



RESPONSE

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## Creative Content Online

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DG InfSo Communication, 3 January 2008

### Executive Summary

This Communication from the European Commission is a welcome recognition of the value of the creative industries and the growing online market. PPL and VPL<sup>1</sup> support the ongoing debate at European level and call for action in relation to competition policy and online piracy.

- **Availability of Creative Content.** There is no shortage of content available online. The issue is whether it is paid for;
- **Digital Rights Management and Interoperability.** Interoperable DRM is essential to some consumer propositions. This is an issue for the hardware and software manufacturers;
- **Multi-territory Licensing & Competition Policy.** The market (both supply and demand side) demands one-stop multi-territory licences. Competition policy should accommodate the market;
- **Online Piracy.** While online piracy remains endemic, legitimate services will struggle to survive;
- **Creative Online Platform.** We support the Commission's plans to put together a Creative Online Platform and offer to take part if requested.

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<sup>1</sup> PPL and VPL are the UK collecting societies licensing on behalf of 47,000 performers, 3,500 record companies and 1,000 music video producers. See Appendix A.

## **A. AVAILABILITY OF CREATIVE CONTENT**

1. The Communication from the Commission concludes that lack of availability of creative content is a major obstacle to the development of online content services. This statement is made without any supporting evidence and there are no questions within the consultation on the availability of content. This assumption, however, does deserve comment.
2. The reality is that there is an abundance of creative content online.
3. Music has been at the forefront of the digital explosion. Music, albeit largely illegal file-sharing, has driven the demand for internet connectivity and latterly broadband. Legitimate online music services were launched in Europe in 2004. In the UK, the growth was so dramatic that within eighteen months, download sales exceeded sales of physical singles. As bandwidth capacity expanded to cater for full track audio-visual downloading and streaming on demand, music video services were launched – in 2005 on mobile (by 3 and others), and later in 2005 on PC/portable devices (by iTunes and others).
4. The online market for music is growing fast in terms of availability of content (2m tracks), choice of services (over 300 in Europe) and take-up by consumers (downloads now driving the charts). Initial growth in revenues has been similarly dramatic. Digital revenues already make up around 15% of revenue and most industry executives predict that online revenues will represent over 25% of total music revenues within the next few years.
5. Despite these successes, the easy access to free, illegal material has reduced revenues across the music industry, for creators and investors alike. At a time when consumption and demand has increased, one would expect revenues to increase too. In fact, they have declined, because of online piracy.

## **B. 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?*
- 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?*
- 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?*

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?*

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?*

6. The music industry wants the interoperability between devices demanded by consumers. The challenge is a technical one for the hardware manufacturers and software developers in producing DRM systems which operate effectively across platforms.
7. PPL takes a pragmatic approach to DRM systems in its licensing. The record companies expect a degree of protection for their recordings. Equally, DRM systems have not been developed for all platforms and business models. DRM systems allow different business models to present a range of consumer offerings, where the consumer gets what they pay for, no more, no less. Without DRM, business models will reduce to a one-size-fits-all which is not in the interests of consumers, creators or business.
8. There is a particular problem over interoperability where consumers expect to be able to move content from one device to another. Apple's iTunes service, for example, does not permit tracks to be moved to another device as Apple has not allowed other providers access to their DRM. While this is an issue for the industry, it is something government's should be aware of.

### **C. MULTI-TERRITORY LICENSING**

9. The main barrier to multi-territory rights licensing is the current application of competition policy.
10. While there is a clear market demand (from users and rightholders) for one-stop multi-territory licences and such a system is entirely compatible with Articles 81 and 82 of the EC Treaty, there are real or perceived barriers arising from the application of competition policy. Furthermore, the online market is global by nature so any inefficiencies within the European region will disadvantage operators in that market and reduce Europe's competitiveness.
11. It is necessary therefore to consider the market conditions and apply competition policy accordingly. In particular, the competition authorities should acknowledge the economic efficiencies of collective licensing and the benefits of such a system for European competitiveness.

