Creative content Online – Policy/Regulatory issues
Proposed answers to the Commission's 11questions from the Music Lessons Research Group, Department for Media Technology and Graphic Arts, Royal Institute of Technology (KTH), Stockholm, Sweden
To be sent to avpolicy@ec.europa.eu by February 29th 2008.

General
*These comments are based on our experiences from the Music Lessons project (FP6 Scientific Support Activities with the title: "*Broadband technologies transforming business models and challenging regulatory frameworks – lessons from the music industry*", on policy issues identified from the Music Industry's response to digital technology (www.musiclesons.se), as well as emerging issues in the FP7 "Peer to Peer Next" project, where KTH will be working on regulatory and legislative issues.*

We must stress that the key issues at stake are those highlighted in section 2 of the descriptive paper, with the heading "Challenges and Proposals". The development of digital technologies for production/editing, storage and distribution is providing gigantic opportunities for both established and new groups of creators to contribute to content development and distribution in Europe. But problems relating to IPR uncertainties are thwarting this developing. As soon as users generate content, with consumers becoming "prosumers" then the distinction between users and creators becomes fuzzy. There is the related likelihood of hybrid creations emerging with a wide variety of IPR elements. This means that ownership and control issues inevitably become more complex – at present fears of transgressing any possible IPRs, with the associated risks of expensive legal repercussions, can hinder further exploitation and distribution. The absence of both functioning orphan rights regulations as well as general forms of blanket licensing compounds these issues. The fact that a small handful of mega media companies, particularly in the music sector, control up to 80% of all rights further complicates the picture and can hinder creative opportunities. Broadcasters are becoming increasingly aware of these threats to innovation and related risks, as they endeavour to involve consumers in creativity and seek to re-transmit in various forms the results of this new creativity. Even finding new means of allowing consumers to interact with the vast amounts of archive materials available comes up against almost insolvable IPR problems due to lack of certainty about which rights holders may or not be lurking and waiting to pounce! **The current debate regarding the extension of copyright protection for sound recordings (promoted by DG Internal Market) is likely to confuse the picture even more, and hinder rather than stimulate and reward more creativity and investment in new cultural products.**
The delicate balance between rights holders and those of consumers/ new creators which is an essential prerequisite for innovation in society is no longer guaranteed as the debate focus has shifted more to "protecting rights" rather than creating an environment which fosters new business models and forms of consumer involvement.

Questions 1 – 5.Digital Rights Management (DRM)

Firstly may we offer a general observation regarding music creators and innovators. No innovation occurs entirely in a vacuum – most creativity involves improving or altering existing ideas. Strict legal regimes that give owners of rights/ideas and the extensive ability to hinder such improvements, or make it harder through uncertainties regarding the actual extent of IPRs, do not foster a creative environment. Innovators create ideas, which hopefully can be exploited, interpreted and give pleasure to consumers over a long period of time. Revenues provide an incentive for further creativity and can come sooner or later.

This means that any DRM applications that limit the availability of works, either in time or via different hardware/software systems, have to be viewed with much suspicion and doubt. Creators must surely support any measures which make it easier for consumers to discover, and enjoy the widest possible range of cultural diversity, whilst providing consumers or others in the business chain the ability to pay for such usage. Today's licensing systems (or absence of such systems) and technical restrictions do not satisfy such goals.

An overall conclusion of almost a decade of experimenting with DRM systems in the digital environment is that consumers totally reject highly intrusive DRM systems that entail Draconian degrees of control over what they can or cannot do. After a flood of copying limitation/controlling devices, including several debacles (eg. The SONY rootkit affair), the music industry seems to be making a 180 degree about turn, offering more and more "DRM free" services.

DRM started primarily as a controlling mechanism, fostering dreams amongst particularly large copyright holders of being able to control how, when, how often, for how long, with whom, on which machine etc. consumers can enjoy audio and audiovisual materials. The shift now is towards viewing DRM as a non-intrusive tool for studying aggregate data on usage for the purpose of fairly distributing revenues to rights holders. We must welcome this shift since it should provide a better potential for the general public to enjoy a range of choice which is as wide as possible, and is not limited by the particular selection of cultural goods that dominant major companies wish to promote at any point in time. This is also essential for the uninhibited development of creative activity in the European Union member states.
The same should apply to hardware and software applications that allow for storage and performance of cultural products. The MP3 file is a ubiquitous product, just as the CD became in the 1980s/90s. Consumers did not accept the argument that they had to buy different CDs of the same work to be able to listen on different players (at home, in the car). CD copy protection devices failed for this reason.

