IFPI'S RESPONSE TO :
CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE
A REFLECTION DOCUMENT OF DG INFSO AND DG MARKT

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EXECUTIVE SUMMARY

- IFPI finds it incomprehensible that a Commission document on creative content in the European digital market contains only one reference to online piracy and even that reference is only to say that to tackle piracy right holders need to provide more effective licensing mechanisms. It is an undeniable fact that piracy is the biggest obstacle facing the development of legal services today and if the EU does not recognise this and make urgent proposals to address the problem, any efforts to develop the legitimate online market will be doomed. Right holders, governments and Internet Service providers must tackle this problem. Some countries in Europe are already reacting to this threat to their cultural industries and have taken legislative measures to fight piracy. This includes the law based on a graduated response in France, as well as the pending Digital Economy Bill in the UK. IFPI urges the EU authorities to adopt deterrent measures in order to migrate consumers towards legitimate online services.

- The recording industry is dynamic and is reinventing its business models. Music companies are delivering a variety of business models, broadening their licensing activities to develop cross-border services, enabling new types of deals and investing in product innovation in order to deliver music in the way fans want, wherever and whenever they want it. In Europe there are now more than 255 unique legal services offering millions of licensed tracks. However, no legal service can achieve its full potential in the face of unfair competition from unauthorised services.

- Workable models for pan-European licensing of rights are essential to drive the European online and mobile markets for content. The music industry has developed and implemented models for providing pan-European licences. The Commission should encourage the development of multi-territory licensing by authors' collecting societies as well.

- We have a number of specific comments on some of the solutions envisaged in the Reflection Document in order to improve pan-European licensing and remunerate right holders. IFPI is open to discuss ways to consolidate the reproduction and communication to the public rights implicated in on-line transmission into a single licence, under appropriate conditions; IFPI also advocates the principle that producers should act as a one-stop-shop for commercial users in order to facilitate the licensing of rights in the online and mobile environment. In contrast, IFPI is opposed to the extension of the Cable and Satellite Directive to the online environment as well as to the idea of a "global

licence" as an alternative form of remuneration for right holders. On exceptions, IFPI does not see any Internal Market need to make all exceptions mandatory and is prepared to discuss nuanced solutions to the issues identified in the Document, for instance to deal with orphan works.

GENERAL COMMENTS

The online music industry

The music sector continues to lead the digital revolution, alongside the games industry, with digital sales amounting to more than double those of the film, newspaper and magazine industries combined. The shift from physical to digital products continues. In 2009, Europe was the fastest growing region of the world in terms of digital sales.

Music companies are experimenting with a variety of business models, broadening their licensing activities to develop cross-border services, enabling new types of deals and investing in product innovation in order to deliver music in the way fans want, where and when they want it. This is a key challenge in the digital age, and it is a challenge not just for the music sector but indeed for the whole range of content industries. Our ability to meet that challenge in building legitimate services is seriously undermined however, by the impossibility of competing with illegal services which make content available without respecting any legal obligations and without remunerating right holders.

In Europe there are now more than 255 unique legal services offering millions of licensed tracks. A comprehensive list of these can be found at http://www.pro-music.org/Content/GetMusicOnline/stores-europe.php

These services now include a wide variety of choices for fans, such as:

- Free to consumer ad-supported streaming services
- Subscription-based premium streaming services (some of which also offer downloads included in the subscription price)
- A-la-carte music - per song and per album (iTunes, Amazon, etc)
- CDs and physical sales, as well as 'premium content' offers
- Portable streaming services
- Streaming concerts
- Subscription services through ISPs to access music catalogues (TDC PLAY, Sky Songs, etc)
- Music through TV
- Online purchasing of the physical album
- Music downloads via the mobile and other mobile content (ringtones, ringback tones, etc)

Global digital revenues to music companies are expected to grow by an estimated 12% to €3.0 billion in 2009. Digital channels now account for 27% of music sales, up from 21% in 2008 and 15% in 2007. Record companies have built an estimated €0.6 billion European digital music market in five years based on new technology.

In terms of services the music sector can offer, there is an unlimited range of possibilities, suiting diverse groups of consumers. Music companies are working with new partners while attempting to ensure they maintain the value of their content and that creators are properly compensated.

Traditional à-la-carte download services continue to provide music online and drive the digital market in some countries. These services guarantee tremendous availability of affordable high quality online music. Most à-la-carte music services today offer music in MP3 format, meaning consumers can transfer the purchased files to different portable players: this format is completely interoperable.

