



IMPALA comments on the Commission Communication of 3rd January 2008 on Creative Content Online in the Single Market

On behalf of over 4,000 independent music companies and national associations across Europe, representing 99% of music actors in Europe, over 80% of all new musical releases, and over 50% of the jobs, IMPALA thanks the Commission for the opportunity to contribute to this open consultation¹.

We welcome the aim of the EC to quadruple the online market in Europe and have preliminary remarks which need to be made upfront:

- From our members' perspective, it is clear that the digital market in Europe lags way behind that in the USA. We urge the Commission to undertake urgent research into the reasons for this. We believe that the very narrow and somewhat technical issues set out in this consultation do not tell the whole story;
- We are surprised by the absence of any cultural diversity assessment angles in this consultation. This is a serious omission, given the adoption of the UNESCO Convention on cultural diversity, and the EC's Agenda for Culture, which envisages mainstreaming of culture in key areas, not to mention Article 151(4) of the EC Treaty which already makes it an obligation for the EC to take cultural diversity into account in all policy areas.
- If the Commission wants a competitive, diverse and innovative online market, it first needs to address the content which drives it. An open, competitive, diverse and innovative content market is an essential precursor to growing the online market.
- SMEs are the ones who secure choice for consumers as they play a vital role in fostering creativity and innovation as well as cultural diversity. Independent production and distribution - is vital, whether for film or music. The same approach must be adopted for independent production in music (production, distribution, broadcasting) as has been done with respect to the independent production of films.
- All channels, whether physical or online, must be open to SMEs who should not suffer discriminatory terms, instead they should benefit from positive

¹ IMPALA has over 4000 members including the top independents: !K7 (Germany), Beggars Group (UK), Bonnier Amigo (Sweden), CLS Music (Hungary), CNR (NL), Cooking Vinyl (UK), Edel (Germany), Epitaph (US/NL), Gazell (Sweden), Menart doo (Slovenia), Musicvertrieb (Switzerland), Naive (France), Odyssey (Ukraine), PIAS Group (Belgium), Playground (Sweden), Red Bullet (NL), Soyuz Music (Russia), SPV (Germany), Wagram (France), as well as national trade associations from the UK (AIM), France (UPFI), Germany (VUT), Spain (UFI), Italy (PMI), Belgium (BIMA), Denmark (DUP), Norway (FONO), Israel (PIL) and Sweden (SOM) and the Catalanian association APECAT.

discrimination in the light of their extraordinary contribution to consumer choice and cultural diversity.

- Effective collective licensing and support for such mechanisms is vital for small licensors and small licensees.
- The current system for online licensing of publishing rights has effectively created a two tier structure where local repertoire is being discriminated against.
- The on-line market cannot be quadrupled without also dealing with the issue of stakeholder co-operation to address ISP practices.

IMPALA takes the view that the future should bring:

- reward to creators of music
- diversity in music genre and expressions
- reward to risk takers in creativity
- consumer satisfaction and legal security

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?

Given current market developments, this question already seems outdated if we are talking about DRM mechanisms to control copying. For some purposes, however, DRM to monitor usage will still be relevant. IMPALA differentiates between a restrictive DRM and a monitoring DRM like watermarking. Interoperable DRM is a condition sine qua non for an efficient and fair monitoring (and distribution of monies) system. In this respect, we would note that such DRM monitoring system must refer to usage and transaction data. We advise the EC to have a survey on interoperable monitoring DRM systems and data privacy.

As regards interoperability, to the extent that DRM is used, then of course it must be interoperable. In addition, it is important to note the other real issue is content interoperability. IMPALA is of the opinion that interoperable content formats, with or without DRM, are essential to grow creative online content services.

There are two main obstacles to interoperability, both of which are business related. First, there is no automatic incentive for DRM owners, where they are also a content provider, to enable the content they are selling to work with another system. Second, the technology industries have been slow to agree functionalities of DRM that are acceptable to the content industry and have been generally unwilling to roll out DRM because piracy and private copying is a convenient way to subsidize broadband network roll out and the selling of recording devices (consumer electronics - computer equipment). In any event, DRM no longer seems relevant in today's market. Technical obstacles to DRM interoperability are less severe because it is relatively trivial to translate restrictions into different technical formats.

