representing the recording industry worldwide

CREATIVE CONTENT ONLINE
IFPI RESPONSE TO THE COMMISSION CONSULTATION

29 February 2008

IFPI represents the recording industry worldwide and has some 1,400 members including major recording companies and all sizes of independents. IFPI's mission includes promoting and expanding commercial uses of recorded music in all relevant markets. IFPI submitted a detailed response to the initial Content Online consultation in October 2006 and has continued to follow the initiative closely.

INTRODUCTION

The recording industry continues to be at the forefront of developing the market for creative content and services online. Music's digital market share by revenue is higher than in any other entertainment sector except games[1] and the number of legal music services has grown from less than 50 in 2003 to over 500 in 2007 with the number of available tracks reaching more than 6 million on the major online services[2]. Our members remain dedicated to providing consumers with choice in the digital world and are therefore constantly seeking to develop attractive services which fulfil consumer needs. Today a single artist release may appear in over 100 different formats, which include video downloads, ring tunes or mobile full tracks.

However, important obstacles remain which prevent the European music market from achieving its full potential. For a number of reasons Europe is severely lagging behind its main trading partners when it comes to online music sales. In 2007 digital music sales only accounted for 8 % of the total music sales revenues in Europe as compared to 29 % in the US, 14 % in Japan and the global average of 17 %[3]. IFPI pointed to a number of issues hampering the development of a thriving online market in content in its submission of October 2006. Today, 16 months later, most of these issues remain unresolved.

An important obstacle to developing a thriving online market in music is piracy[4]. Record companies cannot compete with illegal free offers, which remain widely available on the Internet and which continue to develop and to take on varied forms. IFPI estimates that only 1 in 20 downloaded music files comes from a legal source[5]. Illegal downloading and file sharing have reached unprecedented dimensions in spite of the recording industry's efforts to combat it. Globally tens of billions of illegal files are downloaded illegally on an annual basis. Independent estimates suggest

[1] Source: IFPI Digital Music Report 2008. According to IFPI figures and figures from PriceWaterhouseCoopers (Global Entertainment and Media Outlook) approximately 15 % of the recorded industry global revenues came from digital sales as compared to approximately 7 % for newspapers, 3 % for films and 2 % for books.
[2] Source: IFPI Digital Music Report 2008.
[3] Source: IFPI first half 2007 figures.
[4] IFPI already raised this as a priority issue in its submission of October 2006 to the initial consultation.
[5] Source: IFPI Digital Music Report 2008.

that as much as 80 % of all Internet traffic is generated by P2P file distribution, of which the vast bulk is unauthorised use of copyrighted music and movies[6]. Although the problem is not limited to music, it remains the sector which is most affected as recorded music is desirable content for Internet users and also due to the fact that downloading and uploading of music files require less bandwidth than e.g. downloading or uploading of films or games. It is time for the EU to act on this problem, and to make clear that Internet Service Providers (ISPs) must take appropriate measures to work with right holders in fighting online piracy in order to secure the future of creative content. IFPI therefore welcomes the clear focus on this problem in the Communication and the fact that the Commission intends to address this problem as a priority. We also welcome the reference in the questionnaire (questions 9-11) to solutions which involve cooperation from ISPs.

The Communication also identifies lack of interoperability as an issue in the online environment[7]. Interoperability is a key priority for the record industry to enable consumers to make flexible use of content that they have purchased online. In our view the Commission should focus on ensuring that DRM manufacturers/music service providers, particularly those with a uniquely strong market position, engage with initiatives allowing for DRM interoperability. It is important to note that several solutions already exist. We will address this further in our reply to questions 1-5.

As regards licensing, authors societies' territorial restrictions[8] and discrimination among users are the main problems, which need to be addressed. See our reply to questions 6-8.

As record companies normally contract with the digital music service providers rather than deal directly with the consumers[9], we will only address the questions related to consumer contracts and consumer information from a more general perspective.

DIGITAL RIGHTS MANAGEMENT (questions 1-5)

Question 1: Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

We welcome the fact that the questionnaire rightly refers to "*DRM* interoperability", thereby underlining that the solution lies in interoperable *DRM* systems rather than systems without DRM. We have also noted that the Content Online Communication acknowledges that DRM are a key enabler "allowing for right holders to enforce their rights in the digital environment and to develop business models adapted to consumer demand and needs". DRM have indeed been instrumental in setting up online business models and DRM continue to play a key role, as these technologies allow for a great variety of business models to develop, many of which would not be possible without DRM.

IFPI firmly believes that interoperability is essential to the development of a robust online market for music, one that allows consumers to enjoy and experience a wide variety of music services while being able to play that music on the device of their choice. Interoperability is also important to further competition on the relevant

[6] Source: ipoque Internet Study, 2007
[7] IFPI referred to this as an important aspect already in its submission of October 2006 to the initial consultation.
[8] Please note that this is different from "territoriality", see below.
[9] Universal Music Group in France has a music platform named e-compil, which sells directly to consumers.

markets. Record companies remain committed to promoting interoperability in all the appropriate fora. However, it is necessary for DRM manufacturers/digital platforms to engage in finding solutions, as record companies alone cannot reach the goal of full DRM interoperability.

