DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

THE "CONTENT FLAT-RATE": A SOLUTION TO ILLEGAL FILE-SHARING?

EXECUTIVE SUMMARY

Abstract

This study examines the feasibility from both a political and economic perspective of the setting up of a content flat-rate for rights holders to provide consumers with the possibility to do P2P legally. To this end, the study provides an analysis on the evolution of the markets for music and audiovisual entertainment products and services in the last 10 years and information regarding online piracy trends. It presents the key objectives of a content flat-rate approach as well as a content flat-rate and alternative scenarios.

IP/B/CULT/FWC/2010-001//Lot3/C3/SC1 July 2011

PE 460.058 EN

This document was requested by the European Parliament's Committee on Culture and Education.

AUTHORS

Media Consulting Group
Mr Alain Modot
Ms Héloïse Fontanel
Mr Nic Garnett
Mr Erik Lambert
Mr André Chaubeau
Mr Jérôme Chung
Mr Pierre Jalladeau

RESPONSIBLE ADMINISTRATOR

Mrs Ana Maria NOGUEIRA
Policy Department B: Structural and Cohesion Policies
European Parliament
B-1047 Brussels
E-mail: ipoldepb@europarl.europa.eu

EDITORIAL ASSISTANCE

Ms Lyna Pärt

LINGUISTIC VERSIONS

Original: EN
Translation: DE, FR

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to: ipoldepb@europarl.europa.eu

Manuscript completed in July 2011.

This document is available on the Internet at:
http://www.europarl.europa.eu/activities/expert/eStudies.do?language=N

DISCLAIMER

LIST OF ABBREVIATIONS

ARPU	Average revenue per user
AV	Audiovisual
BT	British Telecom
CRM	Collective Right Management
CRMO	Collective Right Management Organisations
DDL	Direct Download
DRM	Digital Rights Management
DTT	Digital terrestrial television
EU	European Union
FTP	File Transfer Protocol
HADOPI	Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet
IPAP	Internet Protocol Address provider
IPRED	Intellectual Property Rights Enforcement Directive
IP TV	Internet Protocol TV
ISP	Internet Service Provider
LPs	Long Playing record albums
MG	Minimum guarantees
MIDEM	Marché International du Disque et de l'Edition Musicale
NMPA	National Music Publishers’ Association
P2P	Peer to Peer
PC	Personal Computer
PSB	Public Service Broadcaster

ROI	Return on Investment
VOD	Video On Demand
SACEM	Société des Auteurs, Compositeurs et Editeurs de musique
STIM	Svenska Tonsättares Internationella Musikbyrå
SVOD	Subscription Video On Demand
TRIPs	Trade-Related aspects of Intellectual Property Rights Agreement.
TVoIP	Television over Internet Protocol
UGC	User Generated Content
VHS	Video Home System
WTC	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation

EXECUTIVE SUMMARY

This study is the response to the expressed wish of the Education and Culture Committee of the European Parliament to be informed about how a content flat-rate could, from both a political and economic perspective, be implemented in practice in the file sharing environment.

This study provides information and analysis on the following topics: the evolution of the markets for music and audiovisual entertainment products and services in the last 10 years; online piracy trends and phenomena; the key objectives of a content flat-rate approach; a content flat-rate system and alternative scenarios for its implementation.

A content flat-rate system is an opportunity for rights holders to provide consumers with the possibility of engaging in legal P2P file sharing, implemented under an extended collective licensing for activities which are not covered by transactional agreements. Limited to what is strictly necessary to download content from a P2P network (i.e. a reproduction right and a very limited making available right[1]), collected by Internet service providers (ISPs) and redistributed by an *ad-hoc* pan European collecting society, a content flat-rate system could be a relevant solution for generating value in the legitimate market and to reducing both the appeal and scale of piracy.

Music industry overview

Copyright law has been, from its inception, constantly trying to keep pace with technological change. Private copying levy systems in Europe have been extended to include much of the copying activity and storage capacity of consumers.

The music industry is a complex industry which straddles a variety of distinct yet interrelated channels. These include live performance, recordings, broadcasting and other forms of what was traditionally referred to as secondary exploitation.

Copyright law provides the basic legal and economic framework within which the music industry works. It grants rights holders exclusive rights to control certain forms of exploitation of their works.

