GIART Comments on the European Commission's Reflection Document on Creative Content in a European Digital Single Market

December 2009

INTRODUCTION

GIART, the International Organisation representing the Performers' Collective Management Societies, would like to express its comments on the European Commission's Reflection Document on Creative Content in a European Digital Single Market.

Preliminarily we would like to express our general agreement on the objectives and targets of the future Commission legislative action which are enumerated as follows:

- creating a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works, as well as for a culturally diverse European market;
- encouraging the provision of attractive legal offers to consumers with transparent pricing and terms of use, thereby facilitating users' access to a wide range of content through digital networks anywhere and at any time;
- promoting a level playing field for new business models and innovative solutions for the distribution of creative content.

We also would like to stress the necessity that any future legislation on creative content and digital single market respect the delicate balance between cultural and economic requirements, as it has been enhanced by the Lévai Report of the Legal Committee of the European Parliament on the Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services. Up to now, culture has fallen within the competences of the Member States and has been firmly separated from EU single market law and international trade law.

Even if the economic importance of creative content on the Internet is pushing some stakeholders to put pressure on the EU to consider creative content as an economic good, we do not agree and esteem that cultural goods are not like any other good. We believe that if European content is to flourish we have to preserve and defend European cultural diversity which is a fundamental principle of the European construction.

Furthermore, GIART members consider that any legislative initiative should be undertaken by a co decision procedure from the Commission and the Parliament altogether, as has been underlined by the Lévai Report. This is the better way to ensure legal certainty and the most democratic participation of all the stakeholders involved.

The evolution of technology and content markets

We would like here to say that we oppose the creation of a new category of rightholders or a new category of content; the so-called "user-created content". In reality if a user creates a song, music,

audiovisual work, he must be considered as a rightholder as any other depending on the category of creation. He will be then a composer, a film-maker, performer, visual artist…

There is on the contrary an interest of the ISPs to promote the artificial creation of a new category of content, the user-created one, in order to not have to pay the remuneration for the content used by their platforms. It has to be noticed that even the so –called user creators are demanding some participation in the revenues for the spreading of their creations on the Internet.

Music

Firstly, we would like to clarify that there is a major inaccuracy as far as performers' right of communication to the public (footnote 11, page 5), is concerned. Non-interactive streaming is included in the right of communication to the public. There is no difference between traditional radios and "non-interactive" radios via Internet such as simulcasting or non-interactive webcasting. Therefore it is also not correct to say that performers get any substantive remuneration from their reproduction right as this right is usually assigned to the producers and the performers only get in most case a symbolic payment in exchange of the transfer of this right.

So the only income that the performers receives is the remuneration right for private copying if this right is granted at national level.

As regards the licensing of the making available right, we would like to highlight that performers' CMS are involved in a very limited way in the multiterritory-licensing of on-line performers' rights. In fact, due to the national transposition of the making available right introduced by the 2001 Directive in most of the countries as an exclusive right which is transferred to producers by contract, the performers most of the times do not receive any remuneration for it. This situation makes it impossible for the CMS to manage such right.

GIART therefore calls the EU legislator to change this situation and to adopt a system where the making available right is considered as a remuneration right submitted to collective management as it is the only way to make this right effective. This is the way how the making available right was transposed in Spain[1]. We welcome the consideration of the Commission:

*The introduction of **an extended or mandatory collective management system** for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration53 has been also suggested by rightholders. Although these suggestions would seem to add an additional layer of complexity to collective management, they could have the potential to create more effective protection and a stronger position for creators in their negotiations with their production companies.*

Another system would be like the one in Portugal[2] .

[1] According to the Spanish Intellectual Property Law (Consolidated Text, RLD 1/1996, as amended by the Law 23/2006), although the making available right is an exclusive right for audio and audiovisual performers, it can be presumably assigned to the audio or audiovisual producer. In that case the performer is granted an unwaivable remuneration right to be paid from the person who makes available the subject-matter. Such remuneration will be obtained by the performer obligatorily through the performers' collective management society.

[2] According to the Portuguese Intellectual Property Law, as amended to implement the Infosoc Directive 2001/29 (Law 50/2004 -(implementation of Information Society Directive 2001/29/EC, of May 22)), the making available right was excluded from the equitable remuneration and is treated as an exclusive right (number 1.d and n 4 of art. 178), though subject to mandatory collective exercise by a performers collecting society.

These two ways of exercising the making available right represent positive and adequate options for the management of Internet rights and for the protection of performer's rights allowing them to receive a proper remuneration. In that way performers would receive a payment for the use of their performances in the on-line environment, without losing the making available right because of an assignment to producers and performers would rely on the structure and resources of their collecting society for that purpose.

We must not forget that on-line rights are the future for performers because it is in such scope where their performances are going to be mainly spread. Performers should benefit from it, not be damaged because of their individually weaker position to operate in the on-line scope which, especially for them, is quite uncertain,.