IMPALA members have not been able to commend any practices on

interoperability. They note that consortium initiatives, though not necessarily without purpose, tend to be competitive efforts rather than collective solutions.

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?

Yes - IMPALA believes that this type of information should be improved. Consumers should not be asked to grapple with difficult concepts which should be relatively simple like buying music. Again, the key issue is content format interoperability (with or without DRM) rather than DRM interoperability.

Concerning personal data, there is not necessarily a justification for keeping personal details just because someone wants to buy music. Transactional services can be provided by banks and there is no need to store personal data unless the consumer wants to be informed.

Subscriptions services are different, as the whole value of the service is ongoing access and is not based on ad hoc purchases of individual pieces of content. There is therefore an ongoing commitment on the part of the consumer who has the duty to understand his ongoing subscription arrangement. In this case, consumer information is the key element.

Again, IMPALA members have not been able to commend any practices as such. Some have referred to the example of 7digital and eMusic who label downloads as "iPod compatible". They consider this to be a good illustration of communicating interoperability simply. However, they also note that it is a simple message to send and also reflects the dominance of Apple on the market.

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?

There is a clear need for this, yes. End user terms and conditions are usually, absurdly wordy and hidden away. Whether it would, in itself, grow the market, is another issue, but the need for improvement is clear.

Again, IMPALA members have not been able to commend any practices as such. IMPALA is of the opinion that there is room for a code of practice regarding terms and conditions for all content. This would reduce complexity, as well as improve consumer confidence in the framework of the online creative content services.

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?

The overriding principle is that consumers need confidence in the framework of the market for digital content distribution. Alternative dispute resolution (ADR) mechanisms can be useful, particularly when dealing with individual business to

business disputes. In the case of consumers and the on-line market, we are really talking about a class of rights rather than individual b2b disputes. In order to increase consumer confidence in the market, consumers need to know that they have rights - not that they have to go through a process. This should be the primary focus. It is better to provide clear information to consumers on the products and services, rather than solving problems through an alternative dispute resolution mechanism.

We understand that progress has been made with regard to making ADR available online, which may help with accessibility. However, just because disputes can be solved on-line, does not mean that it is suitable for resolving issues regarding on-line content, although there may be some examples where such dispute mechanisms are useful. It should not be the automatic response of any supplier that consumers have to resort to ADR. It is certainly not a substitute for consumer rights. We are aware that some use is being made of ADR in consumer disputes, and, to the extent that ADR is considered appropriate, there is generally a need for improving ADR schemes as follows:

- * improve awareness and understanding of ADR
- * clearer definition of the status of ADR outcomes
- * easier enforceability of ADR agreements
- * consistent and accessible quality assurance
- * better funding provision

Again, IMPALA members have not been able to commend any practices as such.

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?

The principle of non-discriminatory access is fundamental, yes. (Again, whether DRM solutions are the issue, however, is another question.)

Whatever the essential tools of the trade are, they should be open to all actors and not exclude or control terms of access to the market. IMPALA represents independent music companies which are world leaders in terms of research, development and discovering new artists. They are all micro businesses or SMEs and produce 80% of the world's new releases². Their individual size means that the independents are by nature innovators and early adopters in general and in particular on the online market, but it also means they lack negotiating power, and suffer from severe market access problems and increasingly complex barriers to trade.

Given their 80% contribution to the sector, SMEs need not just non-discriminatory terms, but preferential treatment, to make sure that distribution channels give space and fair terms to small actors, to preserve and foster competition on the market for digital content distribution.

This is also justifiable if we look at the Council's acknowledgement last year, that cultural and creative SMEs are drivers of growth, jobs, innovation and creativity within Europe. They also play a vital role in fostering cultural diversity and consumer choice. It seems therefore essential to support SMEs that are responsible

² European Commission Study on the Economy of Culture in Europe, November 2006.

for the majority of innovation and creativity of the content distributed in the online market.

Commissioner Kroes recently declared in November 2007 that preferential treatment for SMEs is both politically and economically justifiable. It is now time to put this into practice.