Streaming services are also developing, either free ad-supported, or as part of a subscription. Some of the new services include for example Spotify, available in Sweden, the UK, Germany, Spain, Norway, France, Italy and Finland, or Deezer – a previously unlicensed service, available in France, Germany, Spain and Sweden.

Another important recent development was the roll-out of a new breed of subscription services. In the online sector, subscriptions have taken many forms. ISP-backed services such as TDC Play in Denmark and Sky Songs in the UK are providing new ways to bring the digital music experience to the household. TDC's PLAY service, launched in April 2008, is offered to TDC's broadband, mobile and cable customers. TDC customers signing up to the service get unlimited music streaming from a catalogue of 6.1 million tracks at no additional cost. Songs can be kept for as long as the user continues to be a TDC customer.

In the UK, a new digital music service is being launched by the ISP Virgin Media. This partnership shows the potential for cooperation with ISPs to take steps to protect copyrighted content on their networks, and to offer fans one affordable way to access music legally.

Handset manufacturers like Nokia and SonyEricsson started offering unlimited music services bundled with mobile phones in 2008. Today, Nokia's Comes With Music (CWM) is available in Austria, Belgium, Netherlands, Germany, Italy, Sweden, Finland, Spain, the UK and Switzerland, as well as a number of countries outside Europe. Typical CWM customers download tracks from seven genres, compared to the three genres for typical customers of the Nokia Music Store. CWM customers are downloading 20 times more back catalogue than Nokia Music Store customers.

The many different types and formats of services show that if there is demand, the service can and will be built rapidly, despite the many complexities of offering tailored digital services. But no legal service can achieve its full potential in the face of piracy, which offers everything for free. Piracy in effect imposes an artificial cap on the potential of any legal service by creating unfair competition.

Enforcement of rights

The Reflection Document is fundamentally unbalanced because it seeks to develop a European Digital Single Market for content but fails to address the single biggest obstacle to the true development of that market: online piracy.

Online piracy is the number one obstacle to developing a thriving online music market. Music was the first industry to be hit by the availability of illegal online content, while other sectors such as film, the news media and the publishing sector are now increasingly being affected.

The recording industry's business suffers massive losses from online piracy each year. The music industry in Europe went from total revenue of €7.2 billion in 1999 to €4.8 billion in 2008, a decline of 32%. In 2008 alone, European sales fell by 8% and they are expected to decline by another 8% in 2009. A major problem is that the decline in physical sales is only partially compensated by the increase of the online market which has to compete against massive piracy.

IFPI conservatively estimated that over 40 billion songs were illegally downloaded in 2008 worldwide and only one out of 20 titles is downloaded from a legitimate service[1]. P2P remained the dominant channel for music piracy, but 2009 saw rapid growth in other forms of piracy such as linking sites and cyber lockers, forums/blogs, mobile piracy and others. Independent research in Europe, the US and Australia points to a key trend: unlawful downloading is driven by free availability – not by greater choice of repertoire.

Online piracy prejudices the development of legitimate services online which have to compete against the availability of content for free. Piracy also has an impact on cultural diversity as the losses incurred by the recording companies affect their investments in new recordings, in particular national repertoire. In France, the number of album releases by new artists fell by 16 percent in the first half of 2008. In Spain, just one new local artist featured in the top 50 albums in 2008, in comparison to 10 local artists in 2003.

To tackle this problem, the cooperation of internet service providers is indispensable. Access providers in particular are in a unique position with respect to both control over access to content and relationships with their subscribers, and are usually best placed to act promptly and effectively against infringements over their networks or services. Yet, in Europe, access providers have generally been unwilling so far to provide any meaningful cooperation.

There are a number of feasible and reasonable options that service providers can take to help address copyright infringements on their networks and that can in some cases be supported by technological solutions. For instance, one of the most effective steps an access provider could take is to warn infringing subscribers and thereafter to suspend services to those who continue to repeatedly abuse the service to infringe copyright. Such temporary suspension is proportionate, feasible and not technically burdensome. Other options open to ISPs include the application of filtering measures, including blocking access to specific protocols or to infringing sites.

Some countries in Europe are reacting to this threat to their cultural industries and are taking legislative measures to fight piracy. This includes the law based on a graduated response in France, as well as the pending Digital Economy Bill in the UK. IFPI is open to discussing alternative effective solutions but urges the EU authorities to adopt the needed measures in order to migrate consumers to legitimate online services. A deterrent approach is essential as our experience shows that no other measure will have the weight needed to help change behaviour and complement ongoing education campaigns.