It is also important that interoperability is not understood to require the abandonment of DRM. There are a number of solutions available which enable interoperability when DRM are used and it is therefore unfortunate that much of the current debate regarding interoperability seems to focus on having DRM removed rather than achieving interoperability between different DRM technologies.

Many record companies have started to offer certain formats, mainly single permanent downloads, without DRM to certain platforms. These developments must be seen in their fuller context as a reaction to the failure of DRM manufacturers/music service providers to allow DRM interoperability. In order to respond to increased consumer demand for interoperable solutions many record companies have thus felt compelled to test DRM-free offers for certain formats and services. Furthermore, experimenting with different products and price points is a natural development in a competitive market such as the digital music market. Consequently, these developments are not a rejection of DRM or an indication that DRM are not important. DRM remain vital, and a number of services, such as subscription models, would not be possible without DRM. Our members continue to rely on being able to choose whether, when and how to apply DRM, and full interoperability without abandonment of DRM must therefore remain the goal.

As for the specific solutions, the recording industry is 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 has created 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 different DRM technologies are enabled to "speak together" thus allowing content to be consumed on systems that use different DRM, but in a secure way, which remains invisible to the consumer. The aim is to allow proprietary DRM (as well as open standard DRM if such systems emerge) to compete and evolve, while shielding consumers from the effects of incompatibility. For more information we refer to: www.coral-interop.org.

IFPI does not favour any one solution for achieving DRM interoperability over the other. What is important is that the real problem be addressed and that those who are able to make interoperability happen do not simply hide behind a call for the removal of DRM as an excuse for not taking any action.

Rather than pointing to specific commendable practices we believe that a solution should build on the following general principles:

- respect of DRM and right holders' choice regarding whether, when and how to apply DRM as reflected in the Copyright Directive (2001/29)
- a much larger degree of involvement of DRM manufacturers/music service providers, especially those with very strong market positions, in creating and applying interoperable DRM
- the choice among the various solutions to interoperability should be left to the market players involved as long as a solution is found which allows for true *DRM* interoperability and which reflects consumers' needs.

In addition it should be mentioned that 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 devices fail to incorporate the necessary DRM support.

Question 2 : Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

Considering the nature of this initiative we have assumed that this question mainly relates to labelling in the online environment and less to labelling of physical products.

First, it is noted that labelling regarding interoperability is merely a way of informing the consumer, and does not as such replace the need to obtain interoperable solutions. The achievement of interoperability should largely replace the need for labelling regarding interoperability aspects.

The question is phrased in a way which implies that existing consumer information concerning these aspects is insufficient, i.e. should be "improved". Given the number of diversified legal music services it does not seem appropriate to draw such a conclusion as the answer to the question depends on the specific service in question.

We generally believe that it is important for the consumer to be in a position that allows him to make an informed choice. Whether the information relates to DRM or other relevant aspects of a contract the amount of information should therefore be sufficient to fulfil this criterion. Furthermore, any information should be given in a clear and transparent manner.

In assessing what information is required existing consumer law both at EU and national level provides the necessary guidelines. We are therefore not convinced that further "means and procedures" are necessary in this respect. This is even the more so as there does not seem to be any indications that the information given on existing music platforms is insufficient.

Finally, we note that the question refers to information regarding "data protection features of DRM systems". It should be underlined that for most Internet services to be able to operate they must process personal data. Processing of personal data is therefore constantly taking place on the Internet, which is not problematic provided that data protection rules are respected. It follows that data processing and the respect of data protection rules is not something specific to DRM systems, but rather affects all aspects of Internet commerce.

In any case the existing data protection framework[10] lays down detailed rules on what information must be given to the consumer ("data subject"). Respect of this framework is important and should contribute to ensuring consumer confidence in online services.

IFPI is aware that the systems developed by IT and software companies and applied by online retailers include measures to protect any personal information that is generally required for the delivery of those services to individual customers and to ensure that the consumers' privacy is protected in compliance with applicable laws.

[10] Notably the "Framework Directive" (1995/46) and the "e-Privacy Directive" (2002/58)

In the light of the above we do not find it necessary to add to the already existing legislation, which sufficiently ensures that the necessary information is given when personal data is being processed.

Finally, as the Communication refers to the 2005 opinion from the Article 29 Data Protection Working Party[11] we would like to point out that this opinion contains a number of misleading statements. We alerted the Working Party to this fact following its publication of the opinion, and we believe that the opinion, due to an incorrect understanding of the functioning and purpose of DRM, is unsuited as a reference document. As the issues dealt with in the opinion are not raised directly in the Communication we will not address them further. We would simply conclude by underlining that the purpose of DRM in the music industry is two-fold: to provide for a wide range of usage rules and license conditions, and to ensure that users comply with those rules and that the content is protected from unauthorised use and dissemination.

Question 3: Do you agree that reducing the complexity and enhancing the legibility of end-user license agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

This question implies that EULAs are generally too complex and not sufficiently easy to read. Although this may be the case for some EULAs the reply would depend on the specific EULA in question.

