

CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE

FIM COMMENTS (Jan. 4th, 2010)

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I. CONSULTATION PROCESS

1. We welcome the invitation from DG Info and Markt to comment their reflection document: *Creative Content in a European Digital Single Market: Challenges for the Future*. However, we wish to express strong reservations about the way the consultation process is being carried out by the Commission as regards the various “stakeholders’ platforms”. Despite their repeated requests to be involved, performer organisations were systematically kept out of these platforms, therefore undermining both the latter’s legitimacy and the scope of their conclusions.

2. As an example, at its 2nd meeting on Dec. 16th, 2008, the *online commerce round-table* focused on the issue of online distribution of music, in presence of 9 participants, among which high level representatives from Alcatel-Lucent, Fiat, LVMH and eBay. It is quite difficult to understand the relevance of such panel to the issue addressed. Also, Sir Mick Jagger’s representativeness may not be sufficient to speak on behalf of the European performers’ community, whose situation has very little in common with that of stars.

3. The reflection document mentions that the *Content Online Platform*, “gathered 77 high-level experts from all groups involved: creators, right holders, content providers, consumer associations, ISPs, broadcasters and the telecommunication industry”. Regrettably, none of the experts proposed by the performer organisations were invited to take part in either of the 5 meetings held between April 17th, 2008 and Jan. 21st, 2009. While big industry players were overrepresented, performer organisations were not given a single seat among the 77. It is thus not surprising that the concerns of one of the main right holders’ group are not reflected in the platforms’ reports.

4. Our first comment to the reflection document is therefore to make clear that no initiative in the area of “contents online” can be successful unless all interested parties are properly involved. No round table nor stakeholder platform whatsoever should be held on issues like *online distribution of music, legal offerings and piracy, management of copyright online, cultural diversity* etc. without adequate representation of performers and their organisations. It should be kept in mind that, in the current international environment, performers remain the only link of the creative chain to benefit from having a positive image with the general public. In this respect, the national consultation that has recently taken place in France (*Mission Zelnick*) seems to be organised in a more open way. It remains to be seen however, whether the contribution of performer organisations will be duly taken into account.

II. FAIR AND ADEQUATE REMUNERATIONS

5. In its paragraph 4 (p. 10), the reflection document states that “*Right holders want to ensure that they are remunerated fairly and adequately when their works are used on digital platforms.*” Obviously, the latter statement refers to a fair and adequate payment by the user/consumer. In practice though, this represents only one side of the remuneration issue. When such fair and adequate payment occurs, it does not result in fair and adequate revenue for every category of right holder. In practice, the vast majority of performers receive no share of the money collected, as their rights are usually assigned to producers against a one-off payment.

6. On this very issue, a certain level of understanding seems to be emerging at EU level, as employers from the audiovisual sector recently released a joint statement¹ with trade union federations (FIM, FIA and UNI-MEI),

¹ EC Audiovisual Sectoral Social Dialogue Committee, *Joint Opinion on protecting creativity, innovation and jobs*, November 2009

http://www.fim-musicians.com/documents/AV%20SSDC%20Audiovisual_Joint%20Opinion%20on%20protecting%20creativity%20and%20innovation%20and%20jobs.doc

whereby they acknowledge that performers “are deprived from a fair share of the benefits generated by the digital economy in practice”. This awareness is reflected further in the same document, by saying that: “models of digital online distribution should provide for proper remuneration with respect to all parties concerned.” Efforts should be pursued on this basis in order to ensure a more balanced split of revenues amongst right holders.

7. As pointed out in the European Commission’s *Impact Assessment on the legal and economic situation of performers and record producers in the European Union*², “Session artists transfer their exclusive rights against a lump sum payment, irrespective of the success of the work” and “The rights recognised to performers under the *acquis* do not result in concrete benefits for performers.” The specific and operational objectives listed in the IA include:

- Contribute to enhancing the welfare of performers in the music industry
- Gradually align authors’ and performers’ protection
- Incremental increase in the remuneration of performers

The above listed objectives may be partly reached through a directive extending the performers’ term of protection. But they also need complementary initiatives in order to result in sufficiently tangible effects.