We believe that an EU framework is important to provide a harmonised approach and create a level-playing field in Europe. This legislative change could be achieved either through a review of the Enforcement Directive or other existing legislation, or by making new legislative proposals.

Licensing

The availability of pan-European licensing is essential for the digital market which tends to be cross-border. While some services may be developed gradually over Europe, some providers may want to develop pan-European services rapidly. It is therefore essential that right holders are able to offer pan-European licences of content whenever there is a request from the market for such licences.

The music industry is already providing pan-European licences, either directly by record companies for download services, or via collecting societies on the basis of the IFPI agreements for simulcasting and webcasting.

[1] Source: IFPI Digital Music Report 2008

These agreements are one-stop, multi-territorial, multi-repertoire agreements, allowing the commercial user to obtain such a licence via the participating EEA collecting society of his choice. 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 licences available to a broader range of digital streaming services, and by launching a new reciprocal agreement to facilitate the streaming and podcasting of broadcast programs[2]. These reciprocal agreements are administered by music licensing companies rather than the individual companies.

As a result, online music services are available in several EU countries as well as abroad, and are continuing to develop. To name but a few, à-la-carte downloads services like iTunes and 7digital are available in the majority of EU countries. The bundled service Nokia Comes With Music is already available in Austria, Poland, Belgium, Netherlands, Germany, Italy, Sweden, Finland, Spain, the UK and Switzerland, as well as a number of countries outside Europe. As mentioned above, the recently created streaming services, Spotify and Deezer, are already available in many EU countries. The mobile download service Vodafone is available in at least seven EU countries. And regarding mobile ringtones, the subscription service Jamba is available in Austria, Hungary, Poland, Italy, Sweden, Spain, Germany, Belgium, Netherlands, Norway, Portugal, France and Finland. These services are continuing to expand to other countries where there is a demand from operators and platforms.

The music industry has done its share in providing pan-European licences. The Commission should encourage the development of multi-territory licensing by authors' collecting societies as well. Indeed, a major problem with the authors' societies is their refusal to license record companies for on-line and mobile exploitation. The Commission should ensure that authors' 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) do not discriminate between 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.

SPECIFIC COMMENTS

A. Streamlining pan-European and/or multi-territory licensing

As a general comment, IFPI would like to stress that right holders must have the choice whether to license individually or not. Contrary to what the Reflection Document suggests, copyright is not "the right to be paid". It is the possibility for the right holders to decide which business models and licensing methods are the most appropriate for their interests. The recording industry is therefore generally opposed to compulsory licensing, and to the compulsory collective management of rights.

Aggregation of the rights of reproduction and making available to the public.

The Reflection Document states correctly that these two rights have to be licensed in the case of download and interactive services. As a matter of practice, record companies do license both rights together to providers of online or mobile services.

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

However, such bundling applies only to commercial online uses that implicate both rights simultaneously. The rule should obviously not apply where the rights are not implicated simultaneously in the same transaction, for instance in cases where the making of an audiovisual product first necessitates the licensing of reproduction rights, and that product is subsequently used in online transmission.

IFPI is open to discuss ways to consolidate the reproduction and communication to the public rights implicated in online transmission into a single license, under appropriate conditions, in order to make the licensing process more streamlined for online services.

Aggregation of the rights of different right holders into a single license.

IFPI also agrees with this idea which would facilitate the licensing of rights in the online and mobile environment by providing a one-stop-shop for commercial users. As the Reflection Document rightly points out, this is the practice in the book publishing and audiovisual sector. It is also the practice in the music sector for the distribution of music recordings off-line where music companies produce and sell recordings with the required authors' rights cleared. The same should apply online, and IFPI and its member companies have, from the outset, sought to obtain licences from the authors' collecting societies in order to be able to act as a "one stop shop" for online services and provide licences with all rights cleared. However, the authors' collecting societies have systematically and unjustifiably refused to license record companies for online and mobile exploitation.

As said above, the solution should be similar to the off-line world where record producers, by virtue of contractual arrangements, are able to offer to distributors and retailers sound recordings with all the necessary rights cleared – including artists' and authors' rights. As the creators of the final commercial product, record producers are the natural "one-stop" licensors of recorded music.

EU Database with ownership and license information.

IFPI is in favour of greater clarity and transparency on ownership of rights and license information as a way to facilitate licensing. The recording industry and its Music Licensing Companies have developed and maintained repertoire and rights databases for a long time. There is therefore an existing framework that could possibly be used to build a comprehensive database or network. Support and funding at EU level would be an important driver for this type of project.

Extension of Cable & Satellite Directive.