12. The economic efficiencies of collective licensing are examined in the PwC Report *Music Collecting Societies: Evolution or Regulation?*<sup>2</sup> Competition authorities naturally view collective licensing societies with suspicion as they are monopolies. Competition theory dictates that monopolies will seek to charge monopolistic prices unless otherwise checked. However, PwC demonstrate in *Music Collecting Societies* that the collective licensing model actually delivers allocative, dynamic and productive efficiencies and that both rightholders and users derive economic benefits.
13. They observe that the bargaining power between collective licensing societies and music users is often evenly balanced. In a significant number of cases, the music users have greater bargaining power than the collective licensing societies as they are either large multi-national companies or trade bodies representing an entire business sector. For example, the BBC is about 40 times larger than PPL. Broadcaster RTL is bigger than all the German collecting societies put together.
14. PwC conclude that collective licensing is a natural outcome of a well-functioning market.
15. However, competition policy often appears as a deterrent to one-stop multi-territory licensing.
16. This ambivalence by competition authorities towards collective licensing is demonstrated by the length of the negotiation process leading up to clearance of the IFPI Simulcast Agreement by the European Commission. IFPI led those negotiations, in conjunction with record companies and the collective licensing societies. The Agreement took two years to draft to comply with European competition law (during which time there were informal discussions with the Commission). It then took a further two years from notification of the agreement to clearance by the Commission.
17. Another earlier example was the MTV case in 1994. MTV filed a complaint to the European Commission which led to the issuing of a Statement of Objections<sup>3</sup>. As a result, VPL is only able to license the independent record companies for MTV. The major record companies are denied the right to license their repertoire collectively.
18. There is an essential dilemma here for the competition authorities between the desire for the efficiencies of one-stop licensing and the fear of monopolistic practices. PwC have demonstrated that the market dynamics do not lead to monopolistic practices but that is a natural fear.
19. In a more recent case, the Office of Fair Trading (OFT) in the UK examined the proposed merger between PPL, PAMRA and AURA. PAMRA and AURA were performer societies distributing broadcast and public performance income from the UK and overseas to their performer members. At the same time, a number of performers were signed directly to PPL and received their UK remuneration directly.

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<sup>2</sup> *Music Collecting Societies: Evolution or Regulation?*, PricewaterhouseCoopers LLP, June 2005

<sup>3</sup> European Commission Statement of Objections, 10 March 1994

20. After five years of negotiation and working together under the Performer Forum, the three organisations proposed a merger. This would remove confusion among performers, reduce costs (PAMRA and AURA members were paying an additional commission fee) and allow the creation of an international service for performers. The merger was referred to the OFT in March 2006. The OFT then carried out a two month investigation, consulting performer representative bodies, music users and other interested parties, as well as 60 randomly selected individual performers. At the end of the process, in May 2006, the OFT approved the merger with no conditions.
21. The merger was put in place later in 2006 and formally announced at MIDEM in January 2007. As a result, PAMRA and AURA members no longer suffer the additional commission reduction, performers are finding it easier to register for their airplay income and overseas collections of airplay royalties on behalf of UK performers doubled within the first year.
22. The apparent competition between three separate societies actually led to increased costs which were removed once the three were merged into a single collective licensing society.
23. Competition policy is a key issue for rightholders when deciding on collective or direct licensing in respect of EU-wide licences.
24. Of all the regulatory constraints on collective licensing, competition policy is paramount, particularly as it sometimes appears that commercial users deploy arguments about competition between collective licensing societies as a way of artificially reducing the tariff. At a recent public conference, one music user was claiming that she wanted competition between collecting societies in order to provide a better and more cost effective service for rightholders. The audience did not believe such altruistic sentiments. When pressed, she admitted she wanted competition between collective licensing societies to bring down the rate.
25. Both rightholders and music users desire a one-stop licence for an increasing number of online services. The tariff for these services should be determined according to market circumstances and the value of the rights in that service, rather than a process of forum shopping. Most music users accept and understand this. Indeed, PPL and VPL pride themselves on having good business relationships with licensees, even when the licence negotiations themselves are tough. Commercial users are best served by a legal framework which makes it advantageous for rightholders to license collectively, so creating a one-stop shop for licences.
26. In addition, it is the smaller rightholders who benefit most from collective licensing arrangements. Without such a service, they would simply be unable to license their repertoire in many areas. Arguably, public policy should encourage collective licensing in the interests of individual creators, SMEs and cultural diversity.
27. Competition policy does therefore need to recognise the economic benefits of collective licensing and allow rights to be aggregated to a one-stop multi-territory licence. Commercial disputes should be resolved through classic party vs party court process.

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?*

28. Another Recommendation would not further the development of multi-territory licensing, unless it is able to encompass a competition policy that facilitates one-stop licences (see paragraphs 9-27 above).

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?*

29. The most efficient way of fostering multi-territory rights licensing of audio-visual works is by addressing the competition aspects (see paragraphs 9-27 above).

