



RESPONSE

Content Online in the Single Market

DG InfSo Consultation, 28 July 2006

Executive Summary

As the online content market is growing fast, PPL and VPL¹ welcome this consultation by DG Information Society.

The legal online market for music was launched in the UK in 2004. Since then, it has grown fast, under the auspices of existing legislation, principally the E-Commerce Directive² and the Copyright Directive³. This existing legislation fulfils the primary role of governments – to provide copyright legislation and a conducive business environment which will encourage the production and distribution of creative content.

There are still gaps in copyright legislation and issues around illegal content, particularly copyright infringing material, but these are best handled through the current reviews of existing legislation, such as the Copyright Acquis.

¹ PPL and VPL are the UK collecting societies licensing on behalf of 40,000 performers, 3,000 record companies and 1,000 music video producers. See Appendix A.

² EU Directive 2000/31/EC *Directive on Electronic Commerce*, 2000.

³ EU Directive 2001/29/EC *Copyright in the Information Society*, 2001.

A. BACKGROUND

1. It is important to understand the context of the Content Online initiative and, in particular, any cause for legislative action by DG Information Society. Europe is moving towards an economy driven by value in intangible assets. The creative industries already represent 5.3% of Gross Value Added⁴ and the creative economy is growing twice the rate of the rest of the economy. Even manufacturing in Europe is increasingly IP-based.
2. Music has been at the forefront of the digital explosion. Music, albeit largely illegal file-sharing, has driven the demand for internet connectivity and latterly broadband. Legitimate online music services were launched in Europe in 2004. In the UK, the growth was so dramatic that within eighteen months, download sales exceeded sales of physical singles. As bandwidth capacity expanded to cater for full track audio-visual downloading and streaming on demand, music video services were launched – in 2005 on mobile (by 3 and others), and later in 2005 on PC/portable devices (by iTunes and others). Initial growth has been similarly dramatic and most industry executives predict that online revenues will represent over 25% of total music revenues within the next three or four years.
3. This growth is underpinned by copyright. It is copyright legislation which allows creative content to have value. Governments' primary role is to provide that copyright legislation, together with proper enforcement, liability provisions and education. The key piece of European legislation for the online world is the Copyright Directive. It is the review of the Copyright Acquis which will deliver the forum for closing the remaining gaps in copyright and improving liability provisions to enable all the relevant commercial partners to deal effectively with illegal content online.

B. 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.)?

4. PPL and VPL are collective licensing bodies, licensing rights for the record companies and performers. We provide a service to the industry, offering an alternative to direct licensing by the record companies. Collective licensing is generally chosen by the record companies where the usage is high volume, such as broadcasting in the offline world and simulcasting and interactive radio in the online world. Performers are either paid direct or via record company agreements.
5. In those areas where record companies have opted for collective licensing, PPL's and VPL's role is to ensure that a fair revenue is returned to the creators of the sound recordings and music videos.

⁴ *The Contribution of Copyright and Related Rights to the European Economy*, Turku School of Economics and Administration, 2003.

http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf

6. The way this is achieved is through copyright. Copyright grants ownership rights and it is this ownership which is traded to generate royalty income. The value of the 'content' industries online is directly related to the robustness of the copyright framework, ie the extent of the ownership rights and the mechanisms, both public and private, for enforcing those ownership rights.
7. Despite the successes of the music industry, we are concerned that music is not always valued properly throughout the value chain. A robust copyright framework is the starting point for establishing digital assets as the currency of the creative economy.

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.

8. The wider the scope, the greater the risks there are from a one-size-fits-all approach. A more focused exercise where the scope is specific is more likely to generate informed debate and a workable proposal.