Our members are not involved in drafting agreements between the music platforms and the end-users and we are therefore only able to comment from a more general perspective.

As underlined in our reply to question 2 we believe that consumers should be given sufficient information to be able to make an informed choice and that this information must be given in as clear and transparent a way as possible. Easily understandable terms and conditions contribute to enhancing consumer confidence although a number of other factors, such as the content of the service and the level of choice and flexibility are also important.

In our view it is not a matter of the quantity of information but rather the quality of the information given. A balance must therefore be achieved which ensures that the consumer receives the information necessary to make his choice and be familiar with the basic terms and conditions without unnecessarily complicating matters.

As for the practices to be followed we refer to the existing consumer acquis at both EU and national level, which provides a solid framework. We believe that this framework provides a sufficient basis, and further initiatives therefore would not seem necessary. Should the Commission consider further initiatives, it should make sure that these respect the parties' contractual freedom. We also underline that any attempt to introduce standards in this nascent market could risk hampering rather than favouring the continued development of the online market in content.

Finally, there is also a certain self-regulatory effect on the market, as consumers will for obvious reasons turn to the service that offers them the best product. Platforms with an overall good product and a good service, including clear information and contractual conditions, would naturally gain more popularity whereas services which do not provide these pluses would lose out on sales.

[11] See January 2005 "Working Document on Data Protection Issues Related to Intellectual Property Rights"

Question 4: Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

Mechanisms giving consumers a facilitated access to dispute resolution have many advantages. We therefore generally believe that such systems can be beneficial to all parties provided they are set up in a fair and transparent way. We are, however, less convinced that ADR mechanisms would assist the consumers in the area of DRM. This is so because DRM involve complex questions of both law and technology, are mainly governed by a set of rules different from the general consumer acquis and, in addition, involve a number of different actors.

As for the *application* of DRM it is clear from the Copyright Directive (2001/29) that DRM are protected, and right holders have a choice of whether, how and when to apply DRM. The *administration* of DRM systems involves the music service providers, the DRM manufacturers and the right holders. Given the complexity of this area and the number of actors involved this issue does not seem suited for a case-by-case approach.

In this context it is also noted that the French authority ("ARMT") set up to deal with complaints regarding DRM and interoperability does not grant consumers a right of standing, but focuses on access for competing companies to a specific DRM-technology.

Question 5: Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

As long as DRM technologies are not interoperable it is a fact that certain platforms with a very strong market position continue to benefit from the lack of interoperability to further reinforce their position on the relevant markets both upstream and downstream.

Rather than obliging these companies to license their proprietary DRM solutions we believe that this hurdle must be overcome by putting pressure on them to allow interoperability. Interoperability would naturally facilitate market access. As already mentioned several solutions exist which allow for interoperability even where proprietary DRM are applied. In this context it should be mentioned that the Coral Consortium described above is an example of a technology which facilitates interoperability between different DRM-technologies without necessitating licenses to be granted between the manufacturers involved for their specific proprietary DRM-systems.

Competition rules may, depending on the specific circumstances, contribute to addressing certain aspects related to (non-discriminatory) access to DRM solutions.

MULTI-TERRITORY RIGHTS LICENSING (QUESTIONS 6 – 8)

By way of introduction we would like to make a few comments on the issue of territoriality as the Communication seems to indicate that territoriality could be detrimental to the development of a European market in online content (p. 5). In short, territoriality is understood as the basic principle of copyright protection and licensing according to which the rights are traded and the protection and ownership of copyright and related rights is determined under the applicable national laws.

Copyright has always been based on territoriality, and this principle is acknowledged in all relevant international instruments. The principle of territoriality is also well established both in the ECJ case law and in the relevant EU Directives, including the Copyright Directive (2001/29). All existing rights and licenses therefore rely on this principle and to question territoriality would be to undermine the long-standing network of international rights.

For producers the clearing of rights, repertoire by repertoire, for digital release for each Member State is also dictated by the fact that record producers do not always control all rights to all repertoire for all EU/EEA territories. Territoriality is important also in practice as it firstly safeguards adequate protection of rights within the Internal Market and secondly allows the record producers to apply business models, including so-called staggered releases, which maximise the chance of success of each release to the benefit of all right holders, i.e. authors, performers, music publishers and record companies. The staggered release strategy makes it much easier for the labels to break new acts Europe-wide, on the back of initial success in their home markets.

It should also be made clear that territoriality does not stand in the way of multi-territory licenses. Record producers do grant multi-territory licenses to online service providers and have done so for some time. Thus, record companies are engaged in licensing their digital rights to a wide range of digital service providers, mobile network operators and other aggregators and distributors offering on demand and interactive products. Many of these deals involve multi-territory licences. Once the rights are cleared for a number of territories, it is then usually for the music service providers to decide how they want to operate their services for these territories, including whether they want to set up one site covering all relevant territories or run parallel national sites.

In addition, the IFPI Simulcasting and Webcasting Agreements facilitate certain multi-territory internet streaming models for broadcasters and webcasters[12]. In April 2007 the recording industry and producers' collecting societies took further steps to facilitate cross border collective licensing by extending the scope of the Webcasting Agreement to make blanket licenses available to a broader range of digital streaming services, and by launching a new reciprocal agreement to facilitate the streaming and podcasting of broadcasters' programs[13]. These reciprocal agreements are administered by collecting societies rather than the individual companies.

