

Consultation on Europe's content industry

By Peter Jenner

Competition in the EU for online delivery of recorded music will be optimised by ensuring that there is open access to the community at large for all creators and performers, directly or indirectly. At the same time there must be reliable ways of ensuring that fair and equitable remuneration to the creators and their facilitators is established according to the relative rate of access to any work.

In the new economy it is likely that the bulk of the use of online music will be streamed or rest in the background with the minority of real music enthusiasts going deeper into catalogues and artist sites and buying premium products at premium prices online.

There is no escaping the fact that consumers feel that music delivered online is more like radio than buying a record, and that prices need to reflect that. Like radio, music consumption online should feel free. If not, illegal or semi-legal music services will grow exponentially and there will be no income for the creators and their various facilitators.

The consumers have made it clear that they prefer open formats (MP3 files), and low prices (allof MP3.com), or P2P free access to any other form of service with tough Technical Protection Measures (TPM) leaving many in the major record companies to begin to question the value of tough, restrictive TPM. This is an unstoppable process, as it reflects the essential nature of what the internet does - swap files in greater and greater numbers at a quicker and quicker pace.

Even the most successful of the services (Apple's iTunes) is not bringing in enough revenue to replace the loss of physical sales, and its growth is relatively slow. What complicates this picture more is that the price of the iTunes service can hardly get lower given the transaction costs involved in granular trading.

There are also grounds for thinking that the restrictions put on the access to the core music catalogues and the nightmare of rights clearance has hindered the development of services and new business models. It is also clear that the development of the online delivery of music has been slow. But it is understandable and a certain amount of continuing patience is in order. What is occurring is the radical restructuring of a major industry which involves not only employment issues but also future economic growth, and indeed the very essence of the unique cultures of Europe.

Whilst caution and understanding are required the old structures must reform to service the new possibilities in a more positive fashion. It is likely that some type of collective licensing, as already occurs for radio, cable, television etc, is inevitable, and that this licensing should be done at the very end of the value chain, i.e. the consumers, via the ISPs and other service providers based on a per capita charge.

The charges should be applied to everyone with a broadband or 3G account, bar particular categories, and opt out opportunities should be possible at pain of serious

finer if it is found that subsequent illegal activity takes place. This ensures that charges can be sufficiently low, say a modest €4 a month, so that no one really notices – the “feels free” idea. A share of advertising revenue could also be used as the income source at the ISP level for the creators. The Digital world is fundamentally different due to the possibilities of copying and exchanging music online at virtually zero cost, and this use should be reflected in the pricing.

Payments should be made by the ISPs to the local national rights collectives via a one-stop shop for distribution, to the creative community and their facilitators. But there is the need for a one-stop shop to be formed to represent all the rights holders so that services, ISPs and mobile companies can go to one place in their territory and negotiate the license for their country or internationally, for a single payment structure, merely having to keep a record of traffic on a reasonable sample basis.

Although this process appears anti-competitive it could be argued that it leaves the competition in the right place, between pieces of music and service providers. However other additional services could charge for extra access to artists, or for extra personalized programming, downloads etc. These should be negotiated locally, but income be accounted according to the rules of ‘national treatment’ to the rights owners. All pricing should be local and able to reflect local economic conditions.

An additional advantage of this ‘national’ approach is first that it minimises the problem of whether to charge according to country of download or upload. Secondly, it permits cultural and social deductions (within limits?) to continue according to local decisions. Finally, the establishment of these sorts of structures, which are designed to compensate for the unauthorised usage of music, would help to dispense with the need for hardware and blank media levies .

All this sort of change will require considerable regulatory reserve powers to ensure that access is open and that negotiations deliver reasonable rewards to all parties to reflect a sensible assessment of value added. This needs to be light touch and more like binding arbitration than a judicial process, but that too can vary with local legal systems.

It is hard to see how tampering further with existing structures is going to lead to anything but market distorting unintended consequences, and likely to favour existing institutions at the expense of not yet existing service providers and structures. Radical restructuring is going to be very hard for all concerned, but if it will also involve cross border monopolistic moves by companies or collectives it is liable to come into conflict with local cultural nationalism and all of our cultural diversities.

If the National collective license model is adopted it should be possible over time to ensure proper payments across borders to reflect fairly the popularity of music across the whole market. The current cost of entering the traditional recorded music market is very high. The enormous success of YouTube and MySpace show how hard it is to predict market tastes, and how spontaneous collectives and networks can have a huge impact in a very short space of time. But this sort of service raises enormous copyright problems, as payment by unit requires too much expense (to the provider) and irritation (to the consumer) via TPMs. But to license them properly at the moment would be ridiculously expensive in terms of time and money. So the alternatives for a

new service is either not to pay or else some easy structure to enable a service to pay something if it is using music as part of its essential offer must be developed.

It is important to keep reminding oneself that MySpace only started 4 years ago, and YouTube less than 2 years-old. Being mindful of the fact that we do not know now what services might be offered in the future, and how important a constituent music will be of those services, we will need flexible structures that permit sensible licensing, in a way that is acceptable to all parties.

This document reflects my own personal assessment of the situation. A detailed discussion of all the questions in your questionnaire with all my member states would involve hundreds of hours of discussion to give thousands of different answers. The truth is that we in the music industry are in the eye of a storm and we need wise help, and guidance rather than more shocks. So this document reflects my personal views reflecting the many hours of discussion that I have had with many managers, technical people, rights societies, trade bodies etc. around the world, rather than authoritative structural solutions.

I urge deep and considered involvement by the commission in this (r)evolution by challenging all sectors of the recorded music economy to come up with joint suggestions in short order. Perhaps some joint-funding from the EU to facilitate this would be a wise investment. I commend the practice of the Canadian Copyright Board that permits all parties to come together in order to hammer out plans, including rates. These deals are then taken to the board which then assesses them according to broad cultural, consumer and economic criteria, with help from the competition authorities if required.

If this submission is of any interest I would, of course, be happy to discuss it with you further. It is my considered opinion that the sort of solutions I am suggesting are achievable, as most parties agree that 'something has to be done', but few can commit themselves to specific solutions until....., and that is the hard part.

Peter Jenner"