representing the recording industry worldwide

IFPI RESPONSE TO THE COMMISSION QUESTIONNAIRE "CONTENT ONLINE"

13 October 2006

IFPI represents the recording industry worldwide. We have over 1,400 members, including major recording companies and all sizes of independents. IFPI itself does not deal with digital content, so we comment in this questionnaire from a general industry perspective. We are happy to provide any further information that would be useful.

EXECUTIVE SUMMARY

The recording industry is at the forefront of developing the market for creative content and services online. Global retail sales of recorded music (physical and digital) totalled €27 billion in 2005. In 2005, worldwide digital music sales totalled €1.6 million at retail level, or 6% of overall music sales. Digital sales continued to grow strongly in 2006.

Online distribution gives record companies the possibility to make a wider variety of catalogue available in a way not possible in the past. Record companies are investing heavily in the opportunity provided by the Internet to offer consumers access to songs from local, national and international artists in a wide range of new and flexible ways. With various partners, the recording industry has created entirely new services, such as online pay-per download, subscriptions and rental as well as mobile downloads, ring tones, ring back tones, voice tones, alerts, and 'made for mobile' video clips. On the Internet, there are over 300 online stores, some offering music video as well as music. Music tracks and videos are offered individually for 'cherry picking' by consumers and are also offered as packages in the form of virtual albums and as exclusive online 'enhanced' offerings. Further novel business propositions include advertising-supported models, paid preload of content to mobile handsets and memory cards as well as legitimate, licensed P2P systems.

The basic legislative framework put in place by the Commission in the field of copyright and e-Commerce contributed greatly towards developing a thriving online environment for creative content. This framework is fundamentally satisfactory, subject to some updates or adjustments.

Some of these adjustments require legislative intervention, while others could be resolved through technical or market solutions. For the recording industry, the main issues are: (1) strengthening the fight against online piracy and in particular ensuring effective cooperation from ISPs; (2) supporting the development and deployment of interoperable Digital Rights Management systems (DRM) and the establishment of a real European market for online licensing; (3) enhancing the value of performers' and record companies' rights by extending term of protection of copyright to an equitable level and granting exclusive rights for communication to the public; and (4) promoting education and public awareness about the value of copyright.

We are asking for the support of the Commission and Member States in these important areas. In this respect, it is important that any initiatives taken by the Commission services are consistent and do not contradict each other.

INTRODUCTION

The recording industry is a dynamic, successful, innovation-driven and risk-taking business whose achievements and future success depend critically on adequate intellectual property protection. We are an industry that entertains, innovates, employs, invests, drives economic growth, contributes to cultural diversity and pioneers the knowledge economy.

Intellectual property is central to the future development of the EU and global economy. It is the basis for rewarding creators for their work and is the spur to innovation and creativity. These are assets that are key to the future economic and cultural health of our society and to the post-manufacturing economy.

Intellectual property remains one of the few areas where the EU can still be genuinely competitive on a global scale. At a time when Europe is losing jobs to outsourcing in Asia, where manufacturing costs are low, creative industries based on intellectual property generate an increasing percentage of GDP in Europe.

Europe's creative sector is also competing with the US. Creative industries are looking for EU policies that nurture Europe's creative community. The US is actively promoting and protecting its interest in the knowledge economy. It is vital that Europe keeps pace.

Intellectual property and unlocking economic value

Creative industries based on the value of intangible services and rights – industries including music, film, entertainment, design, software and others – are today widely acknowledged as the key to future economic growth and employment. The global value of media and entertainment industries now accounts for over 7% of global GDP of a sector worth US$1.3 billion (€1 billion) in 2005 and forecast to grow to US$1.8 billion (€1.4 billion) by 2010. The EU media and entertainment industries account for 28% of the global industry (€295 million) (source: PWC Global Entertainment and Media Outlook). This is a fast-growing, dynamic sector, one of the most successful globally, providing millions of jobs and bringing huge benefits in particular to the EU economy.

Creative industries, and the intellectual property rights that give value to their work, are also driving the digital era. They are the source of the commercial content demanded by consumers, without which the most exciting digital distribution technologies are redundant. Intellectual property is the key to getting this content to the market, benefiting the consumer and unlocking economic value.

Copyright underpins the music industry and diversity of choice for consumers

Intellectual property protection underpins the business of the music industry globally. Copyright is the means by which creators and innovators can be rewarded for their works, and thereby provides the incentive for creative business. Record companies' business model is based on what is best known as a "virtuous circle of investment" by which the revenues from a small number of successful recordings finance the substantial costs of developing, promoting and marketing new talent. The recording industry worldwide spends about 15% of its turnover on artists and repertoire – more than almost any other industry.

The role of the record company as an *investor* in music cannot be overstated. No other sector in the music industry, from publisher to retailer, invests on any similar scale nor shoulders the substantial risks involved. No other sector is as dependent on having its content properly protected and its investments properly rewarded. None of this would be possible without effective copyright protection.

The transition to a digital music business is working

The recording industry is today successfully transforming itself into a digital business. It is developing multiple revenue streams and flexible distribution, and is proactively licensing music in as many legitimate formats and channels as possible. Digital technologies have opened up diverse new ways of reaching consumers. Music fans today can access music through online and mobile platforms, purchase music via a-la-carte or subscription payment methods, listen to on-demand radio via the internet or mobile phones, buy single tracks, albums or bundled content to name a few examples. This is certainly more choice for consumers compared to a decade ago when recorded music was available primarily on CD and radio. There are well over two million tracks available from more than 385 online services, 235 in Europe alone, selling at an average cost of less than one Euro per song – less than the price of a cup of coffee or a bus fare in most European countries. More than any other industry selling creative content in the digital marketplace, the music industry is meeting the demands of consumers for flexibility and convenience in their experience of acquiring music.

The digital music market has grown quickly in the last three years, nearly tripling in value in 2005. The value of the digital music market at retail level is estimated at US$2 billion (€1.6 billion), or 5.5% of the industry revenues. This is generally expected to grow significantly over the next few years.

The existing intellectual property regime is key to this emerging market. Existing copyright laws largely provide the appropriate legal protection, allowing record companies to use technological measures to distribute and protect their creative works. They make possible the use of digital rights management (DRM) systems which help flexibly tailor music offerings to consumer demand. DRM is an essential building block of the digital music economy – and it is working, via services like iTunes and Napster, in the market *today.*

The copyright regime is also helping the recording industry protect its creative content and tackle piracy. Adapting its business model to the digital era has been an extraordinarily complex and difficult exercise for the music sector, and one in which copyright protection has played a vital role. Between 1999 and 2003 and explosion of free unauthorised music saw the number of unlicensed music files on the internet jump from less than one million to more than one billion. In 2005 alone, it is estimated that 20 billion songs were illegally exchanged or downloaded globally (source: IFPI Piracy Report 2006).

At the same time a series of network operators have built businesses based on copyright infringement. Actions against illegal file-sharing have played an important role in educating consumers and creating the space for new legitimate services. Even more important, a series of important legal judgments in 2005, including against Grokster and Kazaa, has significantly improved the legal and commercial environment for the emerging legitimate digital market internationally.

Education has played a key role too. Over the last three years record companies have rolled out an internationally-coordinated programme of education initiatives aimed at young people, parents, businesses and internet users. This is an area with a great deal of undeveloped potential for partnership with government, particularly in incorporating copyright education into the school curriculum.

QUESTIONS

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.)?**

The recording industry is at the forefront of developing the market for creative content and services online. Global retail sales of recorded music (physical and digital) totalled €27 billion in 2005. The recording industry is driving new digital models into the mainstream both online and via mobile. In 2005, worldwide digital music sales totalled €1.6 million at retail level, or 6% of overall music sales. These revenues split approximately 60:40 across online and mobile platforms. Digital sales continued to grow strongly in 2006.[1]

Although the core content remains the same, i.e. sound recordings and music videos, the online market enables the recording industry, in collaboration with numerous partners, to create entirely new services, such as online pay-per download, subscriptions and rental as well as mobile downloads, ring tones, ring back tones, voice tones, alerts, and 'made for mobile' video clips. On the Internet, there are over 300 online stores, some offering music video as well as music. Music tracks and videos are offered individually for 'cherry picking' by consumers and are also offered as packages in the form of virtual albums and as exclusive online 'enhanced' offerings. All these services are described in more detail under Question 8. Further novel business propositions are emerging. These include advertising-supported models, paid preload of content to mobile handsets and memory cards as well as legitimate, licensed P2P systems. Examples of some of these models are already live in the marketplace.

Online distribution gives record companies the possibility to make a wider variety of catalogue available in a way not possible in the past because of limited capacity in record stores. Record companies are investing heavily in the opportunity provided by the Internet to offer consumers access to songs from local, national and international artists in a wide range of new and flexible ways.

Advances are also being made in the offline world. The recording industry is cooperating with hardware manufacturers on the development of next-generation digital disc technologies (such as DualDisc, BluRay, UMD and others) as well as continuing to drive what is still the mainstream of digital content delivery: the CD and the DVD Video. New in-store kiosks are also being used by the recording industry to offer 'on-demand' burning of discs or loading of digital music players in a retail store space.

Moreover, the recorded music industry is the engine helping to drive a much larger and more diverse music commercial music sector. This includes live performance, online and high street retailers, ringtone vendors, audio equipment manufacturers, radio advertising revenues, performance rights collections, music magazine revenues, radio subscriptions, portable digital music players and music publishing revenues. This broader music sector is worth more than €80 billion worldwide and shows music to have an economic importance that extends far beyond the scope of record sales.

2. **Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.**

No comment

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.**

The music industry has pursued an active policy of promoting music any time, any place, any where – so long as it is properly licensed and paid for. We have seen a great rise in new content services online. Consumers have shown they are ready and willing to take up these services, and the recording industry will continue to develop new and attractive consumer offerings. Of course the online music market is still in its early stages, and the technical and business environment is evolving daily. In this environment, it is critical that regulators provide an appropriate legal framework to enable the market to continue to develop.