C. 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.

9. In general, yes. The online market for music is growing fast in terms of availability of content (2m tracks), choice of services (over 300 in Europe) and take-up by consumers (downloads now driving the charts).
10. The key piece of legislation behind this market is the Copyright Directive which has established a broad package of ownership rights. However, there remain some barriers which slow down the development of this market in Europe. These are gaps in copyright (term for sound recordings), issues around enforcement and some deficiencies in other Directives.
11. The copyright term for sound recordings in Europe is currently around half that of the USA and about half as long as copyright for other creators. As a result, European performers and producers are at a disadvantage vis-à-vis their counterparts elsewhere in the world, as well as their fellow creators – the composers, authors, graphic artists, photographers, video directors etc. The shorter copyright term will result in a devaluing of the European recorded music heritage and less revenue to invest in new artists and new services for making available the back catalogue.
12. Piracy remains a major barrier to growth as sales are lost and costs are incurred by the industry in tackling it. As part of the review of the Copyright Acquis, the Commission should consider measures, such as liability provisions, for ensuring

that intermediaries (eg ISPs) cooperate with the music industry to stop piracy at source. This issue is linked to the implementation of DRM, both in hardware and software. One example of this is digital radio where new business models such as click-to-buy services would be destroyed by digital stream ripping. The solution to this, as to many online piracy problems, lies in technical solutions (DRM), backed by legislation.

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?

13. The early development of the online music market suggests that public interests are generally well served by current copyright, competition, consumer protection and data protection legislation. Consumer take-up has been very rapid. Less than a year after their launch in the UK, download services were sufficiently popular to have their own Charts. The demand from consumers now is for more variety of offerings which will be possible once the technical barriers of DRM interoperability are overcome.
14. The online music market demonstrates that consumers are best served by a business environment which provides commercial incentives to make content available through a variety of service offerings.

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?

15. The music industry wants the interoperability between devices demanded by consumers. The challenge is a technical one for the hardware manufacturers and software developers in producing DRM systems which operate effectively across platforms.

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?

16. PPL's collective licensing system encourages cultural diversity⁵. The PPL catalogue comprises 8.5m tracks on the CatCo database from tens of thousands of artists. This entire catalogue is available for radio, TV and public performance under a PPL licence. It is testament to the diversity of the music industry.
17. PPL currently has 3,500 record companies and 40,000 performers. Membership is free so there is no barrier to entry. The nature of collective licensing means that every record company, from the largest major to the smallest indie, as well as every performer, benefits from the same licensing terms.

⁵ See *Music Collecting Societies*, PwC, June 2005.

D. 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.

18. The online content industry in Europe is behind the USA. There are a number of factors here.
19. The USA has clearer legislation in respect of copyright, liability and enforcement through the courts. In addition, as the USA is a single territory, it is easier to aggregate rights and offer a single rate.
20. In Europe there are gaps in copyright (shorter term for sound recordings) and it is easier for ISPs and other intermediaries to refuse to accept responsibility for illegal content.
21. There are also issues in Europe in relation to rightholders' options in licensing. While PPL has been successful (in conjunction with IFPI and others) in negotiating multi-territorial agreements in order to license webcasters and simulcasters⁶, these took two years to clear through the competition authorities. There seems to be a presumption against aggregation of rights at European level, despite the fact that both rightholders and users are calling for greater aggregation of rights to facilitate licensing.

E. 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?

22. Record companies and performers have mandated PPL and VPL to license a variety of online services. These are services which are non-interactive, such as internet radio, or which have limited interactivity, such as customised or personalised radio, archive programming and 30-second clips. Fully interactive services such as download sites are licensed directly by the record companies.
23. While PPL is able to offer both national and multi-territorial licences, many music users opt for a national licence as their business model is based on a national audience or consumer base. Very few music users seek a European licence. The choice is generally between national and global.

⁶ IFPI Simulcast Agreement and IFPI Webcast Agreement.

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

24. Digital revenues currently make up 5.5% of record industry income⁷. Most industry executives expect that to rise to 25% in the next few years.

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.

25. The main technological barrier is the development of interoperable DRM systems.

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?