The obstacle to multi-territorial licensing is therefore not the territoriality of copyright protection – the issue is rather whether the licensors, in particular the collecting societies, have sufficiently adapted their procedures to the new digital environment. As will be described below the European digital music markets sorely need procedures that ensure the availability of pan-European blanket licenses, to rights in musical works to all commercial users, on fair and non-discriminatory terms. Producers are looking to provide an "all rights included" product, but they are not, at this stage, able to obtain the necessary rights from authors' societies, in particular when it comes to multi-repertoire licenses on a multi-territorial basis.

[12] As the Commission knows, the Simul- and Webcasting Agreements are one-stop, multi-territorial, multi-repertoire agreements, allowing the commercial user to obtain such license via the participating EEA collecting society of his choice. 39 collecting societies are parties to the Webcasting Agreement and 40 to the Simulcasting Agreement.

[13] Press communication on the new protocols can be accessed via: NEWS - Major step forward in cross border music licensing regime.

Question 6: Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

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. IFPI therefore agrees with the Commission that the availability of multi-territory licenses is important to the development of a thriving online market.

As mentioned, the recording industry has already come up with new and innovative ways to ensure the availability of pan-European licenses for the entire world repertoire and continues to develop this market. Creating a workable European licensing framework for on-line and mobile rights remains a priority for the recording industry, and IFPI's member companies will continue to pursue that objective.

However, problems exist, in particular with respect to the *authors'* practices for collective licensing of online music rights, and these problems continue to have a negative impact on online markets in Europe.

As referred to in the Communication there is already a Recommendation applying to *collective cross-border management* of online music services ("the Recommendation")[14]. Question 6, asking whether the issue of multi-territory rights licensing should be addressed by a Recommendation, is therefore less directly relevant to music.

However, in our view, the Recommendation for music failed to address the real obstacles to cross-border licensing. We have pointed this out on several occasions, most recently in our submission to the Commission call for comments to assess the Collective Cross-Border Management Recommendation and its impact on the market. It is surprising, against this backdrop, that the Commission in its "summary document" of the results of the monitoring of the Recommendation fails to refer to the criticism raised by a number of actors, in particular regarding the so-called "Option 3[15]" favoured by the Recommendation.

It is well known that record companies are both right holders and users of music. As right holders record companies are committed to the development of a robust and legitimate European market place for digital music. With that objective in mind, as users recording companies depend on the authors' collecting societies to provide pan-European blanket licenses on fair commercial terms to enable the record companies to sell or license their sound recordings to the on-line music service providers within the Internal Market. The main problems with licensing of European digital music rights relates to the refusal of the authors' societies to adapt their practices to the new on-line and mobile environment, in particular their inability to offer EU-wide blanket licenses on fair and non-discriminatory terms and to open their services to any form of competition. This situation is further exacerbated by the societies' discriminatory practices in refusing to license record companies for on-line and mobile exploitation, and by applying significantly higher rates for on-line and mobile services than for "traditional uses". Obviously, the above problems concern equally services aiming to offer audiovisual products containing music.

The Recommendation and its favoured Option 3 have done nothing to address the abovementioned obstacles, rather to the contrary. The Recommendation does little

[14] Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services

[15] As also referred to in the Communication the "Option 3" suggests that right holders should be entitled to entrust the management of any of the online rights necessary to operate legitimate online services, with a territorial scope of their choice, to a collective rights manager of their choice.

to address these problems in spite of the fact that they genuinely hamper the development of a thriving European online market. In our view the improvements which have taken place with regard to multi-territorial licensing in the music sector do not owe their existence to the Recommendation.

Therefore, given the failure of the existing Recommendation to address the problems indicated above, and given that this area is in constant development and new services and business models continue to evolve we believe that for the time being the market should be given time to find adequate solutions. For this reason we are satisfied that the Commission, DG Markt, has indicated that it does not intend to legislate in the area of music, but that it will rather continue to monitor developments.

Instead of legislating the Commission should concentrate on applying the existing legal framework to ensure that all collecting societies (i) adapt their existing reciprocal agreements to allow them to offer EU-wide, multi-repertoire on-line and mobile licenses at fair, competitive rates and (ii) stop discriminating among commercial users. The Commission's on-going competition law investigation into the reciprocal representation agreements of the authors' societies (the so called CISAC case, COMP/C-2/38698) is an example of how the existing legal framework can be applied to encourage the development of fair multi-territory licensing practices. However, the Commission must take a robust stance in favour of fair multi-territory licensing. It follows for instance that the commitments proposed by the authors' societies in the CISAC case should not be approved as suggested. They have a large number of shortcomings and do not adequately address the real problems identified by the Commission in its Statement of Objections[16].

Question 7: What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audio-visual works? Do you agree that a model of online licenses based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

As this question refers directly to the audio-visual area we will refrain from commenting in detail on the issues raised. As for the obstacles to be tackled and the best way forward for music, reference is made to our reply to the question above.