The proposals put forward by the European Commission in the field of copyright[1] have been invaluable to create and promote creative content online. IFPI considers that the core legal framework underlying the online music market, in particular the Copyright Directive[2] which sets out the necessary rights and the protection of technology in the digital environment is generally satisfactory, sufficiently harmonised at EU level, and provides in general an acceptable degree of legal certainty as well as flexibility for the future. Efforts should concentrate on the proper implementation and enforcement of this vital framework if a true commercially viable digital content market is to emerge.

Another important instrument is the EU e-commerce Directive[3] which establishes basic rules for online services, including on the responsibility of online intermediaries. This issue is discussed in more detail below.

A number of problems nevertheless remain, relating primarily to fighting piracy effectively in today's online environment, improving the legislative framework for copyright, enhancing the use of technology, and increasing public awareness of copyright. Some of these problems require legislative intervention, while others could be resolved through technical or market solutions. IFPI seeks the support of governments at national or EU level in improving the legal, business, and technical environment for the music sector on these issues.

Fighting piracy in the online environment:

(1) **ISP cooperation.** The fight against online piracy is a top priority for the recording industry. The recording industry needs improved cooperation of ISPs in order to effectively address online piracy. It is essential that ISPs act responsibly and in particular enforce their contractual terms and conditions allowing them to suspend or terminate their contracts with subscribers who infringe intellectual property rights (see further question 21)

[1] References to "copyright" throughout this paper include both copyright and related or neighbouring rights.
[2] Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information Society
[3] Directive 2000/31/EC of the European parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

(2) **Liability for encouraging and facilitating infringement:** It is necessary to ensure clear liability for those that encourage and facilitate infringement, such as unlicensed P2P services. In those countries where the basis for such liability is not clear, it should be clarified (see further question 21).
(3) **Criminal sanctions and international enforcement.** The proposal for harmonisation of criminal sanctions for intellectual property rights recently submitted by the Commission[4] should make clear that the definition of a criminal offence includes infringements that cause substantial harm to right holders. Similarly, the Commission should pursue actively improving enforcement against infringement taking place in third countries such as in Russia or China (see further question 17).

Improving the legal and commercial framework:
(4) **Licensing.** The EU digital market is lagging behind the US. Record companies have great difficulties in obtaining pan-European licences from authors' societies for online and mobile uses. Territorial restrictions and discrimination among users are the main problems. Efficient dispute resolution mechanisms are also lacking at national level (see further questions 14 & 15).
(5) **Term of protection.** The term of protection for sound recordings should be extended within Europe from 50 to 95 years to match the term in the U.S. In an online global market, performers and producers in the EU are at a substantial disadvantage compared with the US and many other trading partners. Consistent longer terms of protection will facilitate the dissemination of works into a larger number of markets and provide an incentive for the development of new ways of getting back catalogue, specialised genres and niche music to consumers (see further question 7).
(6) **Exclusive rights in respect of broadcasting and communication to the public.** Performers and record producers should be granted exclusive rights in relation to broadcasting and communication to the public throughout the EU and indeed in all countries. The lack of exclusive rights makes it impossible to negotiate proper licensing terms with users and in particular to ensure the application of effective technological measures to prevent abuses (see further question 17).
(7) **Points of attachment for performers and sound recordings.** Currently, Member States apply different criteria to determine the protection of sound recordings on their territory. This means that performers and phonogram producers in the EU do not enjoy in some countries the rights recognised by EU legislation, both offline and online. The points of attachment should be harmonised in the EU on the basis of all three criteria provided by the Rome Convention (nationality, fixation and publication).
(8) **Stream ripping.** It is critical to ensure that national laws do not sanction the use of new stream ripping capabilities to selectively copy individual sound recordings from streamed programmes, making time-based transmissions into a substitute for purchasing permanent copies (see further question 11).

Improving the technical environment:
(9) **Interoperability.** Achieving interoperability and enabling consumers to make flexible use of content that they have purchased online is a key goal of the recording industry. While we do not support government regulation in this area, governments can assist in our efforts to engage DRM providers in cooperative discussions, towards a solution that achieves interoperability without compromising the protection of content or the security or integrity of DRM systems (see further question 10).

[4] Proposal for a Directive on Criminal Sanctions for IPR Infringements, 26 April 2006

Improving the perception of the value of copyright:

(10) **Increase public awareness of copyright.** Governments should assist in increasing public awareness of the meaning and value of copyright, including the scope of rights, the nature of exceptions and the beneficial functions of digital rights management. This should include incorporating copyright into the school curriculum (see further question 22)

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?

The recording industry believes that the current legislative and legal framework – comprising laws regarding consumer protection, data protection, intellectual property, competition, e-commerce and financial protection – generally provide a comprehensive and adequate set of protections for consumers and the public interest.

In the context of copyright law, users' interests are taken into account through a framework of exceptions to copyright (for libraries and social institutions, handicapped, education and research, ephemeral recordings for broadcasting, etc). The Copyright Directive provides a detailed list of such exceptions. It also specifically addresses the relationship between the use of technology to protect rights and the continued viability of such exceptions. When implementing that directive, the different Member States have set up procedures by which the beneficiaries of particular exceptions can continue to enjoy them in case right holders do not take adequate measures to accommodate them voluntarily.

Data protection legislation also protects the individuals' interests adequately, including in the online environment. In this sense, services in the field of entertainment are not different from any other commercial online services (financial, marketing, travel, sales, etc). Data protection legislation applies fully to the new digital services. Like other commercial operators, recording companies use the Internet for marketing purposes. If they collect and use personal data (directly or via partners), they do so in full compliance with data protection legislation.

The possibilities offered by the online environment and by technology used to manage rights allow businesses to respond to the needs of users by offering varied services at flexible price points. This has been proved by the remarkable uptake of these legal online music services by consumers. In the last two years, legitimate music online has moved from being a niche proposition into the mainstream of consumer life. In 2005, the number of legitimate music download services reached 335, up from 50 in 2003. The recording industry is fully committed to the further development of mainstream marketplaces online and on mobile.

Consumers need to be able to have confidence in and be able to rely upon these new channels and the commerce environment around them. Music delivery services need to be easy to use, offer a wide range of content on clear and competitive terms and provide flexibility and choice. The environment also extends to the commerce and distribution systems – the online store fronts - which must provide for proper safe, secure handling of payment and account details, proper protection of personal data and freedom from viruses, spam and the like.

This is exactly what is provided by leading online and mobile distributors such as Apple iTunes, Napster, Three and a host more. The most successful services are now reaching mainstream, e.g. with iTunes passing the billion track mark during 2006.

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?

Interoperability is good for the market and for the development of online services. It is desirable that users should be able to pick and choose among services and devices and that the services and devices work seamlessly together. At the same time, interoperability must not be achieved at the expense of the security of technology and of the protection of the content.

At this stage, IFPI believes that Interoperability solutions are best left to the market in the first instance rather than imposed through legislative interventions. The current legal framework at EU level is adequate. We of course welcome the support of governments to encourage DRM providers to engage with the recording industry, and each other, to develop interoperable products and services. [See further answer to question 10].

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?**

The development of legal online services has led to a proliferation of choice and supply for a culturally diverse range of music. Surveys of online music users have consistently found that consumers feel exposed to a wider variety of music online (58% or respondents said that, for example, in a Gartner survey December 2005). Services such Napster and e-music are actively promoting local music repertoire. Local artists are recommended to consumers by filter technologies, by consumer-to-consumer tools or by editorial / web radio. As legal online services continue to develop there are increasing possibilities to offer niche, specialist interest and local music to consumers.

Moreover, copyright protection for online content is itself an engine to enhance such diversity. It provides economic incentives to create share and circulate works. Unlike other forms of intellectual property, it can benefit individuals as easily as business entities because authors gain protection automatically, without the need to seek it from the government or meet difficult criteria. And the online environment levels the playing field even further; it enables digital distribution of local repertoire around the world, without the need to invest in physical production or distribution facilities and services. Thus, for example, aboriginal communities have been able to gain access to a global market for their art by establishing a website.

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.**

Despite some shortcomings, the EU has a good framework of rights and inherent cultural diversity. However, while the online music market is growing steadily in Europe, the US is still leading the digital revolution with 18 per cent of recorded music sales now being made through digital channels. Digital music sales in the US increased by 84 per cent to US$ 513 million (€410 million) in the first six months of 2006. This figure compares to US$156 million (€126 million) digital music sales in the EU in the first half of 2006. Digital sales only account for an average of 6% of overall music sales in the EU compared to 18% in the US, although markets such as the UK, Italy and Sweden have

reached 8%, 9% and 7% of total music sales respectively.

In IFPI's view, there are two main weaknesses in the EU legal and regulatory framework that contribute to this difference:

1. **Complicated licensing regime.** In the US, record companies are able to take a licence from authors and offer fully cleared product to the service providers who therefore have an "all rights included" license. In contrast, authors' societies in Europe have not agreed to this. Second, in the US, there is an arbitration system for royalties which is not available in many territories in Europe. Finally, the US market consists of one unified territory for clearance purposes, while in Europe, it is not yet possible for users to obtain multi-territory, multi-repertoire licences for Europe-wide exploitation of authors' rights. The shortcomings of the EU licensing situation are further explained under Questions 14 and 15.

2. **Shorter term of protection**. The EU provides for a minimum standard of 50 years' term of protection for sound recordings, which places European performers and producers at a competitive disadvantage to their counterparts in other countries with longer term. The US Congress in 1998 extended term of protection for works for hire to a basic term of 95 years. Many other countries also provide for a longer term than the EU, including: Australia (70), Singapore (70), Brazil (70), Mexico (75), Colombia (80), Chile (70), Peru (70), Ecuador (70), Honduras (75), Guatemala (75), Nicaragua (70), Turkey (70), Morocco (70), Bahrain (70), India (60) and Venezuela (60). Europe is now trailing behind a worldwide momentum towards longer terms of protection.

It should be noted that the recording industry invests up to 17 per cent of its turnover in developing new talent. Record companies use income from existing recordings to produce and market new recordings. A longer term of protection will therefore help to finance continued investment in new recordings and encourage creative uses of back catalogue online.