Consumers require hardware and software solution that are simple to use/understand and which are interoperable and show longevity over a reasonable period of time. There is no reason for consumers to accept the need to re-purchase the same recordings every time one changes format, hardware manufacturer etc.

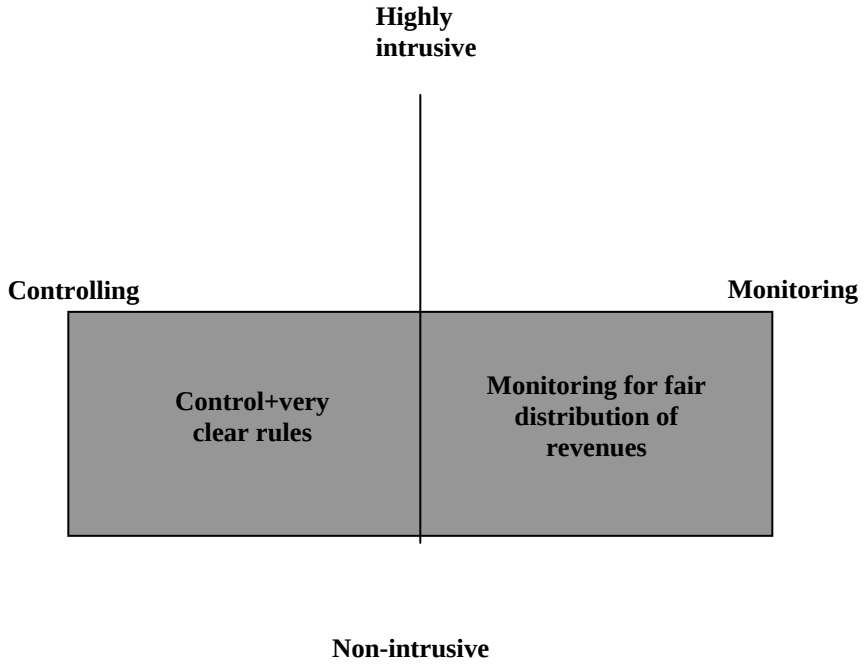
If DRM is becoming increasingly integrated into media that users buy, it will be important to understand how to evaluate the impact of DRM on the media and users experience. Different DRM systems will provide different properties and capabilities for the users. Some properties may not be accepted by users.

Some users may be informed and able to compare media products incorporating DRM and act accordingly but the majority of the users are not aware of DRM. In 2005, Indicare carried out a study of the awareness of DRM among European digital music users. The discouraging result was that on the average 63% of the users had not heard of DRM at all.

There should be a way for users to evaluate systems with integrated DRM. Users should be able to have answers to issues such as:

Transparency: Are users given sufficient information about any impact the DRM system can have on potential uses of the content or interoperability with different terminals. Is the information given sufficiently clear, easy to find and given at relevant times.
Effects of use: What are the limits of use? Does the DRM system allow for time shifts, place shifts, sharing within reasonable limits, creative modifications within reasonable limits? Is there a risk to lose control if a company goes out of business?
Collateral impact: Is there any risk for users privacy to be exposed? What type of information is "phoned home"? Any risk that users terminals will stop working?
Purpose and user benefit: Is the DRM introduced to lock users into old business models or to limit users choices or to innovate new business models?

The Musiclessons project (www.musiclessons.se) carried out a specific study to test the validity of a hypothesis that DRM systems must not be overly intrusive to enjoy long-term consumer acceptance and thereby be successful. The analysis was based on the framework that considers the balance between control – monitoring, on the one hand, and intrusive – non-intrusive technologies on the other. High control makes users less active and low control invites them to experiment and to gain experience. One of the observations in the study is that users are not infrequently one step ahead of the content industry and find ways to circumvent DRM. It is likely that the users will continue to be one step ahead as long as DRM control prevents users from experimentation and imposes a strict control of usage. Another conclusion in the study is that users and content owners will find a mutual area where DRM is accepted by both parties for future development of business models. The grey area in the figure below indicates this.



