



A.F.I. - Associazione dei Fonografici Italiani
Italian Association of Phonographic Producers

Contribution of A.F.I.
the Italian Association of Phonographic Producers
to the public consultation on
“Content online in the Single Market”

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A short presentation of A.F.I.

Founded in 1933, A.F.I. - the Italian Independent Phonographic Producers' Association - represents and defends the interests of Italian SMEs of audio and video music producers. A.F.I. collects and distributes to its members their neighbouring rights and promotes their activities in Italy and abroad.

A.F.I. supports all policies at national and international level that help independent producers to increase their market share and that enforce the protection of music rights against any kind of infringement and piracy. A.F.I. is particularly active in promoting initiatives aiming at developing business models suitable to the SMEs of the music industry and at strengthening the cooperation with other right holders organizations and collecting societies.

In the last years A.F.I. has introduced the first experimental license for the streaming in the web (2000), has shared in founding the Italian Music Observatory (2001) and in launching EMCA, the European Music Copyright Alliance (2003, www.emcaweb.net).

A.F.I. is partner of the Axmedis project, co-financed by the European Commission under the Sixth Framework Programme (IST). In this context this association is the only representative of content owners and is charged of the legal analysis (please see www.axmedis.org).

A.F.I. has shared in founding, at the end of 2005, C.A.P.I. European Federation A.S.B.L., an association which aims at being a forum of all the players operating in the field of the music: artists, producers, performers, publishers.

QUESTIONS POSED BY THE EUROPEAN COMMISSION AND ANSWERS OF A.F.I.

Types of creative content and services online

1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

If "offering" creative content or services means, in this context, "distributing" the answer is no. On the other hand if "offering" means "creating" the answer is yes: A.F.I. represents audiovisual content producers and publishers.

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.



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We think that the present environment should be widely improved.

In particular we would like to draw the attention of the European Commission on the following concerns: violation of protected contents and piracy; price systems not suitable to micro payments; lack of interoperability between devices; lack of homogenous reporting system from users; lack of support to the SMEs in the digitization's phase of their repertoires.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

Our opinion is that, as far as business users are concerned, their rights are fully taken into account.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

The interoperability between devices and platforms is one of the main issues that need to be addressed and is linked to the DRM standardization process.

As soon as interoperable and secure DRM systems will be available, the risk of piracy will be reduced. Therefore the trust in the online market will increase and so the number of content owners acceding to it.

The legal framework of this topic is of course complex but it reflects the complexity of the subject.

New initiatives by the European lawmaker might be taken, in our opinion, only once that new models, needing a regulation, will be really established among the stakeholders of the creative sector and not only because of the pressure of multinational companies.

Today digitisation is a model which involves much more multinational companies than SMEs and therefore the first initiative in this field should be improving the efforts to stimulate the digitisation among SME creative industries. In a second phase, when digitisation will be really spread among the majority of the operators, legislative initiatives having as a target the on line contents' market might be taken in consideration.

The interoperability and DRM will provide consumers with the possibility to enjoy a content legally acquired and this using different devices on the condition that consumers accept that the DRM include technological protection measures against any use of the content not authorized by the content owner.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

We think that cultural diversity self sustaining is very far. Online market, in particular of music content, is driven by major companies and multinational of ICT.



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SMEs of content owners, who are those promoting and supporting the cultural diversity, are often neglected and even if they intend to accede to the new online services they need the collaboration of major distributors or aggregators.

We would like to emphasize that service providers and online content distributors are often not interested in being provided with the repertoires of SMEs which are often considered as “not commercially attractive”.

It should be noted that the latter often include works of young artists or niche works which are the clearest demonstration of how dynamic is cultural diversity in a country.

Competitiveness of European online content industry

7. If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

Please find hereunder a list of the aspects which in our opinion represent the strengths of Europe:

- The richness and diversity of European culture is becoming of greater and greater importance.
- Europe creates and produces high-quality content.
- The potential size of the European multimedia market is considerable, rivalled only by the USA and Japan.
- Compared to most regions of the world, Europe is provided with high quality telephone networks, an high penetration of cable television and personal computers.
- Europe has a strong tradition of public service broadcasting.

However, on the other hand:

- European cultural content sector in general is suffering from a low adoption of new technologies specially in relation to SMEs.
- The rights clearance process, especially for multimedia content, is complex and not homogenous but any initiative concerning this aspect should be taken in consideration carefully in order to avoid any negative consequence on cultural diversity recognized by art. 151 of the Treaty.

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

Of course the new scenarios will give interesting opportunities to SMEs of content owners on a global scale and to all distributing channels.



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Under this point of view A.F.I. is operating as a partner in the context of the AXMEDIS project (IST 2004)- *Automating production of cross- media content for multi channel distribution* – that aims at developing innovative technologies for the automatic production, licensing and protection of content for their multi channel by means of a P2P open network and secure and interoperable DRM.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

We think, and all the available statistics do confirm this, that *on demand* will soon become one of the most common business models for music and video.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Please see the concerns expressed in our answer to question 3.