Uniform longer terms of protection will facilitate the dissemination of works in a global online marketplace. Conversely, retaining a significantly shorter term of protection in the EU will create enforcement problems, particularly in the online environment, where recordings that have fallen into the public domain in Europe could be streamed across borders to countries where the recordings are still in copyright.

Moreover, the economic consequences of extending term of protection to 95 years, would be significant. Revenue generated by sales of recordings between 50 and 95 years after their release is a significant fraction of the revenue that would be generated in the first 50 years. According to a recent analysis carried out by Professor Stan Liebowitz of the University of Texas, term extension to 95 years in Europe would lead to an increase of industry revenue streams by 3% to 10% at current values. Since record companies use income from existing recordings to produce and market new recordings, this should have a positive impact on the production of new works.

The shorter length of term in the EU affects the value of European record companies, as well as hindering their ability to compete in the online global market. The value of a record company is in the copyrights it controls and its ability to continue to derive value from those copyrights and to continue to invest in the development of new copyrights. If two companies have similarly aged repertoire bases, but one operates in and derives the bulk of its revenues from a market with 95 years protection and the other is in a market where protection is only 50 years the two companies will not be equally valued. The company operating in the market with extended protection may be considered to have a higher value than the other company

Creative industries based on intellectual property generate an increasing percentage of GDP in Europe. At a time when Europe is losing jobs to outsourcing in Asia where manufacturing costs are low, the online content industry remains one of the few areas of true innovation where the EU can still be genuinely competitive. European music producers and performers have the talent and ability to compete in the global online market place, but need to be able to operate on an equal footing with other countries. The current disparity in term of protection between Europe and other markets doesn't allow European record companies and performers to compete on a level playing field.

Finally, we note that the copyright sector has consistently been treated as a top priority on the economic and trade agenda of the US authorities. The various US Governments have consistently recognised that copyright-based industries are a key driver for deriving income and have helped the entertainment sector to develop. This is particularly marked in the way in which the US pursues strong and effective IPR protection for its industries in other regions of the world.

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?**

The recording industry is experimenting with many new business models in order to reach consumers. These are described below and include a la carte downloads, subscriptions services, satellite radio, online streaming, mobile music, and P2P networks. Some of these models are being widely taken up by the market, while others are in their infancy. Similarly, some services are offered on a pan-European basis, while others may start on a national scale. It is necessary to have a supportive legal and technical environment. Our sector needs to have flexibility and the choice of which business models make the most sense; no one-size-fits all model should be imposed.

A typical major record company today has between 300 and 400 separate business partners across online and mobile channels. The music industry invests in recording, digitising and marketing some 100,000 albums a year. This is a highly complex undertaking, with the required digital business infrastructure costing many millions of dollars in investment in new technology and music digitisation together with the large scale employment opportunities of skilled, creative and technical staff.

Digital channels range from ring tunes to satellite radio and vary markedly in popularity from country to country. The preferred online purchasing method for the time being is a-la-carte download. The best known download platform is the iTunes Music Store which offers a catalogue of three million tracks via internet download. There are also over 385 other online music stores, 235 in Europe alone (see the IFPI Digital Music Report for more information[5]).

Subscription services, based on a monthly or fixed fee rather than a "pay-per-download" payment, are an important delivery channel. Worldwide there are 3.3 million subscription service users, more than double the 1.5 million at the end of 2004. Music brands like Napster, Virgin and HMV have recently begun to offer subscriptions in Europe.

[5] Available at http://www.ifpi.org/site-content/press/20060119.html

The recording industry has also created markets for online streaming (via international agreements for internet simulcasting and webcasting). Digital radio in various forms, both terrestrial and satellite, are carrying digital music to listeners in Europe, the US and other regions and in several cases the recording industry is cooperating with broadcasters on trials for digital delivery of downloadable tracks via digital broadcast systems.

In the mobile space the recording industry is developing completely new markets, with real tones, ring-back tunes, voice tones and a whole variety of 'made for mobile' content. The mobile music market has great growth potential. It is driven by several factors – the massive installed base of mobile phones; increasing and improving music functionality; and relatively easy and flexible payment options. Within the EU, mobile subscriber numbers top 460 million, or 27% of the global total, and mobile penetration exceeds 100% in at least half of all Member States. The development of mobile handsets and the transition of networks from analogue to digital have been key to create the early mobile music market. 3G usage in Europe is growing and is forecast to reach 40.4 million mobile subscribers by the end of 2006 (source: Jupiter).

"Ring tunes", the first 'real music' product and natural successor to ring tones, have rapidly become the largest mobile music segment by value and will overtake polyphonic ring tones, in volume terms, by the end of 2006. The European mobile music market was worth nearly US$80 million in 2005 (€64 million), growing to US$68 million (€55 million) in the first half of 2006 alone. In markets such as France, Italy and Spain mobile is the most popular platform for digital music, accounting for 62%, 76% and 78% of overall digital sales in these markets respectively.

New opportunities lie in the exploitation of live content via handsets, song recognition services, digital audio broadcasting (DAB), visual radio and mobile TV. Ultimately, and with the right protection in place, the mobile music market will allow artists both to reach a wider audience and to win the younger audience by reaching them in new ways.

Advances in technologies to help filter illegal content and legitimise the distribution of music on p2p networks – combined with the improving legal environment – have led to various projects to develop a legal model for p2p. Further details are given in answer to question 23.

The digital music market is today characterised by constant announcements of new ventures and experimental business models. In October 2006 attention is particularly focused on the following projects:

> MYSPACE - MySpace, the social networking site, has announced plans to sell unprotected music tracks from the three million undiscovered bands that have profile pages and small labels that want to raise awareness of their material. Artists will also be able to sell material from their own stores on their MySpace pages.
>
> SPIRALFROG - SpiralFrog is a new service that will offer advertising-supported legal downloads of audio and video content licensed from the catalogues of record labels. Rather than charging directly per download, the service relies upon advertising revenue.
>
> URGE - Urge is a new service from MTV Networks that says it will "make it easy to enjoy, explore and get the music you want for your PC or portable music player". The service says it offers "access to over two million songs, 18 music genres, countless styles and exclusives from MTV, VH1 and CMT" for a basic monthly fee of US$9.99. Urge also offers "hundreds of play lists and radio stations, music feeds, blogs, interviews and feature stories from leading music voices." The

service is currently available in the US but is expected to be launched in the EU as well.

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

Third party analysts and industry participants agree the digital music market is set for healthy growth in the next few years.

IFPI does not have an official forecast. There are a number of forecasts for the European online music market (incorporating all digital revenues) published by independent analysts. We can mention for instance Jupiter (Europe):

All values in USD million, retail
Jupiter (Europe)

	2005	2006	2007	2008	2009	2010
Online	237	475	709	986	1,283	1,590
Growth		101%	49%	39%	30%	24%

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.

As mentioned under Question 5, the lack of interoperability between different DRMs can be an unwelcome marketplace barrier. Interoperability is a very high priority for the recording industry. We believe it is important for consumers to be able to use content that they have acquired legitimately from any online service, in a flexible manner, on different devices that they own. At the same time, interoperability cannot be confused with the removal or the circumvention of technological measures. It is essential to ensure that interoperability is not obtained at the expense of content protection or the security and integrity of DRM systems. Weakening or removing the usage rules or the technological protection provided for content in order to achieve compatibility of devices and services is not a viable solution, and would undermine the economic basis of many leading digital services.

Interoperability can be achieved without prejudicing the protection of DRM. This is true even when proprietary DRM are used, as long as DRM providers agree to allow their systems to interoperate.

In the current market for online music services, there are a number of different, competing DRM technologies in use. For example, some services use Microsoft's PlaysForSure DRM and Apple uses its Fairplay DRM. It is desirable to ensure that healthy competition between DRM remains.

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IFPI and the recording industry are working to improve interoperability by licensing content onto all secure platforms and by contributing actively to cross-industry standards development. One example of such standards development is the work of the *Coral Consortium*, an open membership body which brings together content providers (including record companies and movie studios), service providers, consumer electronics manufacturers, and other technology companies. Coral's aim is to create specifications for an open, voluntary framework to address DRM and format interoperability issues. Rather than attempt to standardise DRM itself, the Coral Consortium has created an interoperability framework, using, where possible, existing open standards. Within this framework, content can be consumed on systems that use different DRM, but in a secure

fashion. The aim is to allow proprietary DRM (as well as open standard DRM if they emerge) to compete and evolve, while shielding consumers from the effects of incompatibility. See www.coral-interop.org.

We believe that voluntary market solutions in the first instance are preferable to government intervention. However, government can play an important role to call upon and encourage technology providers to engage with content providers in discussions about interoperability.

Another technical issue is the lack of support from the IT and hardware sectors for developing DRM. This point is developed under question 31.

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?

As stated above, the recording industry believes that the exercise of exclusive rights backed by DRM is the best way to develop business models and securing adequate revenue streams. The online market is developing but a number of players have a role to play to help developing and securing the revenue chain for creative content services online. These players are in particular the internet service providers and the collecting societies.

The recording industry encounters a number of problems in securing revenue streams online:

1. Piracy.

A main difficulty in developing revenue streams on the Internet is the high level of piracy. The industry is investing constantly in online services but the commercial viability of those services is threatened if they have to compete with massive dissemination of music without authorisation - and without payment. The recording industry's business suffers massive losses from offline and online piracy each year. On the Internet, IFPI estimates that almost 20 billion songs were illegally downloaded in 2005 (based on consumer research in 10 music markets including research in the UK by Ipsos, Spain by the Consejo de Investigacion de Mercados del Entretenimiento, France by IFOP and Germany by GfK).

IFPI is therefore also fighting online piracy and needs the improved cooperation from ISPs, as explained in detail in our answer to question 21. An important issue in this respect is that identifying data concerning online infringers must be available, both for criminal and civil proceedings. Data protection must be respected, but at the same time, it cannot serve as a shield to hide illicit activities.