The Reflection Document queries whether extending the country of origin system established in the Directive for satellite broadcasting to online services, would improve the pan-European licensing of such online services. IFPI does not support this approach for several reasons. In IFPI's view, EU-wide licensing should be encouraged but should remain voluntary. Second, as the Commission rightly recognises, the extension of the Directive to online services would not in itself guarantee the creation of an EU-wide market because this is determined in large part by the practices of online operators. Any attempt to regulate their practices would be very far-reaching as it would interfere with the contractual and commercial decisions of the online operators.

For music producers, the clearing of rights for digital release on a territorial basis is important for several reasons. It allows the record producers to adopt business models which maximise the chance of success of each release to the benefit of all right holders. For instance, in some cases a staggered release makes it much easier to break new acts Europe-wide, once success is achieved in their home markets. The clearance of rights on a territorial basis is also due to the fact that record producers do not always control all rights to all repertoire for all EU/EEA territories.

However, the principle of 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. Many of the deals with service providers, mobile network operators and other aggregators and distributors 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.

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 said above, the recording industry Music Licensing Companies have set an example in that respect. They have for some time now operated a system of reciprocal agreements that allows users to obtain multi-repertoire, multi-territory licences for producers' rights.

Single Copyright Title

Giving right holders the possibility to opt for a European Copyright Title, based on a fully harmonised copyright law, is the most radical and far-reaching proposal mentioned in the Reflection Document. It is unclear how such a concept would work in the copyright context, and what benefits it would provide (or what negative consequences it would have). If such a system is entirely voluntary, it does not seem likely to be taken up. In the area of trademarks or patents, a single European title provides a number of advantages as it avoids the cumbersome obligation and cost of obtaining rights in multiple countries. However, such an incentive does not exist for copyright which arises throughout the EU from the simple creation of a work or subject-matter without the necessity of an application or registration. If such a system is mandatory, it would mean full harmonisation of copyright throughout the EU—a fundamental rewriting of the law which would entail Member States losing the ability to implement their own cultural values through copyright. A mandatory system would also amount to the introduction of a formality to copyright protection, inconsistent with the international obligations of the EU and its Member States.

In any event, there are simpler ways to achieve the Reflection Document's goals. Some of the options outlined above could achieve the objective of streamlining pan-European licensing without the downsides of a radical approach.

Extended collective licensing

This form of licensing is exceptional and has been used in certain specific circumstances, for instance when the number of right holders is so high that it creates difficulties for licensing. It has also been considered in circumstances where the owners of the rights cannot reasonably be found (e.g. in discussions of the issue of orphan works). We do not see any reasons for the application of extended collective licensing to online distribution of music.

B. Alternative systems of remuneration for right holders

The Reflection Document mentions the possibility of introducing a form of compensation from ISPs to right holders for the illegal mass reproduction and dissemination of protected works on their networks. Such alternative remuneration models are inappropriate and unworkable for legal, commercial and practical reasons.

"Global licence".

In 2005, there were discussions in France about a "global licence". The idea of this system was to introduce the compulsory collective management of the making available right, the collection of the remuneration by the service providers from internet subscribers, and the legalisation of unauthorised downloading under the private copying exception. This approach creates the following problems:

- **Incompatibility with the exclusive right of making available.** The compulsory collective management of the making available right is contrary to the exclusive character of this right established by Article 3 of the EU 2001/29 Directive and Articles 10 & 14 of the WIPO Performances and Phonograms Treaty (WPPT). Obliging right holders to go through a collective management agency would effectively prevent them from exercising and negotiating their exclusive rights themselves and would amount to an expropriation of their rights.
- **Incompatibility with the three-steps test.** The legalisation of downloading is incompatible with the three-steps test (Article 5.5 of the Directive, article 16.2 WPPT and Article 13 TRIPS) as it would directly prejudice the legitimate interests of the right holders and the normal exploitation of works. Indeed, the downloading of a musical recording is, in essence, equivalent to paid-for downloading currently offered by legitimate online platforms.
- **Incompatibility with development of legal offers.** The "generalised flat rate" system envisaged by the global licence would replace the exclusive rights online and would eliminate the possibility to license them to platforms. This would undermine all the efforts of the music industry and the online platforms to develop new and varied business models online.
- **No economic viability.** For a fixed remuneration per subscriber to adequately compensate all the right holders involved for their investments in the creation, production and distribution of creative content, it would have to be so high that it would substantially increase the current price of an Internet subscription.