This principle should also apply to licensees. IMPALA and its members have direct experience of licensees offering to license their music at less favourable terms than the majors. In addition, they also have experience of services not wanting to license their music at all. In our view, if a service operates in 3 territories, it should be obliged to license from the independents as well as the majors. At the same time, the principle should apply in reverse to small licensees - the majors should not be able to refuse to license legitimate services just because of their size.

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?

We strongly believe that licensing should be as easy as possible and as broad as possible. We are concerned by the behaviour of the larger players in the market, both on the content side and the online service side. As far as culture is concerned, local European content hardly circulates. Mobility is a fundamental problem. The challenge here is to ensure that the push for pan-European licensing changes this.

This whole issue of licensing and market structure needs to be addressed, but we also need to consider what all the relevant issues actually are. Some have been hijacked as part of the anti-copyright, anti-territorialisation positioning of the powerful ICT lobby, which has resulted in copyright being labelled as an obstacle. The following question should be considered: Is copyright/territorialisation really an obstacle or is the problem excessive market power of very big players who happen to be copyright holders and sometimes very big players in the online market themselves (Vivendi has important mobile phone interests and cable distributions - Sony has important mobile phone intererests - Bertelsmann controls RTL etc...)? Copyright and territoriality in themselves are not an obstacle. It is market power. We really need the help of the EC in making this distinction and in making sure that copyright is promoted as an enabler. It is also an education issue.

Our opinions on whether a recommendation might be appropriate are influenced by experience with the recommendation regarding online publishing rights. This experience was positive in the sense that it gave music rights owners the possibility to mandate one collecting society of their choice to manage EU-wide exploitation of their online rights. However, there are clearly downsides with its impact in practice:

- it creates a legal environment that is no longer technology neutral (online licensing vs offline licensing), culturally neutral (international artists vs local artists) or genre neutral (music licensing vs other copyright works licensing).
- the major companies are using the Recommendation to bypass collective licensing altogether by using the societies as mere agents, to whom the

terms of licences are dictated by the major and are not subject to the usual constraints. This is clearly beyond the aim of the Recommendation.

- the drive for efficiency cannot be at the expense of cultural diversity, which the EU has successfully promoted internationally with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
- small online content services are potentially exposed to higher costs and unequal bargaining power of multiple negotiations, (for example, a terrestrial radio station in Finland needs one licence for all music publishing from the local society rights, whereas an internet radio station in Finland now needs multiple licences for the same rights.)
- as far as sound recordings are concerned, there are some more fundamental issues to resolve than on-line licensing, such as reciprocity between the societies as well as rights covered by societies. More and more the majors are taking rights out of societies (especially neighbouring rights and tv public performance rights), leaving independent companies stranded on the fence, with societies not covering enough rights to sign blanket agreements and users not being able to sign individual contracts, which allows repertoire to be split up based on geographical or genre areas (a-la Celas), creating a real discrimination between rightowners being included or excluded. A real reciprocity between collecting societies irrespective of the country of use will be a much better approach than the current recommendation that creates a real apartheid not only between small and big publishers but also between artists of one major publisher. This problem may prove to be even more relevant to audio-visual creators that do not have the same reciprocal system between societies that exist in music since decades. It should also be noted, however, that such a system should not be allowed to give rise to a "race to the bottom" approach, in terms of competition on fees, whether licence fees or management fees, without proper checks and balances. Our opinion reflects specific issues regarding the IFPI simulcast/webcast agreement, which forces collecting societies to compete on management costs.

The overriding priority of IMPALA and its members is to achieve effective competition and market access at all operator levels: from rights owners, to licensees, to collecting societies, across the music business.

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?

For the online exploitation of music, an EU-wide licence through a one stop-shop mechanism with strong local agencies is necessary to ensure broad licensing and also proper revenue flows to all creators regardless of their size. The internal market is the appropriate economic environment. Licensing should facilitate access to rights, fair terms and avoid discrimination against the smaller players. Collective licensing is essential. In the absence of collective management, online services would not be able to access the independents' repertoire or may decide not to use it. That would mean independent repertoire might not be played at all on such new services. For the vast majority of smaller companies, collective licensing is the only way to administer the moral and commercial interests of the artists and the

companies. If the system of collective management is weakened, small rights owners would be denied fundamental opportunities and would therefore be marginalised. In return consumers would have less choice.