2. Licensing

As explained more fully in response to questions 14 and 15, IFPI's member companies and business partners have difficulties in obtaining multi-repertoire, multi-territory licences from authors' societies, due to the territorial restrictions contained in such licences. In addition, the authors' societies grant online and mobile licenses only to the retailers providing the services, and refuse to grant such licenses to record companies. As a consequence, record producers are deprived of the possibility of offering an "all rights included" product to on-line service providers. It should be stressed that the record companies do not aim to "reserve the market to themselves" by being the exclusive licensees of the authors' societies. What they wish is to have the possibility to offer an alternative product to service providers and encourage lower barriers to entry for new business models on an ongoing basis (see further under question 17).

3. Lack of exclusive rights for communication to the public and broadcasting for performers and music producers.

The lack of exclusive rights for a number of transmissions makes it difficult, and in some cases impossible, for performers and record producers to negotiate appropriate conditions and terms for a number of digital services such as digital broadcasting or some streaming services. In particular, it makes it virtually impossible to require the use of technological solutions in such services in order to prevent abuses (see further under question 17).

4. Stream ripping.

"Stream ripping" is the process of converting streamed content into a stored file. Stream ripping devices and software allow the user to convert linear sources such as radio or internet webcasts, which are intended for transient and non-interactive listening, into permanent copies of recordings available on demand on the listener's equipment.

Advances in digital recording technology, particularly software or devices designed for recording digital broadcasts, enable individuals to automatically isolate individual sound recordings that they wish to copy from a digital broadcast. Using these stream ripping services, the recording of different parts of the broadcast containing the desired tracks can then be "cut and organised" to create a database of sound recordings in a digital format such as mp3.

This represents a significant threat to music industry revenues. The most advanced stream rippers allow users to automatically split streamed content into individual songs, each labelled with artist and track information, creating massive song libraries that substitute for legitimately purchased digital downloads or physical copies. Moreover, stream ripping applications and devices are becoming ever more sophisticated, and their popularity is likely to increase.

Stream ripping applications that allow listeners to enjoy for free internet streams that would otherwise be available only through on-demand services are also becoming more common.

The threat posed by the ripping of internet streams is at present more prevalent than the threat from digital radio since (i) computer software is generally more sophisticated and flexible than hardware devices; (ii) computers have internet connections allowing for metadata to be supplied automatically from online databases operated by entities such as Gracenote, FreeDB and MusicBrainz; (iii) users have access to an almost unlimited number of sources of internet streams, including both licensed and unlicensed webcasts; and (iv) the quality of internet streams may in some cases exceed that of digital broadcasts.

We need the support of the Commission to ensure that national laws do not endorse or permit the use of new stream ripping capabilities to selectively copy individual sound recordings from streamed programmes, making time-based transmissions into a substitute for purchasing permanent copies.

Comments on **private copying levies and compulsory licences** are provided under question 16.

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?

Most online music services rely in whole or in part upon third party payment service providers to receive payment from their customers. These range from services offered by credit card companies directly (albeit delivered via a bank) to 'aggregators' that provide a suite of payment facilities (e.g. across all major credit and debit cards) to a site allowing it to receive payment by a wider range of methods without the site needing to have the relevant direct relationships. In addition there are services, such as Paypal, that offer alternative payment services for ecommerce transactions by allowing users to put their Paypal account in credit and then use that as currency with which to purchase goods or services.

Such third party payment providers, including credit card companies, have a role to play in enforcement action taken against illegal music services on the Internet. In Germany, a court held a third party payment provider liable for providing services to an Internet site that infringed copyrights once the provider was on notice of the unlawful activity.

This decision underlies the need for credit card companies and third party payment providers to act responsibly in providing their services so as not to facilitate unlawful transactions, and to cooperate with right holders and the authorities where infringing activity is identified. Action is already taken by payment providers including the credit card companies to avoid facilitating transactions involving drugs and pornographic material, making clear that they are able to put in place effective systems. Their responsibility should extend to unlawful transactions infringing copyright. This is especially critical in those cases where the internet service itself may be outside the reach of enforcement action in Europe.

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

Regarding the pricing systems, the main business model online is at this stage the so-called à-la-carte or pay-per-download models in which consumers can cherry-pick individual tracks from a wide selection and buy to keep. Different prices can be offered on some online services for different usages. These differentiated pricing systems are made possible by the application of DRM which implement different usages and models.

There is for example so-called 'tethered' content which resides only on a certain device, as opposed to the kind of unrestricted use that allows content to be burned to CD, transferred to a number (possibly unlimited) of portable devices, and accessed simultaneously from a number of computers.

Online there are also different kinds of subscription models, some similar to book clubs in which a number of tracks can be downloaded permanently each subscription period. Other subscription models allow unlimited access to a vast repertoire for the duration of the subscription, all at one flat rate amounting to roughly the cost of a CD per month. These latter subscriptions cease offering access if the subscription expires. Subscription providers variously offer their subscriptions via high quality streaming, via track downloads or via the new "To Go" models in which subscription content can be copied to offline portable players.

On mobile platforms, mobile operators provide access to different services (track download and streaming models, ring tones, ring tunes, 'made for mobile' content including alerts and short videos) via a range of payment options including links to a 3G subscription and via prepay accounts. The main mobile services are now offering pay-per-track downloads at price points that are getting close to the price of online track downloads.

As a further alternative, it should be noted that advertising supported services are

emerging into the marketplace. Their long term feasibility has yet to be demonstrated, but already some of these services have entered into distribution arrangements with record companies.

As to pricing strategies, each record company, and each service provider, pursues its own pricing strategy in competition with others in the industry. IFPI cannot therefore comment further.

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?
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?

We answer Questions 14 and 15 jointly.

Multi-territory licensing is key for the development and availability of content online. Record companies depend on widespread licensing of their content, through a variety of channels, in order to generate revenues. In the online world this requires primarily, although not exclusively, cross-border licensing. Record companies have for some time been widely engaged in licensing their digital rights to a wide range of Digital Service Providers (DSPs), Mobile Network Operators (MNOs) and other aggregators and distributors offering on demand and interactive products. Many of these deals involve multi-territory licences. For non-interactive models, the IFPI Simulcasting and Webcasting Agreements facilitate multi-territory internet streaming models for broadcasters and non-interactive webcasters.

In contrast, the music publishers' and composers' societies apply overly restrictive licensing practices based on traditional national monopolies in the new on-line and mobile markets, which results in a complicated and inefficient licensing system.

Currently, the users have to ask for licenses from authors' societies on a territory-by-territory basis. We are aware that at least one authors' society – SABAM in Belgium – recently started providing on-line and mobile licenses on a pan-European basis. However the majority of the sister societies were opposed to these schemes. This is despite the fact that the producers' collecting societies, as mentioned above, have demonstrated in their Simulcasting and Webcasting Agreements that it is fully feasible to offer pan-European licenses without territorial restrictions, and without undermining the interests of the right holders.

These contractual territorial restrictions are currently the subject of an investigation by DG Competition, in a case against CISAC and its EEA-member societies. DG Competition has taken the preliminary view in its Statement of Objections that the territorial provisions are restrictions on competition that are no longer justified in circumstances where it is possible to undertake monitoring at a distance (i.e. online and mobile uses). IFPI would welcome a decision by DG Competition requiring the removal of territorial restrictions in authors' societies' reciprocal agreements, to enable and encourage the societies to offer multi-territory, multi-repertoire licences on fair negotiated terms.

Also, as mentioned above, authors' societies have been unwilling to license on-line and mobile uses to any other party than the retailers providing on-line or mobile services, and refuse to grant such licenses to record companies. This restriction is included in the license schemes and enforced in practice by virtually all European authors' societies. The

refusal to license record companies goes against the existing practice for off-line rights and is discriminatory. It also deprives the retailers the option of obtaining all rights through the record producers. It should be stressed that the record companies do not aim to be the exclusive licensees of the authors' societies. The companies merely wish to clear the authors' rights in order to be able to provide a new "all rights included" product to on-line service providers.

In terms of pricing, the authors' societies have established prices among themselves and are mostly not willing to negotiate. This makes it economically nonviable for the record companies and the on-line and mobile music retailers to experiment with flexible pricing for the new services. The record companies and the on-line and mobile retailers have subsequently been forced to bring the authors' societies' on-line and mobile licensing schemes to dispute resolution in arbitration bodies where they exist. In the EU, such bodies exist only in Austria, Germany and the UK.

The problem has been further exacerbated by the fact that individual music publishers, who are members of the collecting societies, are demanding extra payments for mobile rights supposedly on the basis of "*adaptation rights*". The publishers claim that these rights are not managed by the collecting societies and that over and above the collecting society's license fee an additional payment is due to the publishers. These demands can be prohibitively high. In Germany, for example, the demands would almost double the price for the use of master ring tones. IFPI considers these claims fully without merit, but many mobile service providers, e.g. Vodafone and T-Mobile in Germany, have ceased offering ring tones after having been faced with these demands.

The European Commission adopted on 11 October 2005 a Recommendation on cross-border licensing[6]. The Commission's Recommendation was meant to facilitate EU-wide collective licensing, but it does not achieve this goal. In fact, it makes matters worse by suggesting (Point 3 or the so-called Option 3) that all rights should be concentrated in a few "super-societies". This would reinforce the monopoly of a few big societies to the detriment of the smaller ones and to the prejudice of the users. After the publication of the Recommendation, the world's largest music publisher announced its intention to withdraw its on-line and mobile rights from the collecting societies altogether.[7]

On the positive side, the Commission's Recommendation suggests that Member States set up effective mechanisms to resolve disputes between collecting societies and users (Point 15). The Recommendation mentions that the arbitration bodies should guarantee that tariffs and other licensing conditions are set at fair market levels. It should be stressed that the introduction of such mechanisms does not substitute for competition laws, which should continue to be applied and enforced in a fair and effective manner.

IFPI fully supports this point. Real arbitration mechanisms exist in very few EU Member States: in the UK, Germany and very recently in Austria. The lack of such mechanisms is one of the issues holding back the roll out of European music services: for almost 5 years, the digital service providers, the recording industry and the authors' collecting societies have been negotiating about fair terms and conditions without success. There is an imminent need to introduce such dispute resolution bodies in every Member State. Such national bodies should consist of dedicated judges that have special knowledge of IP matters.