8. **Additional unwaivable right to equitable remuneration to the exclusive right of making available** (paragraph 5, p. 20 of the reflection document). This concept is already addressed in the Impact Assessment quoted above. Such provision would extend the system that already exists for the right of rental and lending. For every act of making available on-demand through any digital distribution channel, performers would retain a right to receive an equitable remuneration. The alleged “*additional layer of complexity to collective management*” would be of limited impact in comparison to the expected benefits in terms of balanced revenue split. We believe that this proposal represents the only reasonable and practicable option allowing for a proper remuneration of performers in the digital environment.

9. In practice, the exercise of the rental right granted to performers under Art. 5 of directive 2006/115/EC generally remains ineffective, mainly because it doesn’t specify the body against which the remuneration must be collected. A reference to the user (as in art. 8.2 of the same directive) is therefore necessary in order to bring the wording in line with similar provisions under the same directive. Additionally, it should be underlined that the exercise of such right would not be feasible unless collectively managed.

10. We encourage the Commission to further assess the possibility to introduce such additional unwaivable right to equitable remuneration as soon as possible, so as to redress the current situation whereby music performers are deprived from any significant revenue for the making available on demand of their recordings. This matter should in our view be dealt with as a priority.

11. **Limitations and exceptions.** The international debate that has already started within WIPO shows how difficult and sensitive this issue is. Consumer organisations, who are getting increasingly aware of, and interested in, copyright matters are now systematically involved in discussions at national, regional and international level. In this context, the existing balance between the interests of the various parties concerned may not necessarily be seen as legitimate *per se* and needs therefore to be clearly explained and carefully justified. From a general point of view, we believe that the 3-step test represents an essential tool, which should be kept as *the* reference in international instruments. We consider fundamental to preserve the international consensus about its relevance in today’s environment.

12. Amongst the exceptions addressed by the reflection document, **private copying**, which exists in the majority of EU member states, is probably the most sensitive one and is unanimously considered vital by creators and their organisations, as expressed on prior consultations on this issue. An efficient private copying framework should provide for both a realistic scope and a fair compensation (a compensation equal to zero can’t be considered fair). All types of digital carrier are potentially concerned by acts of private copying (all types of memory cards, hard drives, SSD, flash memories, CDs, DVDs etc.), while the freedom to copy for private purposes is clearly rooted in the consumers’ behaviours. We therefore believe that the only realistic way forward is to ensure that a private copying exception and remuneration scheme is implemented in all EU member states.

13. We can subscribe to the idea that “*Future policy should make a clear distinction and proposals should clearly state which exceptions should be harmonised and made mandatory in scope as a matter of priority and the precise goals pursued in doing so*” (reflection document, item 5.1, last paragraph), provided that future initiatives with this

² Commission Staff working document: *Impact assessment of the legal and economic situation of performers and record producers in the European Union*, April 23rd, 2009 http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf

regard involve a consultation of **all** creators' organisations (including performers' organisations) and do not put at risk existing national schemes that function satisfactorily.

14. As regards the "social and cultural, promotional and funding activities" that CMOs undertake (reflection document, item 4.3, paragraph 6), it is absolutely essential to understand their crucial role. At a moment when public support for culture is shrinking almost everywhere, any weakening of CMOs' existing cultural funds would have a disastrous impact on the whole creative sector (live performance, music education, support to new talents and innovative repertoires...), including in terms of job opportunities, production activity and cultural diversity. Any attempt to reach some level of harmonisation should be carefully framed, so as to ensure that it does not entail any risk to put CMOs' cultural funds at stake.

III. MULTI-TERRITORIAL LICENSING / COMPETITION / HARMONISATION

15. **Multi-territorial licensing, collective management and competition.** The problems connected with the management of copyright and related rights should be placed in the relevant context, i.e. a model founded on the creative act and its cultural value. In our view, copyright and related rights cannot be described as mere products circulating between suppliers and retailers. We should all remain aware that CMOs play a role that goes beyond the technical acts of collecting and distributing. They are an area of solidarity, which enables collegiate and democratic determination of distribution rules and allows for a vital support to creation and diffusion. The latter point is all the more essential, as such help benefits the whole sector.

16. We believe that the European cultural identity is to be found much more in cultural identities which exist side by side and mutually enrich one another than in the hypothetical continental cultural identity. Quite on the contrary, the concept of cultural diversity is gaining ground day by day (cf. *Unesco convention on the protection and promotion of the diversity of cultural expressions*). A strictly competitive model could bring about the eventual disappearance of a good many CMOs (particularly small-sized ones and/or those from new member states), while only a few superstructures of European or international dimension would survive, a scenario that looks quite incompatible with the idea of cultural diversity itself.