Where these exclusive rights exist, performance of an act within the scope of the right without the authorisation of the rights holders constitutes an infringement, actionable as a civil tort or as a criminal offence or as both.

The cinema and audiovisual industry overview

Unlike music, the audiovisual and cinema sectors have prospered and grown steadily over the last 20 years, subject only to historical occurrences.

European cinema has tapped into this market with a new distribution modes and novel financings structures. Financing has been augmented with public funding as indicated by the considerable number of state aids (European, national, regional and local), of all types and the specialised funds (tax credit schemes, equity funds, slates and others).

For the distribution of audiovisual content, the value chain begins with content production or acquisition of rights and continues through sales to the public.

The marketing of audiovisual and cinema programmes requires the development of

[1] The right of making available to the public other subject-matter referred to in Article 3(2) of the directive 2001/29/EC of the European Parliament and of the Council, on the harmonisation of certain aspects of copyright and related rights in the information society, of 22 May 2001 should be understood as covering all acts of making available such works to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

contractual and economic relations between the different types of players, which can be grouped into six identified categories: rights holders and content providers, content aggregators, operators of VoD platforms and services, distributors of platforms services, manufacturers of consumers electronics and end-user (consumers).

Distribution by digital networks has broken this linearity and all players can now directly access the public (including the performers themselves).

While digital distribution facilitates easier dissemination to the benefit of the consumer (the long tail theory) but it is still hard to transform it into sales for now (even beyond the impact of illegal distribution).

Evolution of piracy: impacts and recent trends

Ironically, physical piracy is on the decline in many markets because of the growing incidence of online piracy: consumers no longer need to pay for any physical product if they can find what they want online for free.

The recording industry response to the growth of online piracy has been multi-layered: from strengthened legislation to technologies relevant to the management of its rights in the recordings it produces. These technologies include digital rights management (DRM) technology and other forms of technology associated with rights management systems such as fingerprinting and watermarking technologies.

In the audiovisual sector, the majority of the new ways to acquire content are used for unauthorised purposes. The range of options for unauthorised use opened up by the digital revolution for the distribution of creative content – more than any other argument – explain the difficulty in attributing the dramatic decline in revenues to one or a limited number of factors.

In the last ten years, countless studies have been done to examine the nature and impact of online piracy. Too often such studies are simply exercises in policy-based evidence gathering. The only certain data are that the revenues of the recording industry are diminishing, and that sales of DVDs are languishing or diminishing. Another sure thing is that the use of peer-to-peer networks[2], direct download sites, etc. is extensive and increasing, involving a high percentage of Internet users, and that the Internet is used to access copyrighted content without any remuneration for the rights holders.

But the co-existence of these data does not necessarily constitute irrefutable proof of causality.

The picture of an “online pirate” gets very confused upon further analysis of the details, and global, aggregated, numbers begin to lose some of their impact. In the film and music industry, it is nevertheless important to distinguish the two major categories of pirates: the pirates who are more or less organised to make money through promoting and/or facilitating the distribution of unauthorised copies for profit and the other pirates who are downloading from illegal websites (music and cinema) music tracks and/or films and series for their personal consumption.

[2] P2P (peer to peer) networks (sometimes called “forum” or “social network”) is a specialized website operating as a virtual “club” where members can communicate in real time and exchange messages. Many of those networks are places where individual consumers exchange protected works, music, films or extracts from films, books or articles in electronic format; such clubs can have thousands of members: the most famous is probably Facebook which has millions of members around the world. Such networks often offer indexed lists of works that can be found in opening the appropriate messages of members.

Main legal measures and mechanisms against piracy

Many different legislative approaches have been adopted by different governments to deal with online piracy.

Rights holders have lobbied successfully for the introduction of graduated response laws in a number of jurisdictions around the world: Taiwan, France (Hadopi law) UK (Digital Economy Act 2010), South Korea and New Zealand.

Other legislative paths are being followed, for example in Italy where the government criminalised violation of copyright by making available protected works on computer networks without permission (decreto Urbani) and in Spain (Sinde Law) where intermediaries are targeted rather than users.

As most of these measures are recent, it is still too early to conclude whether one approach is better than the other.