National dispute resolution bodies should apply transparent and fair criteria to resolve disputes and offer guarantees of impartiality and objectivity. The Recommendation does

[6] Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, 11 October 2005 (2005/737/EC).
[7] See EMI Publishing's press statement to withdraw their online and mobile rights from the collecting societies, 23 January 2006

not mention an essential criterion that should be used in disputes, i.e. the *willing buyer, willing seller* standard. This principle should be introduced, as the similar criterion "*fair value in trade*" is also endorsed by the European Court of Justice.[8] Value in trade should be understood as being the rates and terms that would have been negotiated in the marketplace between *a willing buyer* (user) and *a willing seller* (right holder or collecting society)[9].

IFPI welcomes and supports the action of DG Competition in ensuring that the EU copyright licensing system for online use is fair and non-discriminatory, and compatible with EU anti-trust principles.

It is essential for IFPI that the follow-up to DG Markt's recommendation on cross-border licensing takes into account the negative experience with the recommendation in terms of authors' licensing practices and the record industry's criticisms and proposed solutions. Also, IFPI asks that the Commission obliges Member States to introduce effective resolution mechanisms at national level.

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.)?

For the recording industry, the way forward to establish a commercially viable business model is to be able to exercise exclusive rights through the use of DRM. This is the surest path to enable the development of a variety of new formats and new flexible online services at different price points. In contrast, "flat rates" systems such as levies or "global licences", do not provide a viable or acceptable business model for the creation or distribution of musical recordings online.

Private copying levies.

As the recording industry' priority is the exercise of exclusive rights through the use of DRM, IFPI is opposed to the establishment of new levies or to the expansion of existing levy schemes, and considers that levies should be decreased ("levy relief") in proportion to the degree of use effectively enabled by DRM.

The Commission published in May 2006 a stakeholder consultation on copyright levies in a converging world, to which IFPI responded on 13th July 2006. In its consultation document, the Commission seems to envisage two scenarios only: either an absence of DRM justifying the continuation and extension of levies schemes, or a general implementation of DRM justifying the total elimination of private copying levies. In reality, the market shows that there is a gradual take up of DRM, which means that over the years an increasingly important proportion of uses of music are DRM-enabled. At the same time, many unprotected uses of music continue to take place. The priority should therefore be to: (1) further the take-up of DRM and increase the proportion of DRM-enabled uses of music, and (2) decrease levies ("levy relief") whenever DRM is effectively used, in proportion to such use. This second point is specifically required by Article 5.2(b) of the Copyright Directive, which states that: "fair compensation takes into account the application or non-application of technological measures". IFPI is concerned that the consultation document does not appear to consider this requirement.

[8] For example, this principle is used in SENA v NOS Case C-245/00 (6 February 2003) and in Lagardère v SPRE and Others (GVL) Case C-192/04 (14 July 2005)

[9] For example, the "*willing buyer, willing seller*" test has been applied by the Copyright Arbitration Royalty Panel (CARP) for the webcasting statutory licenses in the US under section 114 of the Copyright Act.

IFPI's principles for a "levy relief" mechanism are the following:

1. Levy relief should be provided in proportion to the degree of use effectively enabled by DRM on specific equipment. In practice, many devices have dual roles, with one role of the device to service DRM content and another role of the device to service private copies outside the reach of the DRM that is on the same device. This is the reality for most if not all music devices, and this is why levies-based and DRM-based payment systems might have to co-exist. It is therefore necessary to assess to what extent each role of the device is used by consumers. For example, where DRM-enabled use concerns 40% of the use of the equipment, the levy would be reduced pro rata. In contrast, limiting the application of levies to the proportion of legitimate private copying would be unacceptable and unworkable as this would provide perverse financial incentives for device manufacturers to limit the amount of lawful private copying and the application of DRM in order to reduce the levies applicable.

2. "Uses effectively enabled by DRM" means copying that is controlled and/or licensed through DRM. This degree of use is to be measured by surveys or other objective evidence. There are no mathematical ways to quantify such use on any category of equipment to date, but the evaluation can rely on market surveys. Such market surveys are currently used to establish levies or quantify them.

3. The test should be applied by particular category of equipment rather than by general category (e.g., iPod or Sony player, rather than all MP3 players). This is the only workable way to deal with the fact that one particular manufacturer/provider may incorporate effective DRM while others may not (and should be encouraged to do so). For recording media (blank discs), which do not implement DRM as such, the assessment could be made by general category (CR-R, CR-RW, DVD-R etc).

4. Levy relief should focus on digital equipment and media. Analogue equipment tends not to implement DRM, at least in the music field.

5. Multi-purpose devices (e.g. PCs): in case some of these devices are already subject to levies in a particular jurisdiction, it would be necessary, as a first step, to determine the percentage of use of copyrighted works on these devices in comparison to other data/material (Such assessments have already been done to determine the application and level of levies). Once the percentage is determined, it can be used as a basis for the application of the general test above.

"Global license"

Any levy-based system going beyond traditional private copying, such as the "global license" proposed in France in 2005, which would have replaced exclusive rights and DRM by the application of a levy on Internet transactions, is totally unacceptable for the music industry. Not only would such a system violate international copyright law and treaties, but it cannot possibly remunerate the whole creative chain and enable right holders to create diverse markets where different ways to enjoy music are offered at different prices.

A "global license system" would imply the unrestricted offer and copying of works on the Internet, in exchange for a flat fee. But neither international nor European texts allow the adoption of a non-voluntary licence for exchanges via "peer to peer" networks. Such a limitation applying to the exclusive making available right or such a broad extension of a "private copying exception" would be incompatible with the "three step test" (Article 5.5 of the Directive, article 16.2 WPPT and article 13 TRIPS). It would directly prejudice the legitimate interests of the right holders and the normal exploitation of works, as shown below.

The exchange of works without the authorisation of right holders, and the "generalised flat rate" system envisaged by the global license would destroy the development of legitimate online services (including various options such as listening, downloading, copying and streaming) which cannot compete with the free use and dissemination of content. It would threaten the viability of online platforms for music services such as iTunes, Napster, and many others. It would also directly compete with, and seriously damage the developing legitimate "P2P" exchange services such as imesh and Mashboxx. The free exchange and copying of musical recordings would of course also seriously damage the sale of physical media which currently represent a large proportion of the income from musical production.

A flat fee is not a viable economic solution.

Proposals considered for "global license systems" are not economically viable and cannot provide en equitable return for every part of the creative value chain in a country, including authors, performers, publishers and producers. An in-depth study of the French CSPLA (Conseil supérieur de la propriété littéraire et artistique)[10] concluded that the model proposed was not a sustainable business model, and was incapable of yelding a fair return for all right holders.

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?

We can identify several regulatory barriers, in particular in the field of copyright, that hamper the development of creative content and services, including in the online environment.

1. Term of Protection

The existence of a shorter term of term of protection for producers and performers in the EU, compared to other important music markets, leads to infringements that cannot be effectively addressed. Recordings that have fallen into the public domain in Europe are streamed (or otherwise made available) across borders to countries such as the US where the recordings are still in copyright. The significantly shorter period of protection in Europe is utilised to facilitate the provision of infringing material to significant markets. While these acts infringe rights in the countries of reception (where copyright protection would still apply) an effective enforcement of rights that would have to take place at the source is made difficult by the lapse of the European term.

2. Lack of exclusive rights for broadcasting and communication to the public.

Currently, performers and record producers do not enjoy exclusive rights for broadcasting and communication to the public in most countries of the EU, including for digital services.

Article 8.2 of the EU Rental Directive[11] only provides a minimum right to "equitable remuneration", to be shared between performers and record producers when a commercial phonogram is used for broadcasting or communication to the public. This

[10] Conseil supérieur de la propriété littéraire et artistique "rapport sur la distribution des contenus numériques en ligne", 2005 ; and Avis n.2005-2 of 7 December 2005.
[11] Council Directive 92/100/EEC of 19 November 1992 on rental and lending rights and on certain rights related to copyright in the field of intellectual property.

represents no more than the minimum secured by the 1961 Rome Convention, and prevents producers from negotiating any meaningful broadcasting and retransmission rights and from imposing technological conditions to prevent abuses. This takes on increased significance in the online environment.

Digitisation of programming, the combination of digital transmissions and search engines, and new consumer equipment create a totally new framework for transmission of content. The provision of mere remuneration rights or the establishment of compulsory licenses make it impossible for record producers to negotiate effectively and efficiently over the format of new digital services, many of which can seriously affect the exploitation of records on the primary market.

Digital technology and the Internet allow the creation of more and more highly targeted channels of digital music by genre or even by artists, without interruptions of any kinds, sometimes with advance programming and even a length of programming perfectly adapted to be digitally recorded on a CD-R or mini-disc. These services have nothing in common with the traditional broadcasting of programmes designed for the general public. In addition, the possibility to search and find particular songs or albums easily from these sources, and to copy them in digital quality, has a direct impact upon physical distribution. Such services also compete with the legitimate download services that the music industry and its partners are developing.

Community and international legislation acknowledge the need to re-examine the situation. For example, Recitals 22 and 23 of the Cable and Satellite Directive[12] recognise that "the advent of new technology is likely to have an impact on both the quality and the quantity of the exploitation of works" and that "in the light of these developments the level of protection granted to all right holders should remain under consideration". The need to review the level of rights was also noted in the context of the 1996 WIPO Performers and Phonogram Producers Treaty[13]. The EU Rental Directive allows Member States to provide for more far-reaching protection than the minimum right to remuneration granted by Article 8. So far, some EU Member States (Portugal, France, the UK) and several non-EU countries (Japan, India, Czech Republic, Romania, Lithuania, Argentina, Brazil) grant exclusive rights to phonogram producers for all or at least some forms of communication to the public and/or broadcasting.

The EU Rental Directive should be updated to provide for exclusive rights for performers and record producers for broadcasting and communication to the public.

3. Lack of harmonization of points of attachment.

Despite the harmonization of record producers' substantive rights in the European Union (except for broadcasting and communication to the public as explained above), the protection of sound recordings is patchy because the criteria for eligibility for protection—the so-called points of attachment—remain unharmonized. These differences also affect the protection of performers within the EU because in most countries performances fixed in phonograms are protected only insofar as they are incorporated in protected phonograms.