We also esteem that only the harmonization at EU level of the making available right, along the lines of the mentioned Spanish system, would allow a centralized system of authorization of performers' on-line rights. That would guarantee performers a fair payment for their Internet rights. The clearance of the rights should be on territorial basis. In our opinion, the creation of one-stop-shop should be done by rightholders themselves through their CMS, at national level. Each CMS would take part representing its own territory and rightholders. Such organization would be in charge of granting the authorizations/licenses on behalf of the parties to the users for the whole EU territory and repertoire requested. This structure requires good information systems for the interaction between the one-stop-shop and the national CMS'.

Audiovisual

GIART would like to indicate the Portuguese and Spanish legal systems as systems that offer effective protection to audiovisual performers.

For GIART, the unwaivable equitable remuneration subject to mandatory collective management should be also applied in Audiovisual media services, (e.g. a television broadcast by simulcasting or an on-demand audiovisual service) via European-Level harmonization. It is a solution and a legal certainty that is based on European Directives.

So, a revision or amendment on the rental and lending Directive, should be made for the audiovisual field (art.8), taking the measures proposed by Directive 2007/65/EC of 11 December 2007 into account, and adopting the Portuguese and Spanish System as a solution that will protect and allow performers to receive a fair remuneration from on-line audiovisual works.

Indeed article 178 of the Portuguese Code of Copyright and Related establishes the exclusive right of the performer to prohibit or to authorise uses of its performances, including making available rights.

This Article also states that even if the performer (actor, musician or dancer of a audiovisual or film work) authorises the fixation of his/her performance to a film, audiovisual or video producer or to a broadcasting organisation, it shall be deemed that there was a transfer of the rights, but the performer shall retain the right to obtain an unwaivable and equitable remuneration for all authorisations provided in article 178.

Furthermore, according to the same article only a collecting management society will be entitled to negotiate and manage the afore-mentioned unique remuneration (we consider that unique does not refer to a fixed overall amount, but rather to the remuneration negotiated and managed under that collective exercise, which may include several types of additional remunerations for each single and different use) through agreements with the users. These agreements shall also include performers who are not members of a Collective Management Society.

Possible EU actions for a Single Market for Creative Content Online

Consumer access

With regards to extended collective licensing we agree to apply this system but only to orphan works and out-of-print books. Rightholders however must receive fair remuneration and CMS should have the commitment of identifying orphan works whenever possible and accurate information systems should be put in practice for it, with the help of EU cultural institutions.

As far as the very sensitive issue of limitations and exceptions is concerned, we strongly oppose any further initiative as 2001 Directive established a system of exceptions at EU level which was implemented at national level. Contractual licensing is the most appropriate way to ensure that rightholders receive a fair remuneration.

The Directive 2001/29 already foresees in fact, the necessary measures to balance the protection of the copyright and related rights and the implementation of copyright exceptions. The level of harmonization of the exceptions at national level must remain in the frame of the exceptions established by the Directive.

Commercial users access

The Reflection document analyzes a streamlined pan-European and/or multiterritory licensing process and a frame for the collective rights management. Besides, there is a reference in the document (page 12) to the 1993 Satellite and Cable Directive and the legislative approaches implemented under it.

GIART has reflected on how to conciliate a practical management and clearance of the online rights **for music** (although a similar approach could be applicable to audiovisual rights) with the legitimate remuneration to the different category of right holders. We believe the following elements should be included in the possible solution:

- To adopt a system where the making available right is considered as a remuneration right submitted to compulsory collective management, as it is the only way to make this right effective and to bring a fair remuneration to the rightholders. This is the way how the making available right was transposed in Spain for performers, as explained before. If making available was regulated as an unwaivable remuneration right in the different EU countries, the system would be harmonised and prepared for a collective management, subject to the premises we will explain below. We also appreciation that the Commission is mentioning the same regulation for authors.

- The approach of the 1993 Satellite and Cable Directive model in general can be used as a guide to set up a model of management of online rights and clearance of the rights and **in particular the Satellite approach**. As explained in the Reflection document *"This Directive provides that for a satellite broadcast, the relevant copyright act is the uplink to the satellite, and not the reception of the broadcast in all the Member States within the satellite's footprint… As a result, a satellite broadcaster must only clear rights once, in the country of emission, and is dispensed with clearing the rights again in each country of reception*" Besides, the Reflection document, when considering an extension of the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content, explains that "*the rationale of this Directive to the Internet could imply that once an online service is licensed in one EU territory, **for example the territory with which the service provider is most closely linked**, then this license would cover all Community territories. The principal rationale for domiciling licensor and licensee in one territory is to identify the relevant territory in which the multi-territorial license can be obtained."*

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GIART considers that the rationale of the satellite regulation can be applied to the management of online rights (music and audiovisual) if the relevant copyright act is clearly set up for the Internet, as it is for satellite. Accordingly, to consider the connection with *"the territory with which the service provider is most closely linked"* is a good approach but should be more precise for reasons of legal certainty: the service provider must be legally based in the territory where it would ask for the authorization/license. A similar approach (as to the service provider) was followed by the Santiago agreements that also considered the country corresponding to the "Uniform Resource Locator" used by the service provider, when the main language used by the service provider's site is the main language of the country.