26. There are a number of barriers to securing revenue streams online. The most significant is the expectation on the part of many users that music should either be free or cost very little. This perception was created by the availability of free music in the internet through illegal p2p file-sharing services. Even though the legal online services are now hugely popular and consumers are showing great willingness to pay the price of a download, the 'free music' perception persists. By way of example, hundreds of internet radio stations have started in the UK in the last few years. Although they expect to pay for bandwidth, many of them have made little or no provision in their financing to pay for the music which makes up the bulk of their programming.

F. LICENSING, RIGHTS CLEARANCE, RIGHTHOLDERS' 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?

27. Licensing, rights clearance and rightholders' remuneration are all matters for the Copyright Acquis and subject to a separate review process. However, it is worth reiterating some general points here.

28. As far as sound recording rights are concerned, these are generally available on a multi-territorial basis. The download market (eg iTunes, Napster) has developed as a wholesale market, licensed directly by the record companies. Internet radio on the other hand is licensed collectively by licensing societies such as PPL.

29. It is worth noting that very few licensees actually seek a pan-European licence (despite some of the rhetoric). Most licensees want either a territorial or a global licence to support their business. The business model for commercial radio stations in the UK, for example, is territorial. It is their UK (or in some cases more locally defined) listeners that provide the value to their advertisers. They have therefore opted for UK-only simulcast licences. The BBC on the other hand has a

⁷ See *Global Recording Industry in Numbers*, IFPI, 2006.

specific remit to reach out to audiences outside the UK, but on different terms. It has therefore obtained a multi-territorial licence from PPL.

30. One outstanding issue which we have raised with the relevant Directorates-General is how competition policy interacts with copyright licensing. On the face of it, competition policy resists the monopolies created by the collective licensing societies such as PPL. However, on closer examination, these monopolies exist because of the demand from both rightholders and users and they provide tangible economic benefits to both⁸. Competition policy has begun to recognise this more recently.

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?

31. Again, this is a matter covered within the review of the Copyright Acquis.
32. In our submission to that review, we noted that the main licensing issue is accountability of music users. Many music users refuse to disclose essential information during licence negotiations and fail to account accurately under the terms of the licence⁹.

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.)?

33. Copyright levy reform is a matter currently under review by DG Internal Market as part of the review of the Copyright Acquis.
34. PPL has made a submission to this review and has emphasised. The essence of our submission is that if music is used, payment for that usage should go to the rightholder, whether directly or via a collective licensing body. Copyright levies provide a crude form of remuneration for rightholders, but a licensing system, supported by the necessary legislation, would be preferable¹⁰.

G. 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?

35. There are some legal and regulatory barriers, mainly falling within the remit of DG Internal Market. These are gaps in copyright legislation (the shorter term of copyright for sound recordings) and ISP responsibility and cooperation.
36. As noted above, competition policy can also be a barrier to the development of multi-territorial licence agreements, although PPL is able to offer global licences

⁸ See *Music Collecting Societies*, PwC, June 2005.

⁹ See PPL's submission to the Review of the Copyright Acquis for more information.

¹⁰ See PPL's submission to the Copyright Levy Reform consultation

using the agreement structure negotiated with DG Competition in the IFPI Simulcast and Webcast Agreements.

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

37. The approach of the UK government, supported by industry, is to let the market take the lead in developing online content and services.

H. 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?*

38. Release windows are sometimes used by the music industry. They remain relevant in the online environment as they enable rightholders to offer a range of options to consumers.

I. PIRACY AND UNAUTHORISED UPLOADING AND DOWNLOADING OF COPYRIGHT PROTECTED WORKS

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

39. The UK music industry loses around £300m a year from online piracy¹¹. This is the result of individuals downloading illegally, facilitated by intermediaries. PPL contributes substantial sums on behalf of the entire industry for anti-piracy action.
40. One area of piracy which has not been highlighted is digital stream ripping. This is the process by which it is already possible to capture the stream of a digital radio station, record it to a hard disk track by track and create an entire catalogue of music, without payment or permission. The more advanced software packages enable a PC to scan multiple digital radio streams and record tracks by a particular artist or from one genre, as set by the downloader. A short term solution has been agreed between the radio companies and the record industry in the UK. However, a longer term solution, involving the hardware manufacturers and software producers, is likely to require legislative backup.