Key considerations for a content flat-rate

The diversity of stakeholders characterises the digital world in both the audiovisual and music sectors. The multiplicity of possible distribution modes has significantly increased the number of stakeholders - from originators to aggregators. At the same time, telecom operators and more recently device manufacturers involved through the connected TV have developed market integration and penetration strategies. If content is more than ever king, with production, distribution and catalogue control, the tradition value chain is accommodating new actors who compete in value sharing. The traditional organisation of exploitation is threatened with collapse by the advent of high speed broadband, digital and digital distribution or distribution on all potential supports and means. On top of these traditional stakeholders, today, consumers, through fan subbing, P2P, exchanges in social networks and streaming have an influence on exploitation strategies by each category of rights, windows and territories.

The economic impact of digitisation and the Internet on value creation is not the same regarding the music and the audiovisual industries: the consequences and effects in terms of market structuring and organisation differ as between the sectors.

As a result, the establishment of any content flat-rate system must take into account the diverse interests.

The content flat-rate and other scenarios

The economic objective of the content flat-rate system is to bring about a spill-over effect on the market in order to convince rights holders of the system’s usefulness. From this point of view, a system that would give the sector an income flow approximately equal to what VoD and private copying bring in today's market (e.g. €56 million and €28 million respectively on the French market) would enhance its credibility because it would complement premium offers that are essential to the sector's economy.

The social and political objective is to give Internet users the opportunity to remain within the confines of the law for private downloading and P2P file sharing, so as to win over as many users as possible. The content flat-rate system would therefore legitimise P2P first and foremost with legally acquired works.

The setting of a price for a content flat-rate system must meet a threefold challenge: it should support P2P file sharing while reducing piracy; it must represent an extension of legal offerings; it must enjoy the cooperation of ISPs.

Similarly, the pricing mechanism used must satisfy a number of criteria and avoid several well-known pitfalls: setting the right price, not losing sight of the concept of expected price,

not cutting oneself off from the circuit of revenue collection (Internet and network service providers play a key role).

Therefore, the study presents in its chapter 4.1.1. the potential effects of a price policy for a content flat-rate for audiovisual and cinema works: a low hypothesis of €2, a high hypothesis at €6 and a mid-range hypothesis close to the symbolic price of €5 at €4.99.

The pricing of the content flat-rate system is one issue as is the impact on commercial models. A second issue is the rate of consumer migration in order to establish a forecast for the creation or loss of overall value.

According to the hypothesis developed and presented in chapter 4.1 of the study, a content flat-rate of €4.99, which would deliver more profit, would have the best chance of succeeding. This would be the case particularly if the offer is matched with the possibility for the consumer to use this content flat-rate to swap a large monthly volume of content, as envisaged in this study, a facility which apparently is not available in any of the existing offers regardless of rate. In our opinion, such an option should absolutely form part of any commercial offer in terms of downloading because it is now an established practice among all consumers, who are accustomed to sharing content seen on Internet. Additional tranches of €1 to €2 per month could be bought if the user exceeds the downloading capacity in the basic subscription (regardless of the number of titles).

At a minimum, a cultural flat-rate system should be able to answer two important societal objectives:

- Guarantee a fair remuneration for authors and the creative community, with a fair procedure for distribution;
- Provide a safe haven for the individual user.

There does not seem to be any easy win-win situation for all, or even a solution where the “pain” is meted out in equal measures to all.

Nearly all proposed solutions (from voluntary collective licensing to mandatory collective licensing and extended collective licensing) imply some form of collective or common licensing organisation to collect the revenues and redistribute them.

The credible scenarios to answer the file-sharing issue

Two scenarios are possible: either the “status quo” scenario (business as usual and anti piracy laws) or the content flat-rate scenario with two options: the introduction of a general content flat-rate system constituting a new legal business model; or a limited content flat-rate system.

For various reasons, explained in this study, a general content flat-rate system represents an unacceptable solution for many actors[3]. The limited content flat-rate in a specific political and operational framework could be a workable solution.

Collective management is an unavoidable tool as long as a content flat-rate system is contemplated for non-commercial online uses of works, whatever the extent of the coverage of that system.