- If we are capable of identifying a relevant copyright act: the uploading of contents by the service provider, in the country where such service provider is based, it should be feasible for the collecting societies (for the different rightholders) of the said country to grant a multi-territorial authorisation/license (we will explain this concept better afterwards because we are speaking about a remuneration right) to the user that would cover all the EU territories. Such collecting society would collect for all the rightholders in its territory by means of the authorization granted by the rest of the EU collecting societies through type A bilateral agreements.

  The subsequent task for the national collecting society would be to distribute to the rest of EU societies, through the bilateral agreements, the remuneration generated in the collection territory for the performers represented by each of them. This system is already working for the communication to the public of phonograms (among other rights) in general and for the emissions through satellite in particular: for instance, a performer member of the Spanish performers' society whose performances are emitted through satellite Television in United Kingdom, is paid for his/her rights through the Spanish society by means of its bilateral agreement with the UK homologue society for performers' rights. If the satellite Television uplinks to the satellite in UK, it clears all the rights in this country with the relevant collecting society for all the EU scope and in its turn this society is obliged to pay the rest of the EU societies through bilateral agreements and in the case of our example, to the Spanish performers society.

  The proposed solution could ensure a multi-territorial authorisation/license, which would make easier the requirements for the users/service providers regarding the clearance of the rights and the net of bilateral agreements could ensure a multi-repertoire authorization. Both factors are beneficial for rightholders and users and would allow the simplification of the management of internet rights.

- There are some remaining questions to be considered for the implementation of this model:

  1. As we are speaking about a remuneration right, we should focus on the model of a tariff based system, where the different uses in the Internet could be aggregated or separated depending on the users/service providers' demand. Accordingly such authorisation should be tailored depending on the different uses that can be made through Internet (mobile phones, podcasting, webpages allowing downloads, etc…). Nevertheless, simulcasting and webcasting (understood as the stream of music programmes on the internet), should remain in the communication to the public right scope and excluded from this model because they are already included in the collection of this right.

  2. The user should ask for an authorisation/license for each category of rights (authors and performers). If there is a possibility for the producers to join the system, it should be also welcome. We consider that a single authorisation/license for all the rightholders and for all kind of uses in the Internet would not be a good solution. As for the right holders, it is positive to preserve their capacity of negotiation and collection, following the already working copyright system; it would better balance the rights. As to the uses on the Internet, an adaptation to the demand is required and the authorisation should be tailored

depending on the business model of the user/service provider and subject to the tariffs set up by the collecting societies.

3. At national level a one-stop-shop would be formed with the representation of each category of right holders issued by the already existing collecting societies (authors, performers and, if possible producers). It will be in charge of granting the authorisation/license, setting up the tariffs, negotiating with users and collecting. The distribution would be made through the net of bilateral agreements for each category of rightholders by each national society.

4. At EU level an organization where such national one-stop-shops would be represented, should be set up and linked to the Unit of Copyright and knowledge-based Economy (DG Internal Market and Services) for the coordination and harmonization of their work.

5. Finally, the explained system should be limited to the EU scope as the satellite system is also limited to it. Accordingly there are technological barriers that avoid the emission in EU territory from non-EU broadcasters without an EU license. A European license is then required. The same kind of protection and technical barriers, should be put in place in the proposed solution, for the contents from outside the territory for the benefit of European stakeholders and cultural diversity.

Protection of rightholders

With regards to the harmonisation of copyright laws, we esteem that for the time being there is no need for an EU Copyright Law as copyright is a direct expression of national cultures and takes into account national traditions which differ from country to country. However in case the Commission decides to harmonise Copyright and Related Rights laws, we esteem that a prior extensive consultation with interested parties should be carried out.

In conclusion we agree with the Commission as regards the necessity of :

- The introduction of **an extended or mandatory collective management system** for the administration of the "making available" right of performers and the provision of an additional unwaivable right to equitable remuneration in favour of performers
- Measures focusing on the **governance and transparency of collective rights management organisations**. It would also be of the utmost importance to have harmonised rules as regards the distribution systems as there are still problems in certain European countries
- More **collaboration with ISPs** and other companies providing access technologies.
- Stricter European laws as regards the fight against piracy, modeled upon the recently adopted French “Hadopi” law .

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