Multi-territory rights licensing allows users operating at EU level to seek licences from all rights holders irrespective of their size. They should not restrict market access or erect entry barriers to the detriment of some music companies or service providers. Failure to negotiate a licence with independent companies is discriminatory and participates in marginalising a sector of the industry to the detriment of cultural diversity and consumer choice. The same should apply in reverse to oblige large music companies to ensure they do not discriminate against smaller users.

To reply to the question whether efficient territorial licensing can be achieved by creating primary and secondary multi-territory markets, we would need more information on what this would involve in practice. For the independents, it is important to understand that the issue of territoriality is vital. A label cannot be expected to invest in building a market and consumer demand in one territory, without having the right to revenues for key exploitation relating to that territory. Creating two tiers of markets seems like a false distinction that would risk cutting across the commercial relationships that are required in order to be properly mobile in Europe, which consists of fundamentally unique regional and national territories, with their own linguistic and cultural characteristics, all requiring local specialist knowledge to break new artists and genres, whether local or international.

The independents already have issues where the majors license tracks, for example for compilations or samples, but exclude internet rights. We would also be concerned that this would be another vehicle that would in practice discriminate between international and local repertoire. In the offline world, for recording rights at least, there is a distinction in the sense that broadcast and public performance are dealt with through collecting societies and is considered "secondary exploitation". In the online world, the distinction is blurred, with the result that the bigger companies want to keep all their rights and license direct, whether for publishing or recording. This was also encouraged in part by the Recommendation (although reservation of rights had already been a serious issue). Where rights are split and this impacts on collective v individual licensing questions, the risk is that collecting societies still have to manage the same overheads (they still manage all the repertoire for some exploitation) but with only part of the revenues (the most lucrative exploitation is taken off the top in respect of the most lucrative anglo-american artists).

In any event, we would have to know at a very minimum what is being proposed before we could comment effectively.

We would also add that any reform should also address fundamental issues in terms of governance and transparency regarding collecting societies, whether publishing or recording, online or offline. For example, at present, there is a lack of reciprocity amongst producers' rights societies. These societies should be obliged to have a network of reciprocal agreements in place to secure proper repatriation of income. At the same time, reciprocity should not be used as a tool for controlling market behaviour. One example is the performance revenue under the Rental Directive with respect to non-qualifying performers. In some territories, producers keep 100% of this revenue which discriminates against the independents

in practice and also acts as an incentive for the majors to focus on international/US artists.

Dispute resolution is also an essential element in licensing, and we have previously proposed a European copyright tribunal. In the absence of a unified cultural market and harmonised tariffs, however, it is difficult to envisage a pan-European dispute resolution system. In any respect, effective inexpensive dispute settlement mechanisms at national level should be available as far as they facilitate the negotiation of tariffs, and do not add an additional burdensome step. We would recommend:

- Fair, transparent and efficient collection and distribution mechanisms (no discrimination whether expressly or in effect, against small members) to all collecting societies (recorded music as well as musical works and for offline as well as online).
- Equal representation in the decision-making bodies of the collective rights managers of the different right holders independently of their size.
- Clarification of the position regarding the majors in terms of publishing rights who are not simply exercising freedom of choice, but bypassing the fair constraints of collecting society structures altogether.
- Reasonable management costs (proportionate to the society's services).
- Transparent and equitable allocation of resources for cultural and social activities.
- Low-cost dispute settlement mechanisms at national and European level.
- Proper reciprocity and revenue flow between the societies for producers and performers.
- Rights holders are free to choose but they cannot bypass the traditional constraints collecting societies are subject to.
- Small users do not have to negotiate multiple licences for online when one licence suffices for offline exploitation.

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)?

Different business models should be encouraged. Independent companies have always been expert at developing new business models and using new techniques to talk to consumers. There have also been some impressive stories of artists discovered on the internet. For many artist and music companies, the so-called "long tail" is an important part of the business. It can be effective for artists and operators who do not want to compete in the main market. It is particularly effective for aggregators - indeed, to understand it better, we need to remember what was really said - the long tail would create new opportunities for aggregators, because they are the ones who can sustain, and benefit from, selling less of more.