With regard to the notions of "primary" and "secondary" license we note that they remain unclear. Neither the Communication nor the Working Paper contain a more detailed description of how the proposed system would work. We are therefore not in a position to reply to this question.

In general we would add, however, that the issue of which solutions are suitable should rather be left to the market. Favouring one specific model would interfere with the parties' contractual freedom. Furthermore, the experience with the "Option 3" favoured by the music Recommendation illustrates that it is not in the interest of the market to direct the players to specific solutions.

[16]In particular the authors' societies proposed commitments: fail to include all the necessary rights (they only cover performance rights), fail to cover ex-Europe repertoire (they only cover the repertoire that each society obtains directly from its members), do not enable any type of competition between societies on any element of price or administration cost, and do not permit record companies to obtain and administer licenses on behalf of the users envisaged in the proposed commitments.

Question 8: Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory benefit from multi-territory rights licenses for back-catalogue works (for instance works more than two years old)?

The "Long Tail" theory refers to the idea that products which individually have a low sales volume would collectively be able to generate substantial revenue.

It is clear that new technology has enabled a wider range of repertoire, including specialist, vintage or hard-to-find recordings, to be made available to consumers. Physical albums of back catalogue become uneconomic to reproduce due to the minimum run production costs. Online delivery, however, allows record companies to make earlier repertoire available, even if there is relatively small consumer demand – it creates opportunities for 'long-tail' sales.

It is obvious that the greater the number of potential customers exposed to the Long Tail the better because the likelihood of finding niche fans interested in the long tail products increases. It follows that business models based on the theory should benefit from the availability of multi-territory licenses. We reject, however, the idea that the Long Tail products should be subject to any type of special licensing regime.

As already mentioned under question 6 we favour and depend on multi-territorial licenses. Such licenses would also cover back-catalogue works where there is sufficient demand and thus a market for it.

There is evidence that consumers appreciate the availability of a multitude of products, including back-catalogue works and niche-products. There is thus definitely a market for these works and due to the huge investments made by the record industry to digitise, create and maintain a digital supply chain for hundreds of fixed-line and mobile partners, the consumer today has access to a wider choice of back catalogue recordings than ever before.

There is little incentive to invest in digitisation or invest in the re-mastering of public domain material, particularly of those titles that are less popular. An extension of the current 50 year term of protection on sound recordings in the EU would increase the incentive for record companies to invest in digitisation of older catalogue. If a company has a longer period of time to try to recoup its investment, it would be more likely to invest

For the sake of completeness it should be mentioned that back-catalogue is one important part of the "long-tail" theory. However, other low-volume recordings such as niche-recordings would also form part of this concept. It does not seem appropriate to try to identify a certain age for back-catalogue as this varies from product to product as well as within the same range of products.

LEGAL OFFERS AND PIRACY (QUESTIONS 9 – 11)

IFPI greatly welcomes the focus in this consultation on online piracy.

Online piracy is the number one obstacle to developing a thriving online music market. The piracy figures and rates speak for themselves, and urgent action is needed to turn the situation around.

Our members constantly strive to develop online offers that meet consumers' needs. The development of legal offers is ongoing whereas piracy remains at unprecedented levels. Therefore, although we agree that the availability of legal services is important in the fight against piracy, the current situation clearly illustrates that this alone is not enough. Our members are dedicated to fulfilling their part of the "deal"

and are ready to engage in discussions on how to further increase consumer choice and flexibility, but it is time to focus on creating better tools to fight online piracy. Our members have tried to enforce their online rights for years and continue to do so. However, it is clear that additional solutions are needed, which involve assistance from the ISPs and, notably the access providers. The industry's continued attempts to reach agreements with ISPs have not brought satisfactory results. It is therefore critical to bring together the relevant stakeholders to reach an effective solution without further delay.

We believe that strong political pressure is necessary to ensure that the relevant stakeholders, in particular ISPs, meaningfully engage in finding effective and fair solutions to the problem. This is illustrated by the French Memorandum of Understanding, described in our reply to question 10, which became a reality due to high-level political pressure and engagement predicated on the notion that it was unacceptable for a civilized society to accept complete passivity in the face of massive theft. Another example is the recent announcement from the UK Government, which confirms the Government's plans to ensure that ISPs play a far bigger role in combating online music piracy. These and various other national developments in other EU Member States illustrate that the necessity of involving ISPs in the fight against piracy is increasingly accepted. The Commission should follow this line and engage in finding EU solutions to create a level playing field and allow the market for creative content to flourish.

Question 9: How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

For several years now, IFPI has been asking for the cooperation of Internet Service Providers, in particular access providers, to help control the unauthorised offer and dissemination of protected content online.

The recording industry's business suffers massive losses from online piracy each year. Tens of billions of illegal music files are traded annually worldwide and IFPI's research shows that only one out of 20 titles is downloaded from a legitimate service[17]. This has had a major impact on the development of legal services, holding back growth in the whole online sector.

With the evolution of Internet piracy towards P2P, the cooperation of access providers has become indispensable. Today, approximately 80% of all Internet traffic is P2P, of which the vast part is illegal. Access providers are in a unique position with respect to both control over access to content and relationships with its subscribers, and are usually best placed to act promptly and effectively against infringements over their networks or services. Yet, in Europe, access providers have been unwilling so far to provide any meaningful cooperation.