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?*

¹¹ See BPI Statistical Handbook, BPI, 2006

41. There have been several copyright awareness campaigns in the UK, the most successful being those linked to the litigation actions against serial uploaders. The BPI has monitored awareness and understanding. Both have improved, but there is more to be done to reach every level of society that is now engaged online and presented with choices between legal and illegal sources of content.
42. One simple proposal (being piloted in the USA) is for children to put copyright ownership notices on their school work. That would develop the basic understanding that when you create something, it's yours. Children would become aware that they own the work they create, and would expect respect for their own creations. It is then easier to understand why permissions and payment are expected in relation to other people's work.

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?

43. Peer-to-peer services are licensed directly by record companies, as they are the equivalent of the sale of a record.

J. DIGITAL RIGHTS MANAGEMENT SYSTEMS (DRMs)

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?

44. PPL takes a pragmatic approach to DRM systems in its licensing. The record companies expect a degree of protection for their recordings. Equally, DRM systems have not been developed for all platforms and business models. DRM systems allow different business models to present a range of consumer offerings, where the consumer gets what they pay for, no more, no less. Without DRM, business models will reduce to a one-size-fits-all which is not in the interests of consumers or business.
45. There is a particular problem over interoperability where consumers expect to be able to move content from one device to another. Apple's iTunes service, for example, does not permit tracks to be moved to another device as Apple has not allowed other providers access to their DRM. While this is an issue for the industry, it is something government's should be aware of.

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?

46. Some DRM systems are available now, but not sufficient to deal with consumer demand for the range of service offerings (see paragraph 44 above). Investment is only put into DRM systems where it is clear to the market that the business models they support will not be competing with illegal free alternatives.

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?*

47. DRM systems have been developed to deal with digital stream ripping. However, these have not been implemented by radio stations and hardware manufacturers.

K. 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?*

48. At first sight, opening up public archives might sound like an attractive proposition – more material, more available, all for free. However, it is not a simple proposition. Content in public archives often has private interests (such as private ownership of the underlying copyright) and there are market impact considerations.
49. The publicly owned audio and audiovisual archives, databases and collections are one segment of a market. Traditionally, these archives have been just that – archives where a single or limited number of copies are retained as a record of our society's heritage. Once these archives are distributed and made available, they enter the creative industries' market. If they undercut that market (for example by providing free product), they will reduce supply from other sources and, in some cases, foreclose a market entirely. Furthermore, these effects are multiplied. As private supply reduces and the public sector assumes a greater role, the costs to the public sector increase as the economic and tax benefits from the private sector diminish.
50. Solutions have been found. For example, the Ordnance Survey in the UK is a public body with a valuable and unique body of assets. There is public demand for their information as well as opportunities for economic activity based on their core data. To address this, the Ordnance Survey has been given a commercial objective. The results speak for themselves. They offer the general public specific pieces of information free to download (eg a map of their area), similar to the way many commercial companies offer limited product free to consumers. Businesses can access more data and use that to add value and develop their own products on payment of a licence fee. This facility has spawned a myriad of business opportunities which have added value to the Ordnance Survey's core data. As a final benefit, the Ordnance Survey costs the taxpayer nothing. In fact, it returns a surplus to the Exchequer which reduces the overall tax burden.
51. In our submission to the Review of the BBC Royal Charter, we proposed a simple rule of thumb which would help manage the making available of public archives within the market context. We suggested that if the market is charging for a particular service or online product, then public sector bodies should adopt a similar charging policy. That would facilitate retaining overall plurality of supply, citizen access and business opportunities. It would also reduce the cost of

providing these public services and, in the case of valuable assets (such as the BBC archive), would generate a surplus for the public good.