17. Massive concentration would probably entail new administrative costs: offices in different member states, teams trained to work with numerous legal frameworks and languages etc. Against this backdrop, the concerns of big CMOs would in all probability become increasingly remote from those of the majority of performers and would cluster around those of stars, whose rights are cheaper to manage. As for the right holder, his/her capacity as creative artist clearly does not incite him/her to carry out permanent assessment of the market to identify the most efficient intermediary and, in addition, the criteria for assessing performance are not all quantifiable, particularly with regards to the democratic control exercised by right holders on their own society. With this respect, it is also to be feared that the Boards of Directors would no longer reflect right holder diversity, thereby further threatening CMOs' legitimacy.

18. For these reasons, we recommend that any initiative aiming at increasing competition between European CMOs be carried out with extreme cautiousness and take due account of the reservations expressed by performer organisations.

19. From the 2 options suggested for a **pan-European licensing scheme** (reflection document, p. 16), only the first one seems to be achievable within a reasonable time frame (consolidation of *public performance* and *making available* rights into one license). However, such system can only be fair to performers if the right of making available is updated according to paragraphs 8 to 10 above.

20. About the possible introduction of a *European copyright law* (cf. reflection document, item 5.2, p. 18), we believe it is much too early to envisage any kind of such harmonisation. The implementation of copyright and related rights in national legislations as well as their enforcement are extremely variable amongst member states. In some cases, the law may exist but is not even applied. A significant work remains to be done until all member states reach a similar level of development as regards copyright and related rights. Even then, differences in national legal traditions would probably make such initiative a huge challenge.

21. **Governance and transparency of CMOs.** We have entered a period where copyright and related rights are under continuous pressure, as recently experienced during the debate on the issue of the extension of the performers' term of protection in EU. In this context, it is absolutely essential to ensure that CMOs be perceived as efficient and transparent bodies, by either the right holders they represent, the users or the public.

22. Regarding the services provided, we do not believe that *collective bargaining* falls within CMOs' field of competence, as suggested in the reflection document (item 4.3, last paragraph). Collective bargaining remains a

matter for trade unions, including on issues dealing with copyright and related rights. The collective agreement recently signed in France between record producers and musician trade unions is an example of what can be achieved with this respect.

23. Good governance and transparency are a key to a modern approach of collective management. Existing national monopolies, if properly combined with adequate reciprocal agreements and good governance and transparency, can provide the efficiency sought, including as regards the consumers' demand for wider offer and choice.

IV. ALTERNATIVE FORMS OF REMUNERATION

24. We will support all initiatives aiming at identifying fair and realistic solutions to the problem of the profits derived by ISPs from the illicit exchange of protected contents. For about 10 years, the *safe harbour* principle has allowed ISPs to develop their infrastructures and increase their clientele massively. The ability to download/upload protected contents freely has worked as a fantastic incentive for consumers to buy high speed Internet subscriptions. Meanwhile, the music market has collapsed dramatically. It sounds therefore reasonable to contemplate the possibility to have ISPs contribute to the remuneration of right holders, as a compensation for this still flourishing grey market. Ideally, such scheme should be retroactive to some extent, and last as long as this grey market.

25. Some work remains to be carried out until a detailed practicable proposal sees the light. In any case, whatever form a contribution from ISPs may take, it is absolutely essential that it directly benefits performers, irrespective of the latter's contractual arrangements. Again, no discussion should take place on this crucial matter without performer organisations being involved at all stages.

V. RELATIONSHIP BETWEEN INTERESTED PARTIES

26. Item 4.1, paragraph 4 of the reflection document says that "*the Commission and Members of the European Parliament frequently receive information requests and complaints from European citizens asking how they can comply with copyright rules in uploading user-generated content on the internet. European citizens who are willing to comply with copyright rules are often bewildered by the complexity of the response.*" We suggest to undertake consultations between organisations representing users, consumers and right holders (including their CMOs), so as to identify solutions that provide users/consumers with all the necessary information and take due account of the need for transparency.

The International Federation of Musicians (FIM) is a non-governmental organisation representing musicians' unions, guilds and associations in about 70 countries covering all regions of the world, totalling several hundred thousand musicians. The FIM European Group brings together musicians' unions from most Member States of the European Union, the European Economic Area and Switzerland, operating both in the performing arts and recording sectors.