Creative Content in a European Digital Single Market: Challenges for the Future

UFC-Que Choisir's position

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I. HOW TO MEET THE NEEDS OF INTERNET USERS IN TERMS OF LAWFUL CULTURAL OFFERS ON THE INTERNET (IN PARTICULAR MUSIC & CINEMA). THE FRENCH CASE.

We maintain that the lawful supply remains unattractive, and this is not only a question of quantity (availability of the works in digital format).

With regard to music, the record industry in France regularly claims an offer does exist, as over 10 million songs have been digitalised. This argument obliterates the claim, as it is quality above all that makes an offer appealing. This means that even though very much is available, it does not make sense without commercialisation that is adapted to the preferences and utilisation of users.

First of all, it is possible to highlight the unavailability of good unlimited offers (fixed price offers). Indeed, on the one hand, the existing offers only contain DRM (for example the offers of the ISPs- as Orange, Alice- but also of specific retailers as Music-me). On the other hand, neither of them have all the catalogues.

This means that when a consumer pays 10 to 15 euros, he will never have access to all the music he likes, nor will he be able to use the device of his choice. Indeed, in most cases, the DRM used are made by Microsoft, and thus incompatible with, for instance, Apple's equipment that represents 70% of the MP3 players' market. These constraints are more than prohibitive and explain why consumers are not wild about the commercial digital offer.

The unlimited access deals therefore have to be offered without DRM and without any restrictions in terms of catalogues.

The question of money is also relevant. It is obvious that the price that is set is not in line with what the consumer is prepared to pay. The price (0,99 euros) is even more open to challenge as it seems to be taken from the price of CDs, even though the costs are not, and should not, be the same (there is no need for so many intermediaries). Indeed, the production and distribution of a CD represents a third of its price. The cost of reproduction and distribution of a digital file is practically zero.

Since the production and distribution of digital works operate with fixed costs (the marginal cost[1] is almost nil), each sale represents revenue and when the initial investment is covered, each sale represents profit. Therefore, it may be very profitable to cut the price of the files drastically. The difference will then be well compensated for by the volume of sales. Indeed, the more the consumer has the impression that the offer is cheaper, the more likely he will be to buy. This will be all the more so if he has the feeling that it is the market and not an artificially set price. There should be no doubt: consumers consider that 0,99 euros is too expensive for a music file. One may say the same thing for a file at 0,69 euros, which is the price set by certain platforms, all the more so that it applies to the older catalogues that have already been paid a long time ago.

The cost structure for producing and distributing digital works creates a favourable environment for limitless (fixed price) offers. Indeed, since there is almost no marginal cost, abundance is the suitable economic model, particularly as it allows for the modifying of consumer preference in terms of the allotment of all disposable revenue. In simple terms, abundance, which is referred to as limitless, has a price because it gives the consumer more

[1] http://en.wikipedia.org/wiki/Marginal_cost

satisfaction. The consumer will therefore spend a larger part of his revenue on music files if the marginal utility[2] for X additional euros spent is significantly higher than the one received when buying for the same amount "n" songs singly.

With regard to cinema, similar observations on the advisability of the unlimited offers can be made. Admittedly cinema does involve much more significant investments. But a film has the advantage of being commercialised in several different ways. It is paid off, or even makes a profit when first shown in the movie theatres. Then it generates other revenue, in particular through the "exclusive" agreements negotiated with certain television channels (mainly Canal Plus).

Therefore, it is possible to analyse VOD in the same way as ex ante music files.

In the VOD field, which is the mode the most adapted to the uses of the consumers, the current offer is particularly poor. Few actors offer genuine variety, whether singly or with unrestricted access. In this regard, unlimited access offers are especially scandalous: since the Creation and Internet Act, only the films that were released 36 months ago or more will be available. This policy prevents the development of these types of markets, and deprives the film industry of new revenues.

II. HOW TO ENCOURAGE THE DEVELOPMENT OF LAWFUL CULTURAL OFFERS ON THE INTERNET.

The development of a supply of digital works highlights a genuine problem: the existence of barriers blocking entry to the market of contents. Indeed, the record industry, like the film industry, seems to try hard to keep distributors and broadcasters away.