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.

There are a number of feasible and reasonable options that ISPs can take to help address copyright infringements on their networks and that can in some cases be supported by technological solutions. One of the most effective steps an ISP could take is to warn infringing subscribers and thereafter to suspend and, eventually, terminate services to subscribers who are repeatedly abusing the service to infringe copyright. Such termination is feasible and not technically burdensome. In fact, virtually all ISPs 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

[17] Source: IFPI Digital Music Report 2008

the prohibition is not respected[18]. This is an explicit condition in the US Copyright Act, which states that safe harbours 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)). Other options open to ISPs include the application of filtering measures, including blocking access to specific protocols or to infringing sites. If all ISPs in the EU implemented these terms on an industry-wide basis, none would suffer any competitive disadvantage. The need for a level playing field thus clearly justifies EU-intervention in this matter.

The need for ISPs to cooperate in the fight against online piracy and the fact that they are able to do so has been increasingly recognised by courts and legislators. The most prominent example is the so-called "Olivennes Agreement" in France, in which ISPs and right holders agreed to the setting up of a system of warnings and, eventually, suspension and termination, against infringing subscribers, to be implemented by the ISPs. The ISPs also agreed to test filtering technologies (see our answer to question 10).

Other EU countries are also considering initiatives. In the UK, the Government recently announced the launching of a consultation which will include options for ISP cooperation in the fight against illegal P2P. In September 2007 the Swedish Ministry of Justice published a report drafted by Cecilia Renfors, a Swedish judge, entitled "Music and Film on the Internet – Threat or Opportunity". The report examines the problem of online piracy and suggests that a provision on disconnection of infringing subscribers should be added to the Swedish Copyright Act. This suggestion is currently being considered by the Swedish Ministry of Justice. In Belgium, the Tribunal of First Instance rendered a decision in the SABAM/Scarlet case in July 2007, ordering Scarlet to apply filtering "or any measures which can put an end to the P2P infringements of SABAM's repertoire occurring over its network".

The above developments, in particular the Olivennes Agreement, have contributed to creating increased awareness of the need for ISP-cooperation in other EU Member States and thus to placing this on the political agenda.

ISPs continue to benefit from mass-scale dissemination of creative 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. It is therefore reasonable to ask them to play a greater role in the fight against piracy.

In conclusion, the dissemination of unlicensed music and the unfair competition it creates for legitimate services is the biggest challenge to the music business today. It is also one of the biggest challenges facing the European institutions. The cooperation of access providers is indispensable to fight P2P piracy and a number of options are open to them. IFPI therefore urges the European institutions to oblige the parties to cooperate and play a responsible role in the fight against piracy. Should voluntary agreements not be sufficient, the Commission should be prepared to impose obligations to cooperate on ISPs via EU legislation.

Question 10: Do you consider the Memorandum of Understanding, recently adopted in France, as an example to be followed?

The French MOU is a very important example of ISP cooperation which has created considerable and long needed momentum in Europe. Of course it should not be

[18] 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

reproduced at EU level in every detail due to the specificity of the French environment, but it is an example in several respects:

- The French MOU is the first agreement on ISP cooperation where the public authorities got involved and ensured that the parties reached an agreement that met the national interest in securing effective copyright protection;

- The government is implementing parts of this agreement in legislation, which will ensure the effective follow-up and application of the agreement;

- The MOU has been agreed by all the main sectors concerned and has been signed by 45 companies and associations representing the right holders and service providers;

- The MOU recognises that Internet service providers, in particular access providers, are in a position to help in the fight against online piracy and that they must do so.

Regarding the system of cooperation between service providers and right holders, several elements can be used in a European model:

- The MOU creates an effective warning and sanctions system based on the sending of a warning by the ISPs to their subscribers, followed by the suspension and, eventually, the termination of the contract if the subscriber insists on continuing to infringe. This system formally applies the contractual conditions that most ISPs already have in their contracts but which they have until now refused to enforce;

- The ISPs can also be requested to take any other measure "in order to prevent or put an end to an injury created by the content of an online service". This leaves flexibility with regard to the possible measures depending on the evolution of the Internet and of technology;

- Sanctions can be applied against ISPs who refuse to cooperate and apply the system;

- ISPs have agreed to test filtering measures and to apply them if they prove effective. As set out in our reply to questions 9 and 11 filtering and blocking solutions can reasonably and effectively be applied by ISPs.

- The system will not replace the existing legal rules on copyright and ISP liability, and the judicial procedures for copyright infringement, disconnection etc. Right holders will continue to have the choice of recourse to these procedures. It also does not modify the rules on the liability of intermediaries, as set out in the e-Commerce legislation, which continue to apply.

Other parts of the MOU are specific to the French context: the setting up of an administrative authority to apply the system; some modifications to the rules on film release windows, some undertakings regarding non-interoperable DRM. These elements are linked to the specific political, legal and economic context in France, and would not make sense transposed into a European initiative.