A scheme based on what has been successfully achieved with the cable and satellite directive[4] could be implemented for P2P file sharing. The CabSat Directive did not create a new exemption or limitation; it did not impose a compulsory license. It limited the exercise of the exclusive rights to collective rights management organisations. For these reasons it retains compatibility with the international treaties. For P2P file-sharing, the exclusive rights to authorise downloading and file sharing within very specific circumstances and limits are entrusted to the collective rights management organisations by rights holders.

[3] cf. Part 3 of the study and Chapter 4.3.

[4] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

Conclusions: what must be taken into account to achieve the content flat-rate scheme?

In order to establish what could be a relevant public action and policy in the music and audiovisual and cinema industry, it is important to bear in mind the major objectives of the proposed policy and the various steps that it must follow to make sure that all decisions and tools as well as steps and chronology are lead logically to the objective.

It is necessary to provide protection for the end-user, based on facilitating a clear understanding of what acts are legally authorised and those which are not, and facilitate P2P and social networking, as long as those activities remain non-commercial and are not the subject of transactional agreements.

Extended collective licensing or exercise of rights should be promoted where opportunities exist for voluntary licensing and which are not (or cannot be) exploited by rights holders individually. This is intended to increase the legitimate market at the expense of piracy.

The content flat-rate system should be limited to downloading and some form of uploading (making available) to allow access to P2P networks (where the protocol usually requires some form of uploading during downloading). The system will permit the global sharing of works of an end-user’s own digital collection, and will limit any form of sharing, over P2P networks, social sites, cyber lockers, etc., to a private circle of friends and family. As an example, the extended license of the making available right[5] could be limited to 50 best friends, which means that P2P or DDL offerings (with new content offering) should only be allowed within one's social circle (perhaps via a social network).

The content flat-rate system will require that limitations are placed on the capacity of storage systems used within the authorised network and on the quantity of files shared irrespective of the protocols or applications used.

The Internet service providers (ISPs) will have the responsibility to inform its subscribers when the quantity of files shared exceeds the authorised amount and then block excess sharing as they are already doing as part of current Internet and mobile phones subscription packages.

The limited, non-market status of the content flat-rate network should be enforced and the network ring-fenced from any commercial networks. There should be clear communication to potential end-users about the scope of activities which are permissible within the content flat-rate network. The terms should be standardised at European level and by category of work (and therefore not subject to a "single work single licensor" approach, or demarcated by territory of licensing or place of business of licensee and/or licensor).

The 42 Key factors of success for the feasibility of a content flat-rate

Objectives:

1. Where consumers have shown a preference for using content in a particular way and there are ways that such use can be licensed on a viable commercial basis, rights holders should be expected to do so.
2. Artists /creators and other rights holders, including producers must be assured the possibility of remuneration based on the voluntary exercise of their exclusive rights (subject to 1 above).
3. Ensure that a fair balance is struck and maintained between the various fundamental rights protected by the Community legal order[6].

[5] cf. footnote n°1.

[6] As indicated by the Court of Justice in the decision on case Case C-275/06, “Productores de Música de España (Promusicae) v Telefónica de España SAU (Reference for a preliminary ruling from the Juzgado de lo Mercantil no 5 de Madrid).

Legal basis:

4. Do not introduce new copyright exceptions and limitations as they require heavy modifications to existing norms and law (not all would be readily compatible with the existing international instruments, and thus might take quite some time to implement).
5. Favour extended collective licensing for the exercise of rights where appropriate (facilitating easier access to the complete repertoires), but no dilution of the exclusive rights. Where voluntary licensing is shown to work, then there should be no mandating of collective licensing; where opportunities exist for voluntary licensing which are not exploited by rights holders, there may be mechanisms to allow exploitation of the opportunity in other ways for example, as has been implemented by the CabSat Directive[7].
6. The rights that are considered here should be exercised only through a collecting society. Where a rights holder has not entrusted the management of his rights to a collecting society, the collecting society which manages rights of the same category should be deemed to have been so-mandated by that rights holder. Where more than one collecting society manages rights of that category, the rights holder should be free to choose which of those collecting societies is mandated to manage his rights. A rights holder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the licensees (end users) and the collecting society which is deemed to be mandated to manage his rights as the rights holders who have mandated that collecting society. The rights holder will be able to claim any entitlement within a stipulated period.
7. If a rights holder authorises the initial transmission, representation or making available, within the European Union of a work, he shall be deemed to have elected not to exercise his rights in relation to the non-commercial sharing rights under consideration on an individual basis rather to exercise them in accordance with the above provisions relating to collective management.
8. Notwithstanding the above, rights holders may withdraw from collective licensing, as long as they provide for the licensing of the rights for the specified purpose in concurrently with the release of licenses by the relevant collecting society.
9. In case no agreement is reached, there needs to be a provision for mediation.