The vast majority of content distributors are incapable of accessing the entire catalogues[3]. And the hosting platforms find it extremely difficult to negotiate agreements allowing the users to access their services freely.

From this perspective, we believe that a minimum of supervision over both types of markets is essential.

a. For a regulation that encourages the distribution of digital files

To ingratiate the consumer, a retailer has to have a diversified offer and propose a certain number of key works (the hits, the blockbusters, etc.). This is even more the case with specialised offers. For instance, what is the use of a website dedicated to jazz if you cannot find certain albums of Chet Baker or Duke Ellington, or a website specialised in science fiction films without the works of Steven Spielberg?

We consider that the movie and music catalogues constitute an *essential facility*. Access to these catalogues must therefore be allowed on reasonable terms (price) and be perfectly transparent, and for everyone.

[2] http://en.wikipedia.org/wiki/Marginal_utility

[3] See for example the article written by S. Maul, "Are the major labels sandbagging online music? An antitrust analysis of strategic licensing practices?". New York University Journal of Legislation and Public Policy, 2003; 7: 365.

In the same way as for a physical infrastructure, these conditions must be guaranteed by a regulator (as OFCOM): either ex ante by controlling the conditions of access to the catalogues, as the *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP: The French Telecommunications and Posts Regulator) does for the fixed telephony local loop, or ex post in case of abuse, with similar powers to the ARCEP for settling disputes.

Our proposition is based on different studies that acknowledge that the rightholders are in a position to enjoy a monopoly, either individually or collectively. The US Department of Justice (DOJ), seized in the Kazaa, Napster v RIAA case[4], or the Federal Trade Commission (FTC), have several times made a similar analysis[5].

Robert Pitofsky, former president of the FCT, has declared that the case law has extended the *essential facilities* doctrine to intellectual property, in particular copyright[6].

In Europe, with the "Magill" case of 5 October 1995[7], the European Court of justice integrated copyright into competition law. This judgement acknowledges that a database held by a specific undertaking and protected by copyright may constitute a decisive asset for other actors. In this case, the undertaking holding this database had to permit access to the latter to third parties. The European Court of Justice thus opened the way to the control of undertakings potentially in a monopolistic position as to an intangible asset protected by copyright.

In France, the same type of issue brought the *Autorité de concurrence* (the French Competition Authority), in its decision n° 09-D-29 of 31 July 2009 on a claim for measures of conservation presented by the company Euris, to admit that an intangible asset covered by copyright may constitute an *essential facility* if it is not reproducible and is necessary for the competitiveness of another undertaking[8]. Refusing to give access to this type of asset thus constitutes an abuse of a dominant position.

These are not isolated examples. Many rulings (national or European) show that competition law may concern intellectual property and in particular copyright[9].

In this case, considering these elements, it appears that the catalogues must be accessible to all under transparent and reasonable conditions. This justifies that the access to these

[4] See S. Maul (2003), quoted here above.
[5] See for example the cases No. 971-0070 on the website of the FTC, which regroups a certain number of cases concerning the major record companies.
[6] ROBERT PITOFSKY, The essential facilities doctrine under United States antitrust Law, 8–9, http://www.ftc.gov/os/comments/intelpropertycomments/ pitofskyrobert.pdf
[7] JUDGMENT OF THE COURT of 6 April 1996 in Joined Cases C-241/91 P and C-242/91 P: Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities (Competition - Abuse of a dominant position - Copyright)
http://eur-lex.europa.eu/Result.do?arg0=radio+telefis+eireann&arg1=&arg2=&titre=titre&chlang=en&RechType=RECH_mot&Submit=Search
[8] "At this stage of the procedure, the elements contained in the case do not allow to assess whether Cegedim's database is reproducible, and under what conditions, by a competitor, and whether it constitutes an "*essential facility*" to which its holder should give access in order not to commit an abuse of a dominant position, subject to a legitimate reason. Only an inquiry in the framework of an inquiry in a trial on the merits could enable to have clarification on this point". Paragraph 53, decision n° 09-D-29 of 31 July 2009 of the Autorité de Concurrence.
[9] For an inventory, see for example the articles written by F. Marty and J. Pillot "Divergences transatlantiques en matière d'application de la théorie des facilités essentielles aux actifs immatériels", to be published in the Revue d'économie industrielle, or "L'application de la théorie des facilités essentielles dans la décision du Conseil de la Concurrence *voyages-sncf.com* : une analyse économique", *Revue Lamy de la Concurrence*, n° 19, April -June 2009, pp. 20-26.