Finally, it is important to underline that a critical factor to the success of any model is that it allows for a large number of cases to be dealt with expeditiously. This important criteria of effectiveness must be reflected in any agreed or legislated model and must also be respected in the course of the actual application of a future

model. To give an example, there are approximately 6 million illegal file-sharers in the UK. A model for cooperation would therefore not have the necessary impact if it only allows for a limited number of cases to be dealt with each month or if the procedures for dealing with the cases are too lengthy. To address online piracy in an effective way, which will actually contribute to reducing this mass-scale piracy phenomenon, procedures must not be overly complex or burdensome. This does not imply that adequate evidence should not be provided, but rather underlines the fact that traditional court style procedures would not be able to solve this large-scale problem. It is therefore necessary to look at other solutions to supplement the existing legal framework. Whatever solution is put in place it must provide a deterrent and thereby give individual infringers incentives to stop illegal file-sharing. A system of one warning followed by suspension and, eventually, termination is an example of a good and proportionate solution if implemented in a way which allows for a sufficient number of cases to be handled expeditiously.

Question 11: Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

Yes. The rapid evolution of technology has exacerbated the problem of mass infringement of copyright online, and we believe that technology has the capacity to address it. The sheer size of the problem lends itself to a solution that can be automated and scaled to deal with a large volume of infringements. When filtering measures are implemented by ISPs, they have the potential to be extremely effective, given the unique position of ISPs as the gateway to all traffic on the internet.

It must of course be kept in mind that no technology is in itself a 100 % complete fix to the online piracy problem. Technology will always have inherent limitations and it cannot operate in a vacuum. It therefore needs to be properly implemented and updated over time to keep pace with the evolution of online piracy. It is essential that technology is treated as a tool to implement an ISP's policy of addressing piracy on its network rather than a solution in itself.

Similarly, technology cannot substitute for the role right holders play in protecting and enforcing their rights. The recording industry has invested substantial time and resources in recent years in protecting its rights online through various different types of enforcement action, and that investment will continue. However, with cooperation from ISPs, technology and filtering measures can be used to support and supplement enforcement by right holders thereby to some extent shifting focus away from individual lawsuits.

ISPs are in the technology business and they already implement technology to manage traffic across their networks for their own commercial interests. For example most ISPs filter email traffic to remove spam, and many ISPs "throttle" (slow down) traffic on P2P networks at busy times to reduce bandwidth costs. As mentioned in the introduction independent studies suggest that as much as 80 % of all Internet traffic is P2P. Technology would assist in managing this traffic and free more network capacity to the benefit of both right holders and ISPs.

Against this background, it is a logical and feasible step for ISPs to implement technology to prevent or address copyright infringements on their networks. At a basic level, there are at least three technical options (outlined below) available to ISPs to prevent or stop infringements, which can be implemented in various ways to enforce the ISP's copyright policy. None are overly expensive or burdensome, and all can be implemented without disruption to regular services. These options are not mutually exclusive, and could be implemented across an ISP's entire network, or at the level of an individual user or users, in conjunction with a warning and disconnection program as described under questions 9 and 10.

1. **Content filtering:** This would involve the ISP placing an automated appliance at an appropriate point in its network to process traffic, identify audio files, and match them against a reference database of "audio fingerprints" for legitimate sound recordings. Unlicensed files that are a "match" for copyright sound recordings in the database would be blocked and could not be exchanged over the ISP's network. This is a solution that can be very targeted and need not interfere with legitimate uses. ISPs could apply content filtering only to P2P networks, or only to specified P2P services that do not themselves take steps to prevent infringement. Such filtering need not even touch regular traffic such as web and email. It should also be underlined that such filtering does not slow down the Internet traffic.

   The components needed to implement content filtering – the audio recognition ("fingerprint") technology and the databases of reference fingerprints – are already well developed and tested and have been used for some years by the operators of P2P services including Kazaa and iMesh, to enable the legitimate use of their services while preventing infringements. Similarly the new generation of user-generated and social networking sites, including YouTube and MySpace, are increasingly using audio and video recognition technology in order to address infringing material that appears on their services.

   Content filtering can be implemented by ISPs consistently within the existing framework of European law. The use of an automated appliance on the ISP's network should not, in itself, cause an eligible ISP to lose the protection of the Article 12 "mere conduit" safe harbour. Filtering measures can also operate anonymously, so there should be no privacy or data protection concerns

   A common criticism of content filtering at ISP level is that it is less effective in dealing with encrypted traffic, in particular encrypted P2P traffic. This criticism misses the point: currently the majority of P2P traffic is not encrypted and, while it is possible that the level of encryption could increase in future, this should not be an excuse for doing nothing now. If all ISPs implemented content filtering on P2P networks this would dramatically reduce the current level of piracy, and other solutions can be found to deal with encrypted traffic. For example, in addition to technical solutions, ISPs can still operate a system of warning and disconnection in respect of encrypted P2P transmissions, on the basis of evidence provided by right holders.