If we assume that much usage of audio- and audiovisual materials over digital networks which is currently regarded as “illegal”, will eventually become “legal” via some form of licensing system, then non-intrusive DRM systems will be imperative for monitoring use, and distributing revenues. This will entail standard setting and non-discriminatory access to such systems for all right holders, creative firms and collective right management organisations.

Multi-territory rights licensing

We fully understand and appreciate the desire of the Commission to remove barriers to simple multi-territorial licensing systems in the Union. The Recommendations from DG Internal Market presented so far, however, seem to have caused more confusion than

simplification. This is because of the high degree of concentration of ownership in the media industry. Four major publishers and four major record companies, often with close ties within conglomerates, control up to 80% of all publishing and recording rights. The proposal that individual composers should move their on-line rights to one of a few large European collecting societies is not a practical solution. It is only easy in the case of the major publishers with their control over huge swathes of primarily Anglo-American rights.

As a result of the "On-line Recommendations" from the Commission (via DG Market), major publishers are now claiming the rights to authorise Collecting Societies of their choice to license "shares of songs" when they license on-line rights. The EMI Celas initiative (with the PRS and GEMA) is but one such example. This could create potential havoc in the collecting societies' traditional system of blanket licensing. It is particularly unsuitable for heavy users of the widest possible range of music, e.g. broadcasters.

The number of rights holders and their relationships is on the increase. More and more musical works have "split copyrights", i.e. more than one publisher is involved with a share of the work. Many works have several composers and several publishers. This makes it harder and harder for users to identify all rights holders in a work. It could also offer unhealthy new business opportunities for publishers acting as "copyright trolls", i.e. those who buy up rights without any intention of actively exploiting or promoting them, but wait until they are used by someone who is not aware of all the different rights holders (and maybe did not seek the permission of all parties), and then sue or use some other means to claim remuneration. Similar problems are emerging in many different areas involving collaborating computing applications e.g. file sharing). Even in the education field, the ability to use simple and efficient P2P network solutions for exchanging educational materials is severely hindered by lack of clarity regarding rights and feared risks of legal attacks should any mistakes be made.
The same can be said of consumers actively seeking new experiences in different file sharing networks – with a huge mass of both "legal" and "illegal" content, it becomes almost impossible to distinguish between the two. Fear of retribution can frighten consumers away from this opportunity to foster cultural diversity and innovation. This is an area where current legal provisions can actually unnecessarily hinder online distribution of creative content in the EU.

The "long tail" effect is already noticeable in both legal downloading services and file sharing networks including a mix of legal and illegal materials. It is a phenomenon that fosters cultural diversity. But it also comes into conflict with major media companies' desires to sell more copies of fewer high profile products, products by super stars who have often received gigantic up-front royalty payments. The potential advantages for creativity, and in particular user-generated content are enormous. To force major audio and audiovisual producers to accept this change of business models could well require some encouragement from the European Commission/Parliament. The alternative threat of a possible compulsory licensing system usually works wonders as regards helping large media companies to concentrate their minds.

A major problem comes from the increased complexity of rights profiles (more rights holders, more categories, demands for longer protection periods). All this makes it harder and harder for users to identify and clear all rights. The absence of a Orphan rights regime is also an additional hinder. This also open the doors for unsavoury business activities such as those of copyright "trolls", referred to above. This is NOT in the interests of creativity in European and definitely not in the interests of active or potential creators.

Competition Law does not seem to have solved the problems of vertically integrated media conglomerates (note the muddle concerning the Sony-BMG record company merger). The Commission writes in the Communication: "The application of competition law can in some cases remedy abuse relating to exploitation or the bundling or rights". We are not convinced that this ability has been strong enough. **Instead we recommend a regime whereby producers and publishers which cannot demonstrate active exploitation/promotion of works which are over three years old should be forced to return those rights to the creators involved should those creators so desire.**
This would enhance competition, lead to the creation of a multitude of new SMEs in the publishing/production business and, in short, do much to satisfy the goals enumerated under 2. Challenges and Proposals (the full potential of European Content, the updating of legal provisions, fostering users' active role).

