aides accounting is useful and needed – ensuring 'non-discriminatory' access to TPM will not assist competition. Indeed it can be argued that the very reason for adopting TPMs associated with proprietary protocols of use is to impede competition. There is even a suggestion that, for example, the proprietary nature of the iTunes software has impeded the development of rivals to the iPod, and helped maintain a quasi-monopolistic price for devices.

Multi-territory rights licensing

6. Possibly, but market-driven commercially negotiated solutions that ensure fair access to content while providing appropriate remuneration to creators and rights-holders will be much more attractive than any state-imposed solution. It is worth suggesting that the key role of the authorities both at European and National level should be to develop regulatory supervision rather than statutory controls.

7. Licensing networks and services in ways that monetize observable, actual consumer behaviour and which provide attractive value propositions to the consumer need to be developed nationally for the provision of music online. Nationally focussed licenses for the provision of music both on upload and download, which provide consistent, interoperable and verifiable exchanges of money and information within and between countries are needed. This in turn might need to be overseen by effective and appropriate regulation, to provide the basis for solutions that are consistent with European and national legal, cultural and competition structures.

8. Any successful online music service needs to have access to all the music that is available. Without access to everything, a service cannot effectively compete with 'free'. There are problems with licensing due to the need to clear countless pieces of music with all their underlying copyrights for every country. In this context the major suppliers of music, when they do not operate through collectives, can make it very hard for SMEs to access the market on equal terms. There is a strong case for the collective provision of content via monopoly providers that have an obligation to support equally all content rights-holders. Competitive provision of copyrights by different companies or collectives merely makes the provision of services harder for both the service providers and minority content providers. There is also the problem of the failure of the large rights holders to license their more obscure, but often culturally important works. Where the works are not controlled by any local rights-holders they are effectively excluded from any remuneration. Thus the licensing approach, in itself, clearly inhibits the cultural diversity of legal offerings.

Legal offers and piracy

9. Control with regard to music is now history and we will never regain the ability to dictate the behaviour of the music consumer. A new bargain needs to be struck between society and creators with regard to copyright. This bargain needs to provide remuneration to creators while at the same time allowing access to music to the users.

10. An internet which is policed by the state and challenges actual consumer behaviour will never be successful. It will only drive the music consumer towards encryption and other means of circumvention. This has been the experience of all the recorded music industries attempts to control the market up to date. The hackers have always found a way around TPMs and it is sensible to assume that they always will in the future.

11. Filtering which attempts to stop music consumers consuming music the way that they want to will always fail and thus never be successful. We need to find ways of turning 'pirates' into good customers. In addition any system that requires looking at what the individual is accessing on their computers, and what services they legitimately belong to is extremely intrusive and raises serious privacy issues, In addition any move that is likely to increase the use of heavily encrypted files is liable to be very unpopular with the security services. Finally any intrusive approach by the state to protect a civil tort is liable to be extremely unpopular with the criminal enforcement authorities.