"Creative contribution" model

It has also sometimes been suggested to maintain the commercial licenses based on the right of making available, but to legalise the (illegal) downloading of content and introduce a compensation for that downloading. IFPI is opposed to this idea for the following reasons:

- **Incompatibility with legal offer.** Under a "creative contribution model", if users were required to make a monthly payment for the use of (illegal) content, they would be reluctant to pay in addition for the use of legal services online. This would prompt requests to legalise all online exchanges on the basis of the global licence model, and would end up severely damaging the existence and diversity of existing legal services online.
- **Incompatibility with enforcement of copyright.** If a payment is imposed on Internet users to compensate for the illegal use of content, it will make it much more difficult for the right holders to enforce their rights and to take legal action against individuals for the same acts of dissemination, even if these acts are still illegal.

"Fairness". In addition, any system based on a flat rate payment would raise criticisms as to the "fairness of the system" because it would be applied to all subscribers irrespective of whether they use content legally or not, and whether they use a lot of content or not.

Problems for distribution. Finally, the administrative difficulties of any flat-rate system would be immense. The distribution of the money collected would create enormous problems of distribution, to determine how the money would be allocated to the different sectors (films, music, publishing, software, games...), how it would be shared between the different categories of right holders in each sector, and how the distribution would reflect the reality of the market.

In conclusion, IFPI is in favour of a market driven approach to remunerate creation and investment in cultural content. This could be enhanced by certain measures to support the market, provided these measures enhance but do not interfere with its functioning.

Additional right of remuneration for performers for making available

IFPI is opposed to this idea. As said above, the compulsory collective management of the making available right is contrary to the exclusive character of this right established by Article 3 of the EU 2001/29 Directive and Articles 10 & 14 of the WIPO Phonograms Treaty. Obliging right holders to go through a collective management agency would effectively prevent them from exercising and negotiating their exclusive rights themselves.

The creation of a right of remuneration in addition to the exclusive right of making available would also be inconsistent with the contractual practice in the online or off-line world where the rights are licensed to the producers. This system has always existed and has functioned satisfactorily. Performers are currently paid in the same manner for off line and online sales. There is no reason for modifying this system for the online world. On the contrary, an additional right of remuneration would create additional difficulties for licensing by obliging online services to negotiate with an additional party, possibly pay higher royalties, and to deal with additional problems for the pan-European clearance of rights.

In fact, the creation of an additional right of remuneration for making available would run counter to what the Reflection Document is trying to achieve, i.e. improving the conditions for the licensing of content online. It would add a new layer of complexity, with more different types of rights licensed separately by different right holders.

C. Governance and transparency

IFPI wholeheartedly supports measures to improve the governance and transparency of collecting societies. Such transparency is not a problem for producers' societies which already abide by very high standards.

In contrast, the authors' societies' rigid and uniform pricing practices and their reluctance to negotiate makes it difficult for the record companies and the online and mobile music retailers to experiment with flexible pricing for the new services. The record companies and the online and mobile retailers have subsequently been forced to bring the authors' societies' online and mobile licensing schemes to dispute resolution in arbitration bodies where such exist. In the EU, such bodies have until recently only existed in Germany and the UK.

D. Exceptions to copyright

The Reflection Document queries whether there is a necessity to provide further harmonisation of limitations and exceptions in the EU. However, as the Document points out, opinions on this issue are divided.
In IFPI's view, there is no Internal Market need to make exceptions mandatory and to remove the Member States' flexibility to adopt some variations depending on their own national social and cultural policies. First, there is no indication that the different national approaches on some exceptions create difficulties for consumers regarding the use of online services. Second, in a number of cases (e.g. libraries, social institutions) it is possible to deal with exceptions by way of contractual arrangements without the need to intervene by additional legislation.

IFPI supports a "nuanced approach" to exceptions as mentioned in the Reflection Document. The Document seems to make a distinction between "public interest" and "consumer" exceptions. In this respect, it would be necessary to define clearly what is meant by "public interest exceptions". In addition, it would be necessary to check the impact of each exception on the Internal Market, and the compatibility of any changes with the three-steps test.

Orphan works

A lot of work has already been done at EU level on orphan works, leading to the adoption of an MoU signed by the interested parties, defining what constitutes appropriate due diligence in different sectors before a work can be considered to be "orphaned". The legal consequences of orphan status, and how orphan works can lawfully be used, are under discussion in various Member States.

The Reflection Document mentions extended collective licensing as a possible way to deal with the issue of orphan works. IFPI believes this approach would be preferable to the introduction of a new exception as it would not require the reopening of the EU Copyright Directive. Such an approach could be adopted at national level, and would allow authors to be compensated for the use of their works once they were identified and located.