Legal offers and piracy

9) Improved respect for copyright

The prime movers behind the campaign for "improved respect of copyright in the online environment" are the major global record and film producers. These are the same entities who have been so slow to offer consumers so-called "legal alternatives" to the wide range of cultural diversity available via other means over the Internet.
Our impression of SMEs in the media business is that new business models are evolving which rely on current activities in the Internet, rather than on trying to hinder such activities. We note scientific studies which show that those who download "illegally" are also those who are the most active consumers of cultural products, buy more CDs, and even more cinema tickets. Our conclusion therefore is that a prime aim should be, not to hunt millions of "copyright offenders", but to allow what they do to become legal via some form of licensing system. Such a system must also be related to a fair and reliable distribution system for revenues generated by any licence.

The goal of fostering user-generated content, with users becoming producers ("prosumers") is a healthy vision, but not one which should be over-idealised. There is no doubt that some brilliant examples of creativity emerge from users being able to adapt and improve existing innovations and expressions. This should not be hindered by existing IPR law, or by the activities of "copyright trolls" (see above). As things are now, any interactive service where users can edit existing copyrighted materials (even with the permission of the original right holders) will automatically run the risk of having other materials introduced with other rights holders. Difficulties clearing such unclear rights

could provide a major stumbling block for further distribution. Should it really be illegal for a user to replace a face in one film clip with another, unless there is a clear case of infringement of moral rights?

10) MOU in France

This might appear to be a very satisfactory solution on paper, but there are considerable problems that could hamper implementation. The Internet is full of a mix of "legal" and "illegal" materials. More and more SMEs who are record producers make all their new products available on the Internet via, e.g. Pirate Bay. This is where they market their artists. Income is then generated via concert revenues, and sales of physical products (CDs, T-shirts etc). When their records are performed by broadcasters, revenues from neighbouring rights accrue and can amount to a sizeable slice of overall revenue. Distinguishing between what is legal or what should be removed is not an easy task. Even the major companies are divided at times on this strategy. As a Google spokesperson said recently; "first the legal department from the film company phone and tell us to take down a clip from YouTube, then shortly afterwards, the marketing department phone and ask us what we are up to!"

If the ISP were to remove files which were not illegal by mistake, then this could lead to several unhealthy legal fights – something which is not good for creativity and innovation.

The other major problem with the MOU concerns the major media company's strategy of filling digital networks with false files and decoys ("spoofing"). To remove a "genuine" Britney Speers title from the file sharing network Kazzaa, would also involve removing billions of false files, with all the related costs which will be passed on to consumers.

The ultimate sanction proposed in France, and in discussions currently in the UK and Sweden, namely of cutting off a person's or a family's Internet connection is not a practical proposition in the information society of today. In our 24-7-365 society of today, many services are only provided in an efficient fashion over the Net. In Sweden, for instance, it is virtually impossible to book train tickets, register a sick child with the school, etc. by any other means than over the Internet. The notion of pulling the plug on a family when as a member has frequently downloaded "illegal" content is quite simply not practical.

11) Filtering measures

For the same reasons as in 10), we researchers believe this is not a constructive way forward.

More and more of those who live and create outside the world of the four global music publishers and record companies are advocating a very different approach to copyright problems in the Internet (file sharing networks, "illegal" materials etc.). SMEs in the music industry have developed new business models, which accept the new reality as a fact of life, not something which draconian IPR laws and criminal or civil proceedings can thwart. Even if certain record companies with old business models are bleeding, other parts of the music industry, notably the concert scene, are thriving.

New approaches are needed. The Swedish CRM (Collective Rights Management) society, STIM recently announced an initiative to negotiate blanket licence deals with ISPs, in order to make downloading legal via a monthly licence (reference: http://www.stim.se/stim/prod/stimv4eng.nsf/alldocuments/1D66451CBE1B0F81C12573F4002E1CCC). A similar initiative has been announced by the Songwriters Association of Canada (Reference: http://www.songwriters.ca/studio/proposal.php and http://www.thestar.com/entertainment/article/305082

Such proposals do not entail a major upheaval of current legal provisions, since they rely on agreements between rights holders and users (ISPs and indirectly consumers). But the ability of large rights holders to thwart creative development via their power over the market and current uncertainties regarding IPRs, are challenges that must not and cannot be ignored.