Practicability:

10. There should be provision to opt out of collective licensing, while incentives to use it remain: loss of access to the sums being distributed, cost of direct licensing, and cost of direct enforcement activity).
11. The exploitation window issue must be dealt with carefully. The primary impact of piracy occurs during the first two months after the release of a work. At the same time, rights holders must have time to exploit their rights in order to insure the best return on investment.
12. Collective licensing should not be used during an initial release period of ideally 4 months (2 months is a too short period). This embargo could be extended for up to a maximum of 6 months – perhaps even 12 months for audiovisual works. Shorter periods would be much more acceptable for consumers while longer periods risk being self-defeating. The precise duration should be specified after due consultation with rights holders, essential for the film and music businesses. This would also have the effect of creating a specific exclusive exploitation window for new commercial services. The difficulties for rights holders of a short period of exclusivity are well understood, but there must be a balance with the consumer behaviour and expectations.

[7] See Art. 9 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

13. Extended collective licensing of P2P file sharing encompasses the communication to the public/ making available rights[8] implicated in downloading. It should also extend to the limited uploading acts involved sharing limited uploading rights but would not to uploading works for storage in cyber lockers or seeding P2P networks with content in some other way. These latter activities should only be licensed on normal commercial terms - at least for newly-released works.
14. User's rights and obligations should be clear and consistent.
15. Internet intermediaries (ISP) should not need to be licensors of their end-users, but will offer the end-user license and collect the content flat-rate for the actual licensor, being the selected Collective Rights Management Organisation.
16. Some form of collaboration on enforcement, by ISPs and other Internet intermediaries, will be needed. There should not and cannot be any general content monitoring obligation. The normal network traffic management tools could be sufficient to signal extraordinary activity, and of course safe haven clauses must be linked to due response being made when notice of infringements is given (e.g. particularly for recently-released works).

Specificity:

17. The content flat-rate offer subscription will be sold to individual end users by ISPs.
18. Sharing should be limited to a private circle of “friends and family”. As an example, the license for the communication/making available right[9] (except for very short extracts) will be limited to 50 friends (a sufficiently large but restricted number), which means that an authorised P2P or DDL offering could only be allowed within specific social networks.
19. The limited content flat-rate system will allow consumers to share works within P2P networks in the same way private copying of VHS carriers was allowed in the family circle.
20. Downloads must be done only from fully authorised cyber locker sites using legitimate sources. For the good management of the system all artwork must be tagged (or otherwise officially identified).
21. To make the mechanism more relevant, standard “rules of engagement” should be developed and communicated on site by site basis. This should be done by the Collective Rights Management Organisation (CRMO), with the rights holders’ support. It should also be adopted by VoD, SVoD platforms and catch-up TV services that advise consumers about the option when taking up the license offer, also underlining the risks of engaging in unauthorised P2P activities.
22. For practical reasons, the license should be on a flat-rate basis, even though it introduces unfairness between heavy and light sharers. A quantitative rate would not scale and ISPs should not be obliged to monitor content downloaded or uploaded.
23. Differences in consumer behaviour as well as value chains suggest consideration of different content flat-rate systems for music and audiovisual works. However, given the complexity of the management processes involved, the risks of misunderstanding, the bad faith of certain categories of stakeholders as well as of consumers, only one limited content flat-rate covering music and audiovisual is recommended.
24. This private use licence will be paid by consumers on a voluntary basis to the ISP and will be clearly identified in the commercial terms offered by ISP’s. This should not preclude ISPs from establishing an all-inclusive policy for 100% of its private customers (presumably at a better rate).

[8] cf. footnote n°1.
[9] cf. footnote n°1.

Enforceability:

25. There will remain a need to enforce the initial period of exclusivity, especially on the upload side. But the focus should be on up loaders and not down loaders.
26. The limited non-market status of the solution should be enforced, and all indirect market based activities should be prohibited (cf. The Pirate Bay case) and prosecuted (on the basis of authorising infringements). This would help to limit the usability of non licensed sites.