catalogues should be controlled, and that an undertaking that holds a catalogue of films and music and refuses access to it runs a risk of a procedure for abusing a dominant position.

b. The creation of a system for collective management of copyright, for the hosting platforms and the audio and video streaming websites

The platforms that distribute digital content and the streaming websites constitute privileged access for the consumer to a certain number of audio and video contents. However, the use of these platforms is still limited because of the constant conflicts between the managers of the platforms and websites and the rightholders.

The managers deplore the difficulty of accessing the contents (wholesale price too high, locked catalogues), the rightholders regret that they are not (or insufficiently) paid for the use of their works, that they sometimes consider as constituting infringement.

Our experience, in particular within some commissions created by the French government to solve these problems, brings us to believe that it will be difficult to set up a dialogue between some of these parties (hosting providers and some rightholders as Major or specific collective societies) and that we are in a deadlock. And yet, quite a simple solution could pull everyone together. This is the implementation of a collective management system similar to the one that exists for radio broadcasting.

Mechanism of this collective management system:

For a platform that hosts protected contents (Dailymotion, YouTube, etc.):

1. When a work is put online, the user of a hosting provider who complies with point 2, does not have to request the authorisation of each party concerned. It is accepted that he has the authorisation de facto.
2. The platforms accept to pay a contribution proportional to the turnover generated on the relevant territory for the hosting activity for the use of the protected content. The level of contribution will be determined (a percentage) through negotiations within a balanced commission made up of all the actors concerned.
3. The hosting provider takes responsibility for identifying the works for which it has the required marks and metadata, and communicates the data relating to the use of these works to the body in charge of collecting the sums paid by the hosting providers and distributed to the artists, creators and holders of neighbouring rights.
4. The body in charge of redistributing the contribution paid by the hosting providers applies an equity principle: 1/3 for the artists, 1/3 for the authors/composers and 1/3 for the holders of neighbouring rights.

For the broadcaster of contents in streaming (Jiwa, Deezer, etc.)

5. A broadcaster of contents in streaming, who complies with point 6, may broadcast a work of his choice without being obliged to request the authorisation of each party concerned. It is accepted that he has the authorisation de facto.
6. The broadcasters of contents in streaming also pay a contribution that is proportional to the turnover generated in the relevant territory for the broadcasting activity in question. The level of the contribution will be determined (a percentage) through negotiations within a balanced commission made up of all the actors concerned.
7. The broadcasters of contents in streaming have the duty of communicating the data relating to the use of the works to the body in charge of collecting the revenues paid by the broadcasters of contents in streaming and distributed to the artists, creator and neighbouring rights holders.
8. To avoid wasting, the same body will be in charge of the collection and redistribution of the revenues paid by the broadcasters of contents in streaming and by the hosting providers.
9. The body in charge of redistributing the contribution paid by the broadcasters of contents in streaming and by the hosting platforms applies an equity principle: 1/3 for the artists, 1/3 for the authors/composers and 1/3 for the holders of neighbouring rights.

Excluded from the compulsory collective management:

1. Works that have not been commercialised or put at the disposal of the public beforehand by the creators themselves (music or free cinema).
2. Cinematographic works that have not been put at the disposal of the public by the creators, or commercialised through other channels than movie theatres.

Technical devices

The hosting platforms undertake to use technical devices that make it possible:

- to identify the works, in order to guarantee their counting and remuneration by the appropriate body,

- to prevent unauthorised works being put online (exceptions mentioned here above),

- to withdraw them and prevent them reappearing when such contents are present online.