L. 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.)?

52. Equipment and software manufacturers can accelerate the growth in the online market by installing DRM systems. This will be in their longer term interests as the value of market increases. However, some manufacturers may choose short term gains at the expense of the market as a whole (and other players in it), for example, by producing devices which facilitate consumers in obtaining online content from illegal sources free of charge.

M. 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.)?

53. The role of governments is to provide copyright and a conducive business environment which will encourage the production and distribution of creative content. It is not governments' role to intervene in business models.

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?

54. Specifically, governments (at both European and national level), should provide legislation to:
- Close the gaps in copyright legislation (by extending copyright term for sound recordings).
 - Ensure the right level of liability provisions so that rightholders can take action against free, illegal alternatives which inhibit trade.
55. In addition, there are a number of non-legislative areas where governments can and should assist in the move towards the creative economy. These are:
- Promoting copyright awareness and education.
 - Encouraging interoperability between devices.
 - Recognise the fundamental importance of copyright to the creative economy.

PPL/VPL

October 2006

Contact: dominic.mcgonigal@ppluk.com

Briefing note on PPL and VPL

PPL Facts and Figures

- Licenses on behalf of 3,000 record companies and 40,000 performers.
- Licenses 200 TV channels and 300 radio stations broadcasting recorded music, as well as over 200,000 pubs, nightclubs, restaurants, shops and other places playing recorded music in public.
- Has negotiated bilateral agreements with 20 other collecting societies to collect overseas airplay royalties.
- Collected £86.5m in airplay royalties for performers and record companies in 2005.
- Distributes revenue using a comprehensive track-based system – analysing over 17m uses of recorded music reported by TV and radio stations, background music suppliers and venues playing recorded music in public. All track plays are matched to PPL's repertoire database CatCo, containing information on 7m tracks.
- Distributes to all the performers – featured artists, session musicians and backing vocalists – as well as the record companies that create the sound recordings that are played.
- Is the largest performer/producer licensing society in the world.

PPL Recent Achievements

- In 2005, achieved a 5.4% growth in net revenue for the rightholders.
- In the last five years, has increased net revenue by nearly 40%, generating an additional £20m payable to record companies and performers, and almost halved the cost/revenue ratio.
- In 2005, PPL's CatCo was selected as the database underpinning the official combined download and singles chart.
- Signed the IFPI Simulcast Agreement in 2002 and the Webcast Agreement in 2003 paving the way for multi-territorial licences.

PPL and Performers

- In 2001, set up the Performers Forum with AURA, Equity, MPG, MU and PAMRA.
- Located several thousand artists due royalties as a result of the joint RoyaltiesReunited campaign.
- In 2003, signed two Memorandums of Understanding laying down the principles for closer cooperation and collection of overseas airplay royalties.
- In 2006, obtained clearance from the OFT to merge performer operations and amended PPL's Articles of Association to create a new structure for PPL, integrating collection and distribution of UK and overseas royalties for all performers. The new structure provides four Performer Director positions and creates a Performer Board to oversee performer business.

VPL Facts and Figures

- Represents 1,000 music video producers.
- Licenses 60 TV channels broadcasting music videos, including 25 specialist music channels.
- Licenses around 2,000 pubs, nightclubs and other places playing music videos in public.
- Collected £12.8m in airplay royalties for music video producers in 2005.
- Analyses usage information from TV stations and background music services for distribution to rightholders.
- Offers a sourcing service, Music Mall, for back catalogue video clips and other footage.
- Is the largest music video collecting society in the world.

VPL Recent Achievements

- Recently concluded a licence with MTV on behalf of independent companies throughout Europe.
- In 2003, integrated management operations with PPL resulting in cost efficiencies to rightholders.
- Concluded licence arrangements for new video on demand services, such as Home Choice, NTL and Telewest, and the new store forward and narrowcast services.
- Announced a video digitisation project to provide online delivery of music videos to users.

September 2006