SMEs of content industry are slowly adopting new technologies and this because of the investments needed for the digitisation of contents and for the use of tools that often request specific technical skills and human resources.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

Revenue in our sector still come mostly from the off line market.

Among the other issues to be addressed and already reported, secure revenues from online market could also be secured with business models suitable to content owners and users, payments models suitable to consumers and DRM systems capable to provide homogenous reporting on the exploited rights.

A major role to secure revenues to right holders is played by the collecting societies whose role is also of great importance, in particular for SMEs, in negotiating the licenses with the users

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

In the on line context, payment still relies on credit cards.

The trust of the consumer might be improved promoting the use of pre paid cards.

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

Today the price system used for the off line distribution of contents is based on the advance of royalties that allow SMEs to invest in new products.



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The same system does not apply to the digital scenario where the content market is still at its early stage and the common practices do not foresee the clause of the exclusivity.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

The Pan-European licensing as fostered by the *European Commission's Recommendation on online music management for legitimate online services* of last 18.10.2005 (2005/737/CE) would generate, in our vision, a market distortion and the concentration of power in few hands favouring only successful and important authors, composers, publishers, producers and artists and damaging a certain category of rights owners, the less "attractive" repertoire and the less powerful CRMs.

The CRMs' aim would lead to attract and obtain repertoire exploitable on a global scale. Therefore niche and local repertoire would be still managed by less powerful CRMs not having the same negotiating clout vis-à-vis to big and powerful commercial users.

We understand that licensing is one of the main issues that users need to face in order to get and enjoy european content but, as already stated in our position on the *Study on Community initiative on the cross border collective management of copyright* by DG Internal Market, before proposing a legislative intervention, the Commission should take more into account the different scenarios in the Member States for the management of related rights.

This analysis would be particularly important with reference to Member States where the management and collection of related rights involves more than one collecting society each of them having a different legal status, different rules, different efficiency and, above all, a different approach to the management of the rights

Last 18 September A.F.I. has been invited, as a speaker, to an hearing organized at the European Parliament in order to discuss the role of the collecting societies in the on line context.

Please find hereunder an excerpt of the position expressed by A.F.I.:

"Speaking of paneuropean licences, we do not agree with the statement that it is fair to promote the creation of big collecting societies which may licence on a paneuropean scale competing between them and this because in our opinion the future scenario would have very negative consequences for the European culture.

I would like to make reference to the Commission staff working document of the European Commission, DG Internal Market, of July the 7th 2005 which has led to the Commission Recommendation of October the 18th 2005. This study presents, as intervention option n. 3, the paneuropean licence in a context of competition between collecting societies and reading it, we come to the conclusion that this kind of licence would help mostly the collecting societies able to attract the most attractive and most commercial repertoires, namely to the biggest and most economically powerful ones.



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We wonder which would be the destiny of less attractive and less commercial repertoires which are often those with the highest cultural content or can be referred to young and not yet known artists whose music is generally produced by small and medium phonographic enterprises.

Are we sure that in the new scenario the collecting societies would be interested in those creations with a lower commercial value? It is realistic thinking that these big paneuropean collecting societies would pursue their own profit: are we sure that they would be interested in repertoires which do not guarantee a profitability?

We wonder if such a result would be consistent with art. 151 of the Treaty which requests the Community to promote cultural diversity. The answer in our opinion should be negative.

We think therefore that the paneuropean licence cannot be the only outcome of this debate.

We appreciate the attention given by Mrs Levai, rapporteur for the Legal Committee for this file, to this aspect and we rejoice at the content of the speeches of Mr Maier, Mr Lehne and Mr Medina Ortega last 11 September during the exchange of views in the Legal Committee about this dossier. We are glad that the Culture Committee too has emphasized the importance of cultural diversity.

The role played by national collecting societies which protect repertoires and artistic creations which are the expression of the traditional culture of a country no matter if they have or not success at an international level and the economic revenue that they may generate should be safeguarded: we think that denying this would lead to a severe loss for the cultural diversity in the European Union.

Competition should not be seen as an absolute principle but as an element which should be balanced with other elements when there are other values which deserve to be defended.

Art. 151 paragraph 4 of the Treaty requests the Community to take in account the cultural aspect in any action, but I would like to draw your attention also to the principle stated by art. 87 d) of the Treaty.

It admits that state aids (and so a distortion to competition) may be lawful, in case these aids are aimed at promoting culture, provided that these aids do not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

We think that defending cultural diversity is not contrary to the common interest, it is completely consistent with it and the Treaty confirms that cultural diversity is a value.

We do not want to give the impression that we are scared of the future, not at all. We know that paneuropean licence may give good development perspectives to the music's world but it is a tool which should be managed and not simply left to competition.

How could we reconcile these two dimensions, the paneuropean one and the territorial one?

Under this point of view, we would like to express some remarks.



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Firstly we would like to eliminate any misunderstanding stating that we are not at all against new agreed rules which may improve the governance of the collecting societies.