30. The expansion of licensing from the so-called main licence to a secondary market involves the aggregation of additional rights into a single licence. This will be facilitated by addressing the competition aspects (see paragraphs 9-27 above).

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)?*

31. The implication in this question is that back-catalogue works sell less than new works. That is not necessarily the case. There are many catalogue works that out-sell new works. Indeed it is not uncommon for an older track to appear in one of the weekly sales charts.

32. There is a further assumption implicit in this reference that the market will be dominated by the 'Long Tail', ie that the aggregate value of all the low volume sales will exceed the aggregate value of the chart-toppers. This is often not the case. The 'Long Tail' simply means that it becomes economical to distribute works which sell in smaller quantities, thus increasing the availability of niche content.

33. It is this niche content which above all benefits from a collective licensing approach. Because sales of niche content are, by definition, low, there is even more pressure on keeping distribution and associated costs low. Harnessing the efficiencies of one-stop licensing therefore becomes crucial. This cultural dimension should be a factor in the application of competition policy to collective licensing for all works.

## D.

## **LEGAL OFFERS AND PIRACY**

34. Online piracy remains the single biggest barrier to the development of legitimate online services. While whole catalogues are available free of charge from illegal sources, with apparently no sanction, legal services will struggle to compete.

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

35. Stakeholder cooperation is the ideal solution. However, lengthy negotiations within the UK have so far failed to produce an industry agreement which tackles online piracy. The most effective solution will be for the ISPs to take more responsibility for the illegal activities of their customers. However, to date, despite years of talks, the ISPs have not made any commitment to deal with online piracy voluntarily.

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

36. Yes. The Olivennes Commission made a thorough investigation of the market and their solution is based on the commercial positions of the various parties.

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

37. Filtering is a possible solution, combined with other measures. Ideally, it should be the ISPs which decide which technological measures are most appropriate to contain the illegal activities of their customers.

**PPL/VPL**

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## Briefing note on PPL and VPL

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### PPL Facts and Figures

- Licenses on behalf of 3,500 record companies and 47,000 performers.
- Collected £97.9m in airplay royalties for performers and record companies in 2006.
- Licenses 200 TV channels and 300 radio stations broadcasting recorded music, as well as over 200,000 pubs, nightclubs, restaurants, shops and other places playing recorded music in public.
- Has negotiated bilateral agreements with 38 other licensing societies to collect overseas airplay royalties.
- Distributes revenue using a comprehensive track-based system – analysing over 19m uses of recorded music reported by TV and radio stations, background music suppliers and venues playing recorded music in public. All track plays are matched to PPL's repertoire database CatCo, containing information on 9m tracks.
- Distributes to all the performers – featured artists, session musicians and backing vocalists – as well as the record companies that create the sound recordings that are played.
- Is the largest performer/producer collective licensing society in the world.

### PPL Recent Achievements

- In 2006, achieved a 12% growth in net revenue for the rightholders.
- In the last five years, has increased net revenue by 50%, generating an additional £28m payable to record companies and performers, and almost halved the cost/revenue ratio.
- In 2005, PPL's CatCo was selected as the database underpinning the official combined download and singles chart.
- Signed the IFPI Simulcast Agreement in 2002 and the Webcast Agreement in 2003 paving the way for multi-territorial licences.



## **PPL and Performers**

- In 2006, merged with AURA and PAMRA and restructured to bring performers into PPL, for the first time in its 73 year history. Created four Performer Directors, five Performer Guardians and established the Performer Board to oversee performer interests.

## **VPL Facts and Figures**

- Represents 1,000 music video producers.
- Licenses 60 TV channels broadcasting music videos, including 25 specialist music channels.
- Licenses around 2,000 pubs, nightclubs and other places playing music videos in public.
- Collected £12.4m in airplay royalties for music video producers in 2006.
- Analyses usage information from TV stations and background music services for distribution to rightholders.
- Offers a sourcing service, Music Mall, for back catalogue video clips and other footage.
- Is the largest music video collective licensing society in the world.

## **VPL Recent Achievements**

- Recently concluded a licence with MTV covering terrestrial and online services throughout Europe on behalf of independent companies.
- In 2003, integrated management operations with PPL resulting in cost efficiencies to rightholders.
- Concluded licence arrangements for new video on demand services, such as Home Choice and Virgin Media and the new store forward and narrowcast services.
- Announced a video digitisation project to provide online delivery of music videos to users.

## **March 2008**