[c] Council Directive 93/98/EEC of 27 September 1993, on the coordination of certain rules of copyright and related rights applicable to satellite broadcasting and cable retransmission.

[13] The agreed statement relating to Article 15 of WPPT (right to remuneration for Broadcasting and Communication to the public) mentions that: "It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution"

The international Rome Convention[14] lists three points of attachment (nationality, fixation and publication) that each Member State can use to determine whether a recording benefits from protection on its territory. The EU Member States currently apply different criteria. Some apply only the criterion of fixation (Finland and Italy); some apply the criteria of nationality and first publication (Germany, Spain and the UK); others apply the criteria of nationality and fixation (Denmark, Sweden and France).

These differences affect the substantive protection offered to performing artists and phonogram producers in the EU, both offline and online. To mention a few examples:

- A phonogram made by a French record company and incorporating the performance of a French orchestra, would not enjoy distribution or broadcasting rights off line and online in Finland or Italy, if the recording took place outside the EU or in a non-Rome Convention Country, such as Russia or the US.

- A recording of an EU performer made by a US record company in the US and published in Germany would not enjoy broadcasting or public performance rights in Denmark, Finland, France, Italy or the Netherlands

The best course of action would be to revise the EU Rental Directive, and require Members States to apply all three criteria (nationality, fixation and publication). Restricting harmonisation to the application of only two criteria, whichever they are, would not be satisfactory since some recordings with a strong EU link might not be protected in the EU (for instance if the criteria of fixation or first publication is not applied). In addition, exclusion of any of the three criteria would lead to a deterioration of producers' and performers' protection in the countries that currently use that criterion and would mean that phonograms previously protected would cease to be so.

4. Enforcement of rights

Strong deterrent criminal sanctions for serious copyright infringements are urgently needed in the EU. The current proposal for a Directive on criminal sanctions for IPR offences is not broad enough. At present, there is great disparity between the levels of maximum prison terms for intellectual property offences in the Member States, ranging from as little as a one year prison sentence in Malta to a maximum 10 year prison sentence in the UK and Greece. The new proposal should have been an opportunity for the Commission to raise the level in countries at the lowest end of the scale. Instead, the Commission is proposing only to harmonise maximum penalties in those cases where organised crime is involved or where there is a health and safety risk. The Directive also fails to come forward with concrete proposals to encourage law enforcement agencies to take action against pirates and counterfeiters. One of the main concerns of the recording industry is that the courts in the EU Member States tend to impose suspended prison sentences or low fines on infringers. These points must be addressed if the fight against piracy is to be taken seriously in the EU.

The enforcement of rights is often even less satisfactory in key foreign countries, thereby preventing the record industry from developing its products and services, including online, in major markets. Thus, IPR enforcement is a serious problem in China. China has adopted high monetary and numerical thresholds for criminal prosecution of copyright infringements. As a result, in practice no criminal action is taken against infringers, and therefore there is inadequate deterrence, contributing to an 85% piracy rate for sound recordings. In Russia the recording industry is facing a major trade barrier as the Russia authorities do not enforce IPR online. The Allofmp3.com case is a clear example. The Russian government has also recently

[14] WIPO International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) (1961)

decided to replace its existing IPR legislation with a new and untested Civil Code. This will not address the problems, and to the contrary will distract resources away from the urgently needed solutions. Besides, the current draft Civil Code is not in line with EU legislation and international treaties.

We therefore seek the EU's assistance in persuading these countries to better enforce their laws against piracy, and protect the interests of EU right holders, through every means available.

18. How does the country you mainly operate in encourage the development of creative online content and services?

There are many examples of measures by which national governments encourage the development of creative content, including for the online market.

For instance:

- **Tax credits.** The EU cleared a system of "tax credits" introduced by the French Copyright law of 1st August 2006 for the production, development and digitisation of phonograms or music videos (Article 36 modifying the French Tax law). Put very simply, the credit can be granted if the producer is established in the EU and the staff employed is European, and if the production concerns new talent. The producer can deduct up to 20% of its costs between 1.1.2006 and 31.12.2009 with a maximum of €2,3 Million per company and per year.

  The Italian Government also adopted a Bill granting tax credits in October 2006. The Bill contains provisions on tax breaks for A&R and related activity, specifically for the first album, a 20 million euros fund for the digitalization of music content, the creation of a national Music Export Office and the extension of the movie industry credit to cover video clips.

- In Belgium, the Flemish Government is investing in the creation of a database and the digitization of recordings of "Flemish" origin (an indirect link to Flanders is enough). In parallel, the Government of the French Community is considering the creation of an online platform (www.culture.be).

- The Finnish Funding Agency for Technology and Innovation (under the Ministry of Commerce and Industry) grants support for R&D- and pilot - projects to exploit ICT- technologies in new content services, including music. In addition, this Ministry provides partial funding to the joint Finnish Music Export Association MUSEX (of which IFPI is a member) and its export supporting activities.

We welcome the support of the Commission to develop these and other useful initiatives and measures throughout the EU.

Release windows

19. Are "release windows" applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

With new digital channels comes far greater variety in ways to get new music to consumers. New recordings are now starting to have multiple-planned release 'windows',

often starting with a ring tone or exclusive digital track several weeks before the CD single is commercially released. By the time the album is released, its individual songs are available in a multitude of ways.

Windows can assist in maximising sales through carefully planned marketing opportunities, and can also assist in mitigating the effects of pre-release piracy – where physical copies are leaked from a warehouse prior to the authorised release date, are illegally ripped, and the pirate copies are then distributed on the internet for free.

Subject to laws ensuring the free movement of goods within the EEA, the timing of a release is, and should remain, a matter of choice for the individual content owner. It is necessary to have sufficient flexibility in order to allow new and variable business models, and not one-size-fits-all solutions.

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?

To our understanding, the term 'network neutrality' has been only recently introduced into the debate and is generally invoked by parties calling for new regulation of the Internet. At present, commercial players acting on the Internet – e.g. ISPs – are free to design and offer high-quality services. There are no rules in place that would specifically restrict the use of network resources or prevent businesses from making their own choices on how to employ them and react to market dynamics, as long as they satisfy general legal requirements, e.g. competition law and consumer protection law. If, however, 'network neutrality' were perceived as a policy goal, regulation would likely be imposed to prevent stakeholders from reacting to market demand and from adapting and diversifying their services.

IFPI currently sees no need for new regulation to introduce and ensure 'network neutrality'. At this stage we have no reason to doubt that current consumer protection and competition law rules are sufficient to prevent abuse of market power, curb unfair competition, and avoid harm to the interests of consumers.

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?

The recording industry's business suffers massive losses from offline and online piracy each year.

IFPI estimates that CD piracy cost the music industry around US$4.5 billion (€3.6 billion) in 2005 globally (source: IFPI Piracy Report). More than one in three of all music discs purchased around the world is thought to be an illegal copy. It is estimated that some 37 per cent of all CD albums purchased (legally or otherwise) in 2005 were pirate – 1.2 billion pirate CDs in total. Pirate CD sales outnumbered legitimate sales in 2005 in a total of 30 markets.

On the internet, IFPI estimates that almost 20 billion songs were illegally downloaded in 2005. This is based on consumer research in 10 music markets (see also response to question 11).
This leads to losses of billions of Euros for the music industry.

Numerous research studies have shown that online piracy has had a massive negative impact on music sales:

- NPD research in the US (NPD Digital Music Study, Dec 2005) suggests that 26 per cent of the decline in CD units among online users is directly substituted with illegal downloads;
- Research by IFPI/Jupiter in November 2005 among European internet users found that more than one third (35%) of illegal file-sharers are buying fewer CDs as a result of their illegal downloading;
- In April 2006 edition of the *Journal of Law & Economics,* economist Stan Liebowitz concludes that "the evidence here supports the current findings from almost all econometric studies that have been undertaken to date – file sharing has brought significant harm to the recording industry'.

The harm caused to recording companies from illegal file-sharing has also been recognised in the courts. Courts in Europe and around the world have acknowledged the detrimental impact of unlicensed P2P services and the damage caused by individual users.

IFPI's fight against online piracy involves a number of complementary elements:
- Developing legal offers
- Educational initiatives
- Enforcement of legal rights against services that encourage and facilitate infringement, and against egregious individual infringers
- Seeking improved cooperation from ISPs

The first two elements are discussed respectively in our responses to Questions 1 and 8, and Question 22. The last two are addressed in more detail below.

Enforcement of rights

The recording industry has invested considerable resources in litigation against unlicensed services (including P2P networks) that encourage and facilitate infringing activity. A number of recent court decisions, including decisions from the US in *MGM v Grokster*, as well as against Kazaa in Australia, and in Taiwan, Korea and Japan, have reinforced the principle that providers of internet services that facilitate infringement should be required to take steps to prevent their services being used for infringements. Although the decisions are based on different legal systems, there are notable common features which suggest a converging approach to the issues worldwide. Each of the courts held that the providers could be held liable. They focused on the failure of the provider to make any effort to prevent infringement, statements made and steps taken to promote or encourage infringing uses, and revenue to the providers from infringing activity.

Against this international background, France has recently enacted legislation imposing liability on providers that knowingly distribute software manifestly intended to be used to infringe copyright[15]. While existing legal principles in many European countries may lead to liability in similar circumstances, they are not clear everywhere. It is critical that the law in all countries in the EU make it illegal for providers to encourage and facilitate the use of their systems to infringe copyright. In particular, legislation specifically requiring such services to implement reasonable measures to prevent infringement would provide a strong basis for developing legitimate business models based on peer to peer technology.

In addition to the cases against P2P services, the recording industry has also taken action against illegal file-sharers in 17 countries outside the US. The latest wave of nearly 2,000 cases was announced in April 2006. These actions have been taken against large-volume infringers who are often distributing hundreds or thousands of copyrighted files on P2P networks. Profiles of these individuals vary markedly. They come from all walks of life ranging from a French chef to a Finnish carpenter. Settlements have averaged €2,633.