Administration:

27. Transparency in administration is fundamental in the interest of both rights holders and consumers.
28. Organisations with extensive catalogues should be allowed to be present and support the system by bringing the rights of their members to the selected CRMO.
29. The content flat-rate will be collected by ISPs and (after the deduction of a commission, to be discussed, for collection tasks) will be remitted to the selected CRMO.
30. Establishing the basis for distribution of revenues to rights holders is a difficult matter and should be discussed among stakeholders so that they reach a consensus.
31. Measurement issues must be addressed in a new survey in order to identify the best solution.
32. The rates need to be negotiated (with some form of mediation) as there is no scientific way of determining their level. Estimated losses from piracy are not conclusive whereas the ISP's market experience will be of a greater relevance.

Pricing:[10]

33. The price must be high enough to reach a level which creates additional value and provides sufficient margin to build an administrative system to collect and properly distribute the content flat-rate revenue.
34. The price should set high enough to avoid negative side-effects like the migration of consumers from commercial services to the content flat-rate system.
35. The price should be attractive for consumers to persuade them of the value for money (technical quality, authorised P2P sharing with a limited circle of friends, and of course, the wide choice of content available based on legal commercial offers).
36. A content flat-rate system could have a consumer price point in the range of €4 to €6 VAT included /month for audiovisual works. But according to the hypothesis stated in chapter 4 of this report, research needs to be done using all available data to determine the appropriate price points.
37. €4,99 per month could be an attractive starting point to reach a consensus price acceptable by all stakeholders.

Marketing:

38. Consumers must be clearly advised of the final destination of their payments (in the same way that eco-taxes or eco-contributions[11] are now identified and clearly labelled on the prices of a growing number of products, especially household appliances, electronic goods, cars, etc.).
39. These payments will support the creative industries and communities.

[10] Cf. Chapter 4, paragraph 4.1.

[11] These correspond to the cost of collecting and recycling waste electrical and electronic equipment.

40. By subscribing for a license, the consumers will be supporting the creative community and not pirates or illegal activities.
41. A clear distinction must be maintained between the content flat-rate system and the private copying levy system. The private copying levy must be clearly applied solely to the copying of works on physical supports (DVD).
42. Consumers should be given very clear information about what is permitted within the content flat-rate system. Clear distinctions should be drawn between what is authorised within the system and other illegal activities.

Public Policy Recommendations - Preliminary Remarks

The authors of this study are of the firm opinion that there is a significant political risk in proposing and promoting the introduction of a general content flat-rate system which would potentially displace an extremely large number of market mediated exchanges, up to the point of impeding the emergence of new market mediated services - not to speak of extremely large value destruction.

A content flat-rate system with a strictly limited objective must be characterised as a way to avoid threatening the civil liberties of a large number of citizens and should be as limited in scope as required to achieve that objective (by ensuring for example that licences are granted to consumers and not ISPs.). They further believe that the proposal as set out in this study is not the complete framework, and that they have only attempted to identify what in their opinion constitute the high level considerations for the fuller development of the framework. They are confident however that the proposed management structure based on extended collective management is the least objectionable in the present circumstances.

They are aware of the real difficulties (professional and cultural) in building something workable without too many unintended consequences.

Finally they wish to underline that strong political vision and direction are needed to proceed with this approach given the current lack of consensus, consensus being the key requirement for the success for such a project.

There is an opportunity to secure a great European victory for the promotion of culture and the cultural industries, and which could be re-used for all other digital contents.

Political Feasibility

- The creative content licence is not the panacea for all the problems.
- It is a limited content flat-rate system which will create value for the creative community. The objective of this scheme is clearly to reduce the grey zone between legal offers and piracy and to return millions of people to legitimate practices.
- This licence will not constitute authorisation to upload catalogues of music and audiovisual works but rather offer consumers the possibility of legitimately sharing their private selection of the creative contents they like.
- The content flat-rate system is not a new business model which will replace existing models. It is a complementary scheme which will create additional value for the creative community.
- The political authorities must make sure that the public policy foundation for the system is based on a clear rationale and consensus. Such policy pays great attention to the economics of the creative industries in order to preserve the production capacity for cultural content.
- Existing practices and structures should be adopted to avoid reinventing the wheel. Extended collective management should, on that basis, provide the model for the administration the system.