2. **Protocol blocking:** This solution is implemented with the help of an automated appliance, which would detect the "protocol" associated with various types of traffic, and block objectionable traffic. Web and email traffic has a different protocol to P2P traffic, and different P2P services can be distinguished from one another by their protocol. It is therefore possible for ISPs to block their customers' access to specific P2P services that are known to be predominantly infringing and that have refused to implement steps to prevent infringement, while not affecting regular services such as web and email.

3. **Blocking access to infringing online locations:** This solution involves an ISP blocking access for its own customers to specific infringing websites, services or online locations that are hosted overseas or at another ISP. The solution could apply to websites and online services, especially those in rogue jurisdictions or that refuse to cooperate with right holders. There is no doubt that this solution is technically feasible and, if properly implemented, is effective. Some ISPs already block access to websites that contain pornography, and in Denmark courts have twice ordered an ISP to block access to an online service because it was blatantly infringing copyright: Russian website www.allofmp3.com in 2006, and Swedish service the Pirate Bay in early 2008.

The use of technology to prevent or stop infringements is a concept that is gaining increasing acceptance in member states and around the world. In France, the so-

called Vivendi amendment provides that a court can require a service provider to implement measures to stop infringement, where a service is mainly used to infringe. In Belgium, in the case of SABAM versus an ISP, Scarlet, a judge considered an expert report that outlined a number of technical options available to ISPs to manage piracy, and ruled that content filtering (as described under point 1 above) is an effective and not unreasonably burdensome measure for an ISP to implement to address P2P piracy. A major ISP in the US, AT&T, announced recently that it was preparing a network solution to copyright piracy. The recent Olivennes Agreement includes a commitment by ISPs to test filtering measures and implement them if effective.

OTHER ISSUES

The Communication and, in particular, the Staff Working Document, cover a lot of ground. As the consultation is restricted to 3 distinct topics we have limited our comments above to those topics and the specific questions. Without being exhaustive we would, however, like to add a few comments on some of the additional issues raised in the documents:

Term of copyright

We welcome the reference in the Staff Working Document to the call for an extended term of protection and, in particular, the reference to the substantial disadvantage to performers and producers in the EU as a result of the much shorter term of protection in the EU as compared to the US and other trading partners.

We are heartened by the announcement of Commissioner McCreevy that he will come forward shortly with a proposal to extend term of protection to the level of the EU's international partners.

Private copying levies

The recording industry continues to favour exclusive rights exercised through agreements, with the option to implement those agreed terms through DRM.

IFPI's position is therefore that levies should be adapted appropriately when and to the extent that technological measures are effectively implemented ("levy relief"[19]) in proportion to the degree of use effectively enabled by DRM. This levy relief mechanism should address the concern raised in the Staff Working Document, p. 34, stating that consumers pay levies and are, at the same time, restricted by copy-protection measures.

As for the reference to restrictions due to copy-protection measures it is noted that most online music services' terms and conditions allow for a number of copies to be made in order to meet consumer needs to make private copies and to store their music and listen to it on different devices. This should not, however, be confused with levies as those copies are licensed.

[19] IFPI's levy relief mechanism has been described in more detail in our submission of 16 October 2006. The general principles are: 1) Levy relief should be provided in proportion to the degree of use effectively enabled by DRM on specific equipment. 2) "Uses effectively enabled by DRM" means copying that is controlled and/or licensed through DRM. 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). 4) Levy relief should focus on digital equipment and media as analogue equipment tends not to implement DRM, at least in the music field. 5) As for multi-purpose devices (e.g. PCs) which 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. Once the percentage is determined, it can be used as a basis for the application of the general test above.

Finally, we would like to underline that levies do not compensate for sales lost from illegal copying. In that context it is worth noting that it is generally acknowledged that private copying exceptions should not apply to copies from an illegal source. Furthermore, an increasing body of case-law confirms that the private copying exception is not a "right" for consumers to make private copies regardless of the terms of the offer they have accepted.

The Staff Working Document refers to various statements made by hardware manufacturers indicating that levies could be contrary to Internal Market rules on the free movement of goods. It should be underlined that there is no legal or other basis for this claim. Consequently, whereas IFPI agrees that levies should be applied and calculated in a transparent way and in accordance with the principles set out above, we disagree that levies could constitute an inhibitor to the take-up of ICT or to the free movement of goods.

We are aware of Commissioner McCreevy's recent re-launch of a consultation process on private copying levies and we will participate actively in this process and the dialogue that is going to follow.

Reduced VAT-rates

We believe that creative content should benefit from reduced VAT-rates on a non-discriminatory basis. There is no objective reason for allowing reduced VAT-rates for certain cultural products but not for others. Similarly there does not seem to be any immediate justification for having reduced rates off-line but not online.

We therefore encourage the Commission to work with all the Member States in remedying this unfair discrimination of different cultural products.

Another way of supporting the development of creative content is by encouraging various tax credit schemes following the examples set by France, Italy, Belgium and Finland[20].

There are many examples of measures by which national governments encourage the development of creative content, including for the online market. We would welcome the support of the Commission to develop these and other useful initiatives and measures throughout the EU.

Finally, funding is an important way to support the creative sector. Such funding should not only be made available to specific sectors, but should embrace all relevant creative sectors, including the music industry.

[20] The specific schemes are described in further detail in our submission of 16 October 2006.