All infringements of copyright on the internet, including any copying from illegal sources, contribute to the market losses suffered by the recording industry. Obviously, as in the physical world, it makes sense to take enforcement action against large players that facilitate infringements and offer services to others. However, action against individual infringers is needed as well, to bring home the message that unauthorised use of music does not remunerate the artist, composer or producer, is illegal and is not risk-free. It is important to note that the actions of those who use illegal music services ensure that such services remain in operation and derive revenue from their illegal activity.

The role of ISPs in online enforcement

The efforts of the recording industry alone are not sufficient to effectively combat online piracy. The cooperation of ISPs is critical, both to remove infringing material quickly from the Internet and to enable legal action to be brought against infringers. So far ISPs have benefited from mass-scale dissemination of content through increased charges for bandwidth consumed, and increased traffic over their networks. However, they would have much more to gain from the development of a thriving legitimate market. They also should have responsibilities in the fight against piracy. ISPs are in a unique position with respect to both control over access to content and relationships with its providers, and are usually best placed to act promptly and effectively against infringement over their networks or services.

In recent years, the record industry worldwide has asked for reasonable and needed assistance from ISPs to contain the epidemic of online piracy. The key forms of cooperation we have sought are:

- Assistance in quickly stopping the dissemination of infringing content. Prompt removal of infringing material from the internet, or termination of the accounts of customers engaged in egregious infringing activity, upon receipt of notices from right owners.
- Assistance in identifying infringers by retention of the necessary data, and cooperation with right owners and relevant authorities.

The recording industry has pursued various different paths to secure such cooperation, including through IFPI's internet anti-piracy program, through attempts to obtain voluntary agreements and industry codes of conduct, and where necessary, through litigation. Each of these paths is described further below.

[15] Law of 1st August 2006, articles L.335.2-1 and L.336-1 http://www.senat.fr/dossierleg/pjl05-269.html

Stopping dissemination of infringing content, and in particular terminating accounts of serious infringers.

So far, ISPs have not provided the necessary cooperation in the context of today's greatest source of market damage, infringement over P2P networks. ISPs do generally cooperate with respect to hosted content, which gives them a safe harbour under the e-Commerce Directive. But the evolution of internet piracy has distorted the balance struck in the e-Commerce Directive, as P2P infringement was not envisioned at the time the Directive was adopted. As a result, ISPs in Europe are not subject to any legal obligation to take meaningful action to assist in controlling P2P infringement in return for their enjoyment of safe harbours.

One of the most effective steps an ISP could take is to suspend or terminate service to subscribers who are abusing the service to make infringing content available. Such termination is feasible and not burdensome. ISPs clearly have the legal right to do so, since virtually all provide terms of service that prohibit the user of the service to violate the law, including copyright, and reserve the right to terminate accounts if the prohibition is not respected[16]. This is an explicit condition for the corresponding safe harbours in US law, which are only available to an ISP if it has adopted and reasonably implemented a policy that provides for the termination in appropriate circumstances of subscribers who are repeat infringers (US Copyright Act, section 512(i)). If all ISPs in the EU implemented these terms on an industry-wide basis, whether pursuant to a code of conduct or a legislative mandate, none would suffer any competitive disadvantage.

If ISPs were to cooperate in terminating the accounts of those infringing copyrights, it would reduce the need to sue individuals. While these suits have proved a successful and necessary deterrent, suspension or termination of user accounts would be a much more efficient course of action.

Voluntary cooperation and Codes of Conduct

The recording industry has participated in discussions regarding the European Charter for audiovisual content online[17]. Because the Charter does not cover music, and does not provide any concrete obligation for ISPs to take steps in the fight against piracy and in particular enforce their contractual conditions against serious infringers, IFPI was not prepared to sign it. We would however be willing to contribute to the follow-up to the Charter, provided the cooperation procedures between the different stakeholders include firm and concrete commitments from the ISPs to act against P2P piracy.

Litigation against ISPs

Although ISPs are protected from monetary liability under the E-Commerce Directive, they remain subject to injunctive relief under Article 8(3) of the Copyright Directive. IFPI has coordinated legal action by record companies against certain ISPs that are providing services to infringing P2P users, to obtain the identifying information needed to bring lawsuits against those users, or to take steps to prevent the infringement. Courts in some European countries have issued such injunctions. In Belgium, a court held that an ISP providing internet services to infringing P2P users was required to take steps to prevent users using its system to infringe copyright, and ordered the preparation of a technical report to outline the ways in which this could be done, including by filtering of content (*SABAM v Tiscali*, Court of First Instance of Brussels, 28 October 2004). In France, the record industry has obtained 130 orders requiring ISPs to terminate the

[16] A non-exhaustive list of ISP's general conditions is included in section 3.1 "Conditions for effective cooperation to fight piracy" of the European Charter for the development and the take-up of film online of 23 May 2006

[17] European Charter for the development and the take-up of film online, 23 May 2006

accounts of infringing users, and in Denmark, a court recently ordered an ISP to take similar action (Supreme Court Order, 10 February 2006, in case no. 49/2005).

So far ISPs have been unwilling to cooperate voluntarily in the fight against P2P piracy. If reasonable assistance is not forthcoming, the record industry will need to take further steps, either through the courts or through seeking the government's help in obtaining greater cooperation and enabling meaningful action.

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?

Education and public awareness on copyright have a vital role to play in limiting piracy, and more broadly in safeguarding the future success of the creative industries in the digital era. The recording industry has been extremely proactive in this area in recent years. IFPI runs multi-country educational projects aimed at enhancing awareness of copyright and issues surrounding music on the internet. These have been cited as best practice by the European Commission, endorsed by the International Chamber of Commerce and jointly launched with governments including Austria, Italy, Ireland, Hong Kong and Netherlands. They include:

- ***Young People, Music and the Internet*** is a clear and simple guide aimed at parents. It explains "file-sharing" and "peer-to-peer" as well as how the technology works, helping them to keep their children safe, secure and legal on the internet. It has been translated into six languages and is available from www.pro-music.org and on the charity Childnet's website www.childnet-int.org/music. Most recently a Chinese language version of the guide has been launched in partnership with the Hong Kong government.

- **Digital File Check** is freely-available software for all computer users to download from www.ifpi.org. It can help remove or block any of the unwanted file-sharing programmes commonly used to distribute copyrighted files illegally. It can allow consumers to avoid becoming unwitting illegal file-sharers.

- **www.pro-music.org** is a website branded "everything you need to know about music online" available in six languages that acts as a gateway to more than 350 legitimate sites and is a central resource of information about music on the internet.

- **Instant messages** have been sent to more than 53 million heavy illegal music uploaders in 17 countries, warning them to stop their activities.

- ***Copyright Use and Security for Companies and Governments*** is a guide for employers, clarifying their responsibilities to keep their computer networks free from copyright infringement. The guide is produced jointly with the Motion Picture Association and International Video Federation and is endorsed by the International Chamber of Commerce. Copies can be obtained from IFPI.

- **National campaigns** have been run by various IFPI national affiliates, such as the '*Truefan*' kite mark for legal music websites in the Netherlands; a film aimed at young people called '*A thousand jobs in the music industry'* in France and a lesson pack for schools produced in cooperation with the Ministry of Education in Finland.

In some countries the record industry has also enjoyed significant support from governments, in forms ranging from ministerial endorsement of industry initiatives to financial sponsorship (see above answer to Question 18).

As the digital market takes shape, a more long term and structural approach to copyright education is needed. The creative industries are forecast to see 46 per cent employment growth between 1995 and 2015 (source: KPMG). Europe is preparing a generation of young people for employment in the creative and knowledge based economy - yet ironically, millions of young people from that same generation are leaving school without the basic understanding of the copyright and other intellectual property issues on which their future livelihoods may depend.

Copyright education in schools is key to the long term future health of the European creative sector. It must become a higher priority for government. IFPI is calling for educational programmes on copyright, intellectual property and the value of creativity to be incorporated into the core curriculum of primary and secondary schools throughout the EU.

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?

Peer-to-peer (P2P) distribution until now has largely been associated with music and film piracy. Illegal P2P services have enabled the distribution of hundreds of millions of files without authorisation from right holders and without any remuneration. Moreover, illegal P2P services are regularly associated with the distribution of other illegal and harmful content such as pornography, and carry security (viruses) and reporting problems.

As mentioned above, recent court decisions around the world since July 2005, including against Grokster and Kazaa, have helped secure the commercial environment for developing legitimate p2p services. These have confirmed firstly, that providers of P2P services have a significant level of control over their services, and secondly, that providers who promote and encourage the use of their services to infringe copyright can be held liable under copyright law. The continued development of a legitimate market for P2P music distribution in the EU depends upon clear rules establishing liability of unlicensed P2P providers. We address this in our response to question 21.

The recording industry wants to see P2P technology commercialised for the legal distribution of music, as it could potentially be a promising new business model. Record companies are actively working with new services, or existing ones looking to "go legitimate", to develop this model. However, behind the froth of excitement and now that filtering technology is mature and proven in practice to be effective in preventing rampant infringement, P2P companies now face the reality of developing a real business around the technology. There are still many business and commercial questions to be resolved. Pricing structures and business economics largely remain untested. But there is a lot of experimentation and there are licensed legitimate services emerging.

iMesh is the first legal P2P service to have launched commercially in a beta phase. Launched in October 2005, the iMesh network uses Audible Magic song recognition technology to identify songs traded on its network.

Following Kazaa's settlement with the industry for copyright infringement, it has declared its intention to offer a legal P2P service and the industry will be watching this with interest. Also recently EMI and Brilliant Technologies Corporation announced that EMI has licensed its music publishing properties for listening and download on Brilliant's Qtrax legal P2P music network. Qtrax is a new ad-supported peer-to-peer digital content distribution system designed to provide for the legal sharing, distribution and intellectual

property protection of content while driving new revenue streams for the legal peer-to-peer online distribution of EMI's prestigious catalogue of recorded music.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

The music industry does not have a classification or ratings system. In some countries (UK, IRL, US, Australia) it has a voluntary system to advice consumers, with labelling showing "explicit content".

Digital Rights Management systems (DRM)

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?