3. SHARING OVER THE INTERNET: WHAT MODEL?

To Create the debate, UFC-Que Choisir with the platform Creation, Public and Internet ("*Création Public et Internet*") submitted a project, a concrete project, that it hopes to see grow and develop thanks to exchanges it had with different actors from the world of creation. It is a collective financing system based on a collective licence that allows the exchange of digital works between individuals. The precise name for the system has not been decided on.

What rights, what duties?

We propose a right to share files, off the market, granted to each person. The creation of this right would be associated with the financial contribution paid each month by the entirety of internet broadband subscribers. To be predictable and acceptable for the world of creation, this contribution must be compulsory. To be acceptable to consumers, the price must be reasonable. We are convinced that this is possible, while also guaranteeing sufficient revenues.

How to collect this contribution?

We propose that this contribution be paid by the consumer, but collected by the telecom operators. It is very important that this contribution appears clearly on the consumer's invoice so that the latter is aware that there is a compensation for this new right, and that the works are not free. Moreover, this mechanism avoids interference with the price strategies of the operators, and avoids introducing tariff opaqueness and competition distortions.

What price?

It must be subject to concertation between the different actors concerned. The amount of 5 euros per month seems to be a good basis for discussion. 1.2 billion euros could therefore be collected for the creation. This amount seems reasonable since amongst the 1.2 billion euros redistributed each year by collecting management for music, audiovisual and multimedia, under 20% concerns sales or direct licenses to final users, i.e. 240 million euros.

How to share it out?

We propose that a part of the sums collected be allotted to the remuneration of the contributors of the creation of the works shared over the internet (authors, neighbouring rights holders such as performers and record and video producers) and a part to the creation environment yet to come. The sharing out between these two parts is to be discussed and must not necessarily be identical for each medium.

The creators who voluntarily give or publish their works with the right to share off market, and the works placed under this status[10], will have to benefit by right from the entire system of finance or remuneration of creation.

[10] For example under the Creative Commons or Art Libre licences.

The financing promotes or rewards the benefits to the public from the existence of the works. It would be absurd to refuse the benefits of the system to those who give the most rights to the public, and reserve it for those who restrict their rights.

The sharing out of the sums allotted to the remuneration related to existing works raises several questions:

1. How to share between the actors of creation? This needs to be debated. Must we follow the models used for private copying with, for example, a distribution divided into 3 for music: 1/3 for the rights of the producers, 1/3 for the authors/composers and 1/3 for the performing artists?

2. How to identify and count the works downloaded in order to ensure the redistribution of the revenue in the most just and fairest way possible? Different propositions exist, the advantages and the drawbacks of which will have to be discussed. Collecting societies, internet users and analysts all agree that a fair distribution is possible. The differences of opinion only concern the measurement method and will have to be the subject of an open debate and evaluation.

3. How to pay contingent on a given use? In the digital environment, it is unjustified to support the most substantial sales, as is the case in the sales of copies. It will therefore be necessary to make sure that the undistributed sums are not distributed to a limited number of big winners.

Are all the works involved?

No, do not come into the scope of the licence:

1. The works that have not been digitally commercialised, nor put at the disposal of the public by the creators themselves beforehand.

2. The rule of media exploitation chronology (the time that separates the release in the movie theatre from the broadcasting on television or other forms of exploitation of the films, concert or digital distribution, books or their distribution on the internet) is therefore still protected. Of course, the creators will remain free to choose a simultaneous distribution if they consider it useful. For instance, for the promotion of films, as it has already been done many times.

The unauthorised reproduction and distribution must still be subject to infringement proceedings, and such proceedings can be effective when significant rights have been granted to the internet users.

About us:

Established in 1951, UFC-Que Choisir is a not-for-profit organisation with a nation-wide network of nearly 170 local organisations that handles more than 100,000 consumer complaints a year. Through its monthly publication, the high-profile magazine 'Que Choisir' and its wide readership in excess of 500,000 individual subscribers, UFC-Que Choisir carries out in-depth research and test comparison for a range of goods and services. The three

pillars of the UFC-Que Choisir are: Independence, democracy and solidarity.