However, it remains just one part of the overall market, and needs to be seen as such. For creators, the so-called "long tail" theory is often used to tell them that they should be happy in their niche and remain small. It has become a tool of commercial control and the statistics show that the main online markets are even more concentrated than offline. This puts into context the claims that the internet offers more choice and opportunities. If we want consumers to have real choice and if we want content creators to be able to compete on a level playing field, we need to stop talking about the long tail and start talking about competition, concentration and real consumer choice.

Legal offers and Piracy

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

It is necessary to support a new way of doing business which would preserve the incentives and opportunities necessary for innovation and change. It requires commercial negotiations and a framework that is acceptable to music fans.

The industry mostly requires support to monetise activities linked to music distribution on digital networks and recordings on digital equipments. IMPALA members note that the development of broadband networks is in fact essentially subsidized by the music industry. Indeed, ISPs and telcos sell access to broadband on the back of the availability of free music on their networks. Further, the fact that the independents produce 80% of music, means that a business that is essentially composed of SMEs is in practice subsidising large telecom operators, internet service providers and consumer electronics manufacturers. It is as if governments, in order to encourage investment in cable, had allowed cable companies to use broadcasters' content for free - broadcasters would thus have unfairly subsidised cable.

IMPALA members welcome new methods of music consumption as long as revenue flows are generated:

- Independents do not want their revenues to depend on a fee established by some authority: the market should remain a decisive force;
- They want to be able to negotiate on a collective basis with ISP, network providers or other companies (handset manufacturers, consumer electronics, software firms etc) involved in new exploitation models that will want the option to offer individualized services to their consumers;
- They do not want to be prevented from monitoring the way music is being used - for collection and distribution of royalties;
- Licensing is the best way to promote the differentiation of services and the emergence of a competitive digital market place with a variety of music offerings and experiences.

The European Commission should take the leading role in promoting and defending the fundamental need of creators to be treated fairly and be remunerated for their work. A genuine market for the cross-border digital distribution of music and audiovisual works can only be created by the development of shared responsibility between content providers and technology companies. It is important that the relationship with ISPs and network operators is reviewed. The agreement reached in France, as mentioned below, is a good example to follow.

Education initiatives are also necessary to improve understanding and appreciation of creativity and cultural entrepreneurship, as well as foster identity and pride in Europe's culture and diversity. This would include of course the role of copyright as an enabler helping creators earn a living and disseminate their works. Copyright is often labelled as an obstacle. Copyright itself is an enabler and the EC needs to stand proud on this argument. Copyright is not an obstacle - the excessive market power of very big players (as content owners or as content users) is the real problem which does need to be dealt with dealing with any obstacles in its proper context. It should not be used as a tool to undermine copyright. The positioning of

the powerful ICT lobby needs to be seen in this context.

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

IMPALA considers that there is an urgent need and opportunity for the European Commission to take the lead in seeking a practical solution such as the one signed off in France by President N.Sarkozy. This kind of agreement involves commitments from ISPs as well as content providers. ISPs should be invited to share responsibility for content that makes their services attractive. This is both a political and a legal issue. The method used for the French agreement brought together access/service providers, rights holders and consumers so as to find a solution on a crucial issue.

Other countries such as the United Kingdom are working on similar models. IMPALA is of the opinion that a groundbreaking deal on ISP collaboration should be adopted at EU level in order to ensure a wide online offer of attractive content as well as consumer friendly online services. Such an EU initiative should guarantee an adequate protection of copyrighted works, should foresee education initiatives to promote creativity and copyright as an enabler, and should establish a close cooperation to fight piracy and illegal downloading.

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

In terms of unauthorised downloading by individuals, filtering measures would no doubt have an impact (although they may or may not be compatible with encryption at pc level). As far as we understand, however, as they apply at the ISP level, they would not help significantly with largescale commercial online piracy.

The objective of the Commission's exercise is to grow the online market. As mentioned above in our introductory remarks, we believe that the slow development of the online market in Europe is not just a question of these technical issues identified above - most of them apply to the US market, where the online market is faring much better. Urgent research needs to be carried out to identify the real reasons for this.

Any solutions or recommendations must take into account the role of SMEs and independent production and distribution in ensuring consumer choice and cultural diversity.

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