



Response by the UK MMF to:

Creative Content

In a European Digital Single Market:

Challenges for the Future

The UK Music Managers Forum is comprised of managers and representatives of featured artists. Featured artists are the performers who are personally contracted to the phonogram producer, either third party or self owned, and who are the source of over 95% of the income in the global music industry.

Featured artists are always performers but in many cases they are also authors (songwriters and composers), whereas non-featured performers are session players and singers who are brought in to augment a recording by a featured artist.

Managers of featured artists receive a commission based on the actual income that a featured artist receives, so the interests of featured artists and their managers are identical once the initial artist management agreement has been agreed.

We welcome the chance to reflect upon the challenges for the future. The issues facing the European Digital Single Market are complex and originated in the application of analogue, territorial laws onto a digital pan-European environment. We believe that in the first instance market solutions should provide the way forward but in the event of failure (and there has been much failure to date) then the EC should be prepared to legislate to facilitate the development of the market.

We are dealing with a time of fundamental change in the way creative content is used, distributed and paid for. We are involved in the music industry as a whole and we can see radical change in live, recorded and broadcast music, and also in advertising, film, TV and other areas where music is distributed. Music is more pervasive now than ever before, but we are trying to control (through outdated licensing models) a situation which reflects a totally different economic and industrial structure. In addition the major rights holders receive value (revenue, advances or equity) from licensing that is not reflected in a transparent and fair way in equivalent artist accounting.

The long term health of the creative industries in Europe will depend on developing administrative and business structures that effectively and reasonably reward the creators of, and investors in, content, and can facilitate revenue streams that permit and encourage this activity. At the same time the public

needs to be empowered to utilise technology legally for their convenience and to its best advantage. New services need to be able to license content in an easy way so that payments are fair and transparent, and permit and encourage innovation. New technologies and consequent new services provide enough challenges for the innovator without making the licensing system an even greater problem. We want creators to have access to services with fair treatment for all, and for services to have access to the content they require, subject to reasonable commercial terms.

We feel strongly that there need to be full theoretical and empirical studies carried out on the economics of creative content in a digital Europe, which is not time specific but tries to address basic principles. This would provide a theoretical structure to debate the sensible distribution of rights, duties and obligations all the way from the creator to the end user. It is clear that the current structure has failed, the end user has taken to the new technology with enthusiasm and has stretched it, and will continue stretching it as the engineers relentlessly develop more, better and cheaper technical solutions that increase both speed of use and storage capacity, but the creators have not had the same happy experience, nor have many services. We have to accept that we cannot control the internet but we need to balance the rights of users, consumers, creators and investors. Governments may have to intervene to help but that should be the result of a pan-European consensus .

The international failure of working with and adapting of copyright for the digital environment has resulted in a situation that has led to rampant illegal usage of content, and consequent drastic attempts to control how people can and should use the ever evolving technology. Attempts to deal with today's problems however must be broad and imaginative enough to deal with possible future developments.

There are a number of principles that should be recognized whilst the market develops:

1. Consumers have a desire to access digital content at a time and place of their choosing anywhere within the EU. There should not be territorial or contractual barriers to them doing this. The EU needs to function as one market and at the very least that means, for instance, that digital service providers such as i-Tunes stores should be able to be accessed by consumers from anywhere within the EU. Obviously the ideal would be that there are portals in each relevant language, but before that happens there should be no reason why a consumer in Latvia cannot purchase a download from i-Tunes UK or anywhere else in the EU. Rights holders complaining about illegal downloading in Latvia whilst consumers there are prevented from acting legally is shameful. The issue of who owns the income from that download should be dealt with transparently by the service provider (such as i-Tunes), the Collective Rights Management Organisations (CMOs) etc but in reality is a backroom function that is of little interest to the consumer or the licensee and certainly should not be a barrier. In the physical world there is nothing to stop a consumer in Latvia buying a CD from an outlet in the UK. The rights issues are sorted by the CD manufacturer supplier and the CMO representing the authors. It should be no different in the digital world. If the concept of exhaustion needs to be adopted by the EU in the digital world to make this happen then legislation should be introduced. This is recognition of consumer behavior which is impossible to legislate against and restrictive practices result in driving consumers to illegal markets.
2. Competition laws should not be a barrier to the development of a digital market. A realisation that a relaxation of competition law in one area can create a vibrant competitive market in another area would be welcome. Banks were allowed to put aside competition concerns to create clearance systems that enabled competitive markets to flourish (e.g. Visa and Mastercard). It should be the same with authors' rights. Competition between CMOs on the

