

Roma, 30 June 2009

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles - BELGIUM

via mail: Comp-Greffe-Anitrust@ec.europa.eu

Subject: consultation on the report of the Online Commerce Roundtable

Dear Sirs,

Fastweb S.p.A, a major broadband and Quadruple Play provider in the Italian market, is pleased to participate to the above mentioned consultation.

Fastweb is interested in the development of the online content industry under various aspects:

- (i) as a **leading infrastructured telco** (the second broadband provider in Italy): the availability of legal content on the net is a key condition to support and justify substantial infrastructure investment in NGN networks;
- (ii) as **an innovative broadband access provider**: thanks to its large FTTH all-IP network it has implemented a quadruple play strategy, offering voice (fixed and mobile), access to internet and an IPTV service. Fastweb is very keen to promote cooperation with content providers and broadcasters in order to identify new business models for the delivery of on demand content through our networks.
- (iii) **as an IPTV provider** (started in 2001, the first in Europe): Fastweb has developed stable relationships with collecting societies because, as a broadcaster, has to pay music rights embedded in in audiovisual content.

In light of the above, Fastweb is pleased to submit its comments in relation to the consultation of the Online Commerce Roundtable.

Opportunities for the online music business (par. III.1, A)

Likewise Apple (par. 20), Fastweb believes that Internet must be regarded by traditional industry as an opportunity rather than a threat. One should therefore clearly understand the full implications of digital revolution, involving not only benefits, like new promising distribution and payment channels, but also dramatic changes, especially for traditional and consolidated business models. This is particularly important for rights-holders which, when starting to operate in the digital world, should adapt their business strategy in terms of pricing, distribution criteria, territorial restrictions and right ownerships.



Fastweb has always condemned the unlawful dissemination of copyrighted works. However, one should borne in mind that the endemic presence of piracy in the Internet is a consequence of the fact that most music labels have not full-heart accepted the digital revolution. When the Internet started to become popular in the mid to late '90s, there were no legitimate music sites available, so consumers found it easy to justify breaching copyright laws. This was, unfortunately, the beginning of a culture of disrespect for copyright rules. Then, in the early part of 2000, the technology continued to develop and created better and faster ways of sharing music. Nevertheless, the music industry did not warmly embraced these new technologies: rather than picking the opportunities offered by the technological progress, the response was to demand tougher and more aggressive laws against file-sharing. As a consequence, the culture of disrespect for copyright rules became even more firmly anchored in the online consciousness, with the paradoxical result that pirates are often regarded as heroes and not as infringers.

An example of this attitude is shown by Emi's statement of par. 29 whereby "*without strong laws and the cooperation of ISPs and the telecommunication industry, it will be impossible to build a stable marketplace for legitimate commerce on the Internet*". Although Fastweb fully share EMI's ambition to defeat piracy, one should recognise, after 10 years of deeply entrenched rejection of copyright laws, that only a legitimate, accessible and workable market for digital music is the principal instrument to address piracy and education over the Internet. Despite this, there are increasing requests focussing on more and even stricter laws, blaming third parties (ISPs) and imposing remedies which interfere with fundamental rights of citizens like privacy, freedom of speech and presumption of innocence. The recent decision of the French Constitutional court against the Hadopy Law has revealed, once again, the limits and the weakness of such approaches vis-à-vis the digital revolution.

To effectively develop the digital market, one should change the focus from the piracy repression to a serious debate on how to make copyright legitimate again in the eyes of consumers. That means that all stakeholders must engage in creating more and better services, so that customers at least have the option of downloading music lawfully. In this respect, one should examine whether the legal offers in the market may be considered effectively workable in the digital market so that to discourage piracy. First of all, it is important to separate out those sites that sell only a small selection of music, such as music by a single band or studio. Generally these niche sites simply "bulk up the numbers" and give a misleading impression of competition that isn't there. To the opposite, most customers want services that give access to the entire music catalogues of the major labels that between them control most popular music. Some of these services are in theory available, however it is interesting to learn how they developed effectively due to the constraints imposed by right-holders:

- Pandora.com: it has a vastly sophisticated way of learning the interests and tastes of its individual consumers, offering them music tailored to their own style. It si considered a truly innovative service, because it offers an adaptability and personalisation that will never be available to somebody accessing music illegally. However, Pandora has been forced to withdraw from the European market because the music labels wouldn't offer it licenses in Europe on economically viable terms.
- Rhapsody: it is a subscription music library. In return for a reasonable monthly fee consumers can stream any music track from the library. In theory, this library contains the entire collection of recorded music from the major labels. Unfortunately, due to the



restrictive licensing practices of the European music industry, Rhapsody is only available in America.

- Playloder MSP: it is an example that European entrepreneurs are any less inventive than American ones. Playloder's insight was that the public liked the convenience of peer-to-peer filesharing. Their market research found that customers would happily pay a premium for the right to share music files legally. Playloder believed that this created the opportunity to market "Internet access with legal filesharing" as a premium product, with profits remitted to the music industry in return for a proper, legal license. Unfortunately this model can only work if the customer is buying the right to share any music track, regardless of publisher. Thus, Playloder was unable to find workable agreements with the record labels and the service ran into difficulties.
- Apple iTunes: it is well-known and very popular. However, the price per track is often too high to be competing with traditional album prices.

The lesson that we can learn from the above is that: it is possible to create online services that make customers want to pay for music, provided that the music industry make more efforts to let them develop. ISPs and telcos like Fastweb would love to see such innovation develop and flourish, so that customers could enjoy exciting new business models for music.

B) Barriers to the digital distribution of music (par. III.1, B)

In general, a fundamental barrier to the digital distribution of music is constituted by the current licensing system of authors' rights. Such system is highly complex and characterized by licenses of national dimension, which are then reflected in the digital European market.

Fastweb considers that a multi-territory rights licensing may be desirable to create competition amongst collecting societies and enhance the integration of the European digital market. Such system should be driven by rights owners making the choice about how best to license their rights in order to reach their primary and secondary markets effectively.

Furthermore, multi-territory rights licenses may contribute to establish a common floor where content purchaser (mainly, Telcos and ISP) may choose the way to acquire content rights at favourable conditions, thus fostering the efficiency of the content on line services' market.

The above system will be potentially able to meet the demands of new services by consumers at European level and without artificial boundaries, in line with the ubiquity of such on-line services.

While remaining at your disposal for any further information you may need, Fastweb hereby declares to be available and pleased to directly participate to the next meeting of the Online Commerce Roundtable.

Kind regards,

Giovanni Moglia

Director of Legal and Regulatory Affairs