The recording industry is offering content through multiple and varied online and mobile platforms, already described above. The greatest majority of the services described are currently supported by digital rights management. For example, files made available from Napster are protected by Windows' PlaysForSure DRM. Apple iTunes' DRM is FairPlay; O2 and Vodafone are customers of CoreMedia DRM (see http://www.coremedia.com/en/28452/customers/); Beep Science (which implements OMA DRM) claims Nokia and others as partners (see http://www.beepscience.com/partners/partners.asp).

We believe that DRM is an appropriate and useful way to manage and secure the distribution of copyright content online. DRM technologies implement the varying terms and conditions on which copyright content is made available. In many ways, they can be compared to the terms and conditions of retail establishments and performance venues in the bricks-and-mortar world, but permit much greater flexibility. With DRM, consumers can be offered a wide range of options, involving different levels and durations of use for different prices. They may choose to purchase a disc, burn a copy, subscribe to a monthly service, listen to streamed music, or download singles or albums. Payments can be tailored to usage, benefiting consumers and right holders alike. DRM also makes it possible to record content usage so that all in the value chain can be properly remunerated.

Not all services use DRM - for example, Snocap recently released a technology that assists independent artists to sell content on the internet in unprotected MP3 format. Similarly, social networking site MySpace has announced it will make available music files without DRM, where authorised by the copyright owners. Whether to use DRM is, and should remain a matter of choice for the individual content owner and service provider.

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?

From a technological point of view, we consider the DRM systems used by our industry as robust and reliable. There are still problems with the lack of interoperability between services and equipments and between equipments themselves (see above answer to Questions 10). It is also important that the IT and hardware industry assist in developing the take up of DRM as there still are many devices that fail to include or support any DRM (see further answer to Question 31).

Technically robust DRM systems also need adequate legal protection against circumvention, or else their value will quickly be nullified, as right holders are inevitably caught up in an endless game of cat-and-mouse with would-be hackers. For this reason, the 1996 WIPO Internet Treaties and Article 6 and 7 of the EU Copyright Directive prohibit such circumvention. The Directive also outlaws the circumvention of technology as well as the provision of devices or services that enable consumers to engage in acts of circumvention. The protection of technological measures must continue to be properly pursued throughout the EU and we welcome the Commission's action and support on this to make sure that all Member States implement these provisions properly, in particular by providing both civil and criminal remedies in case of infringement, as required by the Directive.

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?

We believe that DRM systems as implemented in connection with current online music services are generally transparent and user-friendly. DRM has already been widely accepted in the marketplace in connection with online services as well as many forms of physical carriers. When consumers purchase music online, they understand that their chosen form of enjoyment comes with certain functionalities and certain restrictions, reflecting the bargain they have struck. Thus, they may pay one price to experience the music by listening to streams, another to retain copies temporarily, and another to burn several permanent copies. The DRM is part of the background, designed to be seamless and transparent and not distract from the user experience.

The music industry uses DRM to increase and enhance access to music in multiple ways. DRM is used today not just to restrict copying and distribution, but also to enable many uses that go well beyond the technical limits of copyright exceptions. These expanded uses may include making multiple copies in different formats for personal use, or appropriate sharing with friends and family. In some circumstances, use without any payment is accommodated—for example, sampling a recording for a period of time to decide whether to buy.

This positive experience is reflected in the fact that DRM is working in the marketplace. Digital music services using DRM are developing rapidly, due to the appeal of their flexible offerings. Hundreds of legitimate online services are now available globally; record companies have licensed more than 2 million tracks for consumers to enjoy; and the number of tracks downloaded has more than doubled in the past year (reaching 420 million).

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?

The importance and potential value of copy-protection measures are recognised by the WIPO treaties and by the EU Copyright Directive (article 6).

The CD format was originally put on the market 25 years ago, before the advent of or

need for such protective technologies. In recent years, record companies have used copy-protection measures on some releases in some territories. At times, these measures have met consumer resistance, at least in part due to their novelty in the music context. Each record company pursues its own strategy, however, as to the level of protection and formats it wants to use. In any event, when CDs with copy protection measures are put on the market, record companies apply clearly visible labels on the outside of the packaging to ensure sufficient consumer awareness and avoid confusion over features of audio discs. The copy protected discs usually carry a copy protection logo (developed and administered by IFPI) and provide further information about the features of the product and technology. IFPI has developed labelling guidelines that are regularly updated to ensure coherent messaging and minimum standards.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

Interoperability is developed under question 10. The need for support for DRM by sectors of the hardware and IT industries is developed under question 31.

As with all technology, DRM is neutral in that it can be designed and implemented in different ways—some more permissive and some more restrictive. But real-world market pressures lead to reasonable implementations. The business imperative for record companies is to maximise the sale of music. If any particular DRM gives the consumer a bad bargain, the consumer will walk away.

DRM technologies are no more insecure than other software products, all of which can be developed and tested sufficiently so as to avoid unacceptable risks. Consumers should be provided with adequate information when deciding to purchase a product that implements DRM. To that end, IFPI has adopted labelling guidelines for clearly indicating key features of copy control technologies when applied to CDs. The record industry is also committed to respecting user privacy, and does not use DRM to inappropriately gather personally identifying information.

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?

For audiovisual content or music and certain fields of publishing, digital collections (public and private) will become an increasingly important vector for the dissemination of content, competing with physical and online retailers. Some of this activity will take place through commercial channels and in other cases through public sector libraries. In all cases acquisition and dissemination of content under copyright must be carried out on the basis of licence agreements with right holders, as in the analogue environment. Otherwise the dissemination of such content without proper remuneration or conditions would seriously compete with and damage legitimate commercial offers. Therefore, it is crucial that digitisation for any purpose other than preservation, and the further making available through digital communication systems, must be done with the explicit permission of the right holders.

Should a public sector European digital library wish to provide access to European content, it should do so through contracts between rights holders and users in the same way as is common practice for physical content, in a manner not interfering with the legitimate commercial exploitation of such content. This will encourage increased access to European works and promote the development of innovative business models.

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.)?

If equipment and software manufacturers offer, or contribute to, a secure environment, the long-term result maximize the flow of high-quality and diverse content. This will in turn make their products more attractive to consumers. In addition, this sector can profit from developing and providing DRMs that can be used to protect content.

The hardware and software sectors also have an important role to play in the take up of DRM. Consumers will not be able to benefit from the full range of new digital services if their devices fail to incorporate the necessary DRM support. There has been great progress with computers, mobile and with consumer electronics devices, but still a significant proportion fail to include or support any DRM, or work with DRM only partially. Better support for DRM could diminish the need for levies as a means of compensating right holders, to the benefit of all.

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.)?

At national level, with respect to legislation, Member States should work to ensure that their laws adequately and effectively address the issues of stream ripping and liability for encouraging and facilitating infringement that are described above in our responses to Questions 11 and 21. They should also strengthen existing public performance and broadcasting rights to provide exclusive rights for performers and record producers, and should establish efficient and impartial dispute resolution bodies to resolve disputes between collecting societies and users.

Other useful steps would include encouraging ISPs to be more cooperative in working with right holders to address online piracy, and supporting efforts to engage DRM providers in discussions towards developing interoperable products and services.

Finally, national governments should prioritise copyright education and public awareness about the value and nature of copyright, including by incorporating it into the core curriculum of their primary and secondary schools.

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?

Most fundamentally, the EU must continue to develop the essential framework it has put in place in the field of copyright and electronic commerce and defend it against any attempts to undermine the value of copyright rights or the ability to enforce them.

We welcome assistance from the Commission on specific issues as follows:

Piracy and enforcement:

- **ISP cooperation:** Ensuring that ISPs cooperate in the fight against piracy, in

particular in communicating the details of copyright infringers, and suspending or terminating contracts with their subscribers who infringe copyright. If ISPs continue to be unwilling to improve their cooperation, this could require a revision of current legislation such as the e-Commerce Directive or the Telecoms package, or, if necessary, a new instrument;
- **P2P/Inducement liability:** Ensuring consistent and effective law in all EU countries establishing the liability of designers or providers of P2P software, or others who encourage and facilitate unauthorised copying and dissemination of content;
- **Criminal enforcement:** Improving enforcement within the EU by strengthening the current proposal harmonising criminal sanctions for IPR infringements and in particular making clear that the definition of a criminal offence includes infringements that cause substantial harm to right holders;
- **Scope of rights and enforcement in foreign countries:** The Commission should increase its efforts to obtain better protection of the rights of EU performers and music producers, and in particular increase its fight to obtain proper enforcement of copyright and related rights in foreign markets, such as China and Russia.

Protection of copyright and neighbouring rights:

- **Term extension:** Extending the term of protection for performers and producers in Europe to match the 95 years provided by the U.S. in the course of the current review of existing Term of Protection legislation (Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights).
- **Exclusive rights of broadcasting and communication to the public:** Requiring Member States to provide performers and record producers with exclusive rights for broadcasting and communication to the public, for instance in a revision of the Rental and Neighbouring Rights Directive;
- **Points of attachment:** Harmonising the points of attachment for the protection of sound recordings throughout the EU on the basis of the three international criteria (nationality, fixation and first publication), possibly in a review of the Rental and neighbouring Rights Directive, or in another instrument.
- **Stream ripping:** Ensuring that national laws prevent and do not endorse the use of new stream ripping capabilities to selectively copy individual sound recordings from streamed programmes that would make time-based transmissions into a substitute for purchasing permanent copies.

Rights management/DRM:
- **Licensing:** Requesting the introduction of efficient and impartial dispute resolution bodies in the Member States in order to help solving disputes between collecting societies and users.
- **DRM and levies:** Providing guidelines, in a Recommendation or other instrument, on the promotion of DRM and a "levy-relief" mechanism for adapting levies to the introduction of DRM in accordance with Article 5(2)(b) of the EU Copyright Directive;
- **Interoperability.** The current legal framework at EU level is adequate as it leaves the development of interoperability solutions to the market, but we welcome the support of the Commission to encourage DRM providers to engage with right holders and each other, to develop interoperable products and services.

Education and awareness:
- The Commission should continue to promote **education about copyright** and its vital role for creation in general and the development of legitimate digital music services. The Commission should support the creation of educational programmes on copyright, intellectual property and the value of creativity and their incorporation into the core curriculum of primary and secondary schools throughout the EU.