basis of transparency and efficiency will allow the market to develop and could be structured in such a way that cultural diversity is still recognised. Acceptance of the need for pan-European values does not need to produce a “race to the bottom” for the value of digital rights. In addition the aggregation of authors’ rights so that users can obtain necessary clearances in a much reduced number of transactions is obviously desirable. The aim is surely a one stop shop solution if it produces the desired results.

3. Creators want to be remunerated in a fair and transparent way. Consumers are becoming creators through User Generated Content (UGC) and should have their rights and obligations clarified. Creators moral rights do not need strengthening but they do need protection and also practical administrative structures to ensure a good balance exists both creatively and financially between the UGC world, and that of the original creators. If protocols are adopted for UGC to be able to be legally uploaded to licensed sites (as should be the case) then creators still need to have the ability, as now, to take down content such as mash-ups to which they object on moral grounds. This process needs to be made easy and fast and should not have to rely on creators taking expensive court action to achieve their aims.
4. The ability of any creator to object to licensing of digital services in a prevailing illegal environment though is much more difficult to understand and deal with. If terrestrial radio can be licensed on a blanket basis through CMO’s then surely digital streaming services should be licensed in the same way? The issue for digital services is where the line is drawn between blanket licensing and rights owner approval. It would seem logical that any service that mirrored terrestrial services should be licensed by CMOs in a similar way. The fact that streaming is “on demand” and territorial radio is not is not relevant anymore. Therefore digital streaming services could be licensed collectively but digital downloading (even if supplied by the same service) would be licensed by rights owners.
5. In the digital world much content that was previously not available either because it was an orphan work or because it was not economically viable to produce can easily be made available to the consumer. Much of this content is only available illegally. There is also evidence to show that the long tail in music is not generating as much usage, either as downloads or streams, as might have been expected. In that situation rights owners are loath to spend money digitizing content for legitimate services arguing that the consumer has shown that demand is not there for millions of tracks. There are many possible reasons for this including the fact that heavy consumers of music may favour illegal digital services for the wider choice. CMOs have a major role to play here both in licensing orphan works and content that has low levels of use. It could be argued that if a rights holder is collecting public performance royalties via a CMO for particular tracks then the CMO could also grant and administer sufficient streaming and download rights for those tracks if they were not being granted by the rights holder already. This would help unlock orphan and unavailable content subject to the moral rights of creators.

Apart from the 5 principles above there are other actions that should be mandatory for EU states:

We would like to see a full study of the governance and efficiency of national collecting societies, their role, and payment and accounting practices. They need to be established where local governments have failed to implement necessary legislation with transparent systems and equitable democratic governance.

To that end databases of full and accurate information that enable the digital licensing market to function across borders should be encouraged by all relevant bodies.

The Making Available Right for Performers has largely been ignored and unmonetised. Without introducing further complexity this right could be licensed with producers rights but monetized separately.

Issues regarding VAT and withholding tax are often mentioned as barriers to rights administration in the EU. If we are going to function as one market then those issues need to be resolved.

The creation of a single European Copyright Law is obviously complex but should be investigated and if it provides tangible benefits should be the ultimate aim.

Overall we need to update the legislation, custom and practice that has governed the past and provide a new framework to allow the development of the digital market for the benefit of creators, consumers, investors and users. The digital economy is vitally important to the future of Europe and the EC should not be afraid to step in and facilitate this if the market fails to provide the necessary solutions.

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