As far as the paneuropean licence is concerned: if we can think of a new kind of licence model which could be issued by the territorial collecting societies, why not thinking of a single collecting society shared by all the territorial collecting societies and charged of the exclusive task of managing the digital rights at a paneuropean level?

We are fully aware of the fact that this hypothesis should be analysed according to art. 86 of the Treaty but we want to be coherent with our statement that the principle of cultural diversity, in our opinion, can influence the principle of the free competition.

In this way all the European repertoire may be licensed at a paneuropean scale without running the risk of discrimination between more and less attractive repertoires.”

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

No, we do not see any problem which causes big shortcomings to how the sector works. Of course efficiency and efficacy can always be improved.

The digital scenario obliges to think to the market on a global scale but under this point of view please see our answer to question n. 14.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

The distribution of content involves the remuneration of the right holders and therefore it must be taken into account.

Regarding the relation between DRM interoperability and compensation for private copy this is an outstanding issue.

A.F.I. holds that the point of reference in this debate should be the international treaties subscribed by the European Community and in particular the WIPO Performances and Phonograms Treaty (WPPT) approved by the Council by mean of the decision of 16 May 2000.

Article 11 of the Treaty disciplines as follows:

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

Article 16 on the other hand disciplines the limitations and exclusions and rules as follows:

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they



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provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

The regulation given by both the articles makes clear the right of producers of phonograms in relation to any direct or indirect reproduction of the latter.

This is the context where the debate about copyright levies should be set.

Our concern relates to the positions advocating the phasing out of so called private copying “levies”, without to date any effective alternative, being DRM still to be developed.

We are extremely worried about the consequences for creative content right holders who would not get any compensation for the private copying of their works.

The contradiction with WPPT Treaty is clear.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

The legal and regulatory barriers which might exist are due to the decision of the European lawmaker to harmonise just in partial way the European copyright's discipline.

On the other hand art. 30 of the Treaty CE allows Member States to take some measures in order to protect commercial and industrial property.

“The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

In addition we would like to underline that the related rights are too often not taken in the due account both at national and European level. The definition of the “Producer of Phonogram” as stated in WIPO Treaty and in the EU Directive 29/01 clearly states to whom related rights must be granted and it has a considerable meaning especially as it take into account the way related rights could be exploited in the digital environment. The great opportunity to exploit a single “track” in the digital market on a worldwide basis added to the loss of importance of the “physical recording ” have made it clear that the related rights require more consideration and that owner of the related right is the person that invests in promoting “creativity”.



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Networks

20. The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

We support neutrality.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between "small" and "big" ones?

Piracy is harmfully damaging the music sector. In Italy it is an issue also in the off line context. There are major efforts against piracy undertaken by FPM the Italian federation against piracy and also new educational initiatives supported by EMCA – European Music Copyright Alliance – of which A.F.I. is founder member, that aims at promoting among young people awareness campaigns on the creativity world and their rights.

"Unauthorized" means not allowed and so unlawful in relation to the exclusive right of reproduction recognized by the WPPT Treaty.

Article 11 of the WPPT Treaty disciplines as follows:

"Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form."

No distinction should be made between "small" acts of piracy and big "acts" of piracy. Piracy is piracy and is unlawful.

22. To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

A.F.I. is member of EMCA – www.emcaweb.net – whose partner in Italy are SIAE (Italian authors and publishers society) and IMAIE (Italian artist's rights collecting society). EMCA Italy is committed in the organization of several events targeted to middle school's students to promote the "Respect of Creativity". A major campaign that will involve more than 11.000 middle schools is being launched in these days.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?



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As already clarified above, A.F.I. is partner of AXMEDIS project (www.axmedis.org) that will develop a legal, open and interoperable platform for the distribution and exploitation of content through a P2P network at business to business level.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

Please see the answer n. 23 about the AXMEDIS project. As soon as interoperable, secure and effective DRM will be available they will become a great means to manage, promote, license, protect and distribute content online.

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

As far as we know “robust DRM system” do not exist and even most recent and technologically advanced DRM systems are cracked by hackers.

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

No, DRM are not widely used in Italy.

It is true that one of the main issues in the debate now in course is also the need of user friendly DRM.

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

Copy protection measures are meaningful if linked to interoperable DRM

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

They can be useful to promote content and services .

What role for equipment and software manufacturers?

31. How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?



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We think that manufacturers are already taking advantages from this framework considering the increasing number of persons buying devices to play, share, copy and buy content. We do hope that in the next future their strategy will include, as a target, the increase of the number of persons that enjoy contents legally acquired.

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

National government should not intervene in driving the future business models. However they must play a major role in fostering the cooperation between technologies and content owners: the interests of all the involved parties should be taken into account.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

AXMEDIS can represent a great chance since the Consortium (that include European content owners, aggregators, distributors, providers, ICT developers, broadcaster, collecting societies, consumers' electronic, research centres and universities) is working cooperatively to create the first European open and interoperable platform for the legal distribution and exploitation of all types of cross media content on a global scale.

A.F.I. will be glad to discuss further the content of this document with the services of the European Commission.