- Adopting an extended collective management approach should provide the significant advantages of consensus building among rights holders, pan-European implementation, and thus opens up the possibility of multi territory licensing.
- Limiting the implementation of the system to one pan European collective rights management organisation preserves compatibility with international agreements and will avoid duplication of cost.
- It is essential to continue the war against commercial forms of piracy.
- Promoting the content flat-rate system with consumers as a voluntary proposition, clearly marketed as such ("My value for money"), will help to demonstrate what is legal and what is not.

Economic Feasibility

– There must be a further in-depth study of the business model and which addresses the issues of pricing, collecting costs, management costs, exploitation windows, etc.

– This survey must also cope with the issue of the criteria for distribution of revenues, a key issue for convincing important rights holders to bring their libraries to the proposed Collective Rights Management Organisation.

– Finally this future survey must also investigate the need of a certification or labelisation[12] policy as a new tool against piracy and illegal platforms.

– Promote the project in order to make sure that the largest number of rights holders will bring their rights to the collective rights management organisation in order to have the most updated, recent and diverse catalogues. It is a key issue to insure the success of the content flat-rate on the market and among professionals.

To conclude

On one side, there are right holders establishing licences for uses that are not covered by their existing models for exploitation. On the other side, there are consumers subscribing on a voluntary basis to a legitimate offer limited for downloading and P2P file sharing.

This subscription revenue is collected by ISPs and is remitted to a collective right management organisation. This latter will organise the distribution of the revenues on the basis of a formula of calculation that still needs to be defined. It could be based on market results such as the DVD sales or VoD downloads indicators but in any case, a consensus shall be reached.

There is a decoupling between what are the actual works shared by consumers and what is paid to download and exchange them. There is no need to infringe the consumer's privacy as use of specific works is not tracked; the system will be based on the volume of works shared.

Piracy remains a plague that has to be dealt with.

This system as proposed will only cover cinema and audiovisual works. Given the specificities of the music sector, its different value chain, its different consumption habits and the volumes involved it falls out of the scope of what is proposed here. A similar system could work for music but an in depth and case study of the existing offers should be conducted in order to build up and refine a workable model that could be validated by both consumers and rights holders. However, this work would represent a much greater challenge than that involved in dealing with audiovisual works.

[12] It could be based on the experience of the HADOPI certification system for music platforms that helps the consumer to clearly identify the legal offer.

GENERAL INFORMATION

This study is the response to the expressed wish of the Education and Culture Committee of the European Parliament to be informed about how a content flat rate could from both a political and economic perspective be implemented in practice in the file sharing environment.

The study provides information and analysis on the following topics:
- The evolution of the markets for music and audiovisual entertainment products and services in the last 10 years (Part one of the study);
- Online piracy trends and phenomenon (Part two of the study);
- Key objectives of a content flat-rate approach (Part three of the study);
- Content flat-rate and alternative scenarios (Part four of the study);
- Conclusions and Recommendations (Part five of the study).

Scope of the study

Geographical scope

The survey covers the European Union Member States. Additionally, various third countries systems’ are also analysed and used as examples of good (or bad) practices.

Chronological scope of the study

The study covers the last ten years (2001-2011) and gives information about future perspectives, where available.

Scope of the content sector

In compliance with the specifications of the tender, the following cultural sectors are covered by the study: cinema, television and music.
In the study, the term audiovisual includes films of all kinds and all windows: theatrical, video, VoD, etc.

Methodology

Methodological tools

The research relied principally on two main tools: desk research and interviews (field research).
The desk work used the main printed and online sources available.
Interviews were conducted in Europe and elsewhere, with some of the most relevant stakeholders in each field. The sources and the list of interviews are set out in an appendix to the study.

Methodological challenges

Lack of statistical data

One of the major problems encountered by the consultants and professionals in general in the area is the general paucity particularly on an EU-wide basis of statistical data available for this type of study. This is clearly the case for the analysis of piracy volumes in particular or the private copy levy that only exist in 25 EU Member States. It is also the case for detailed information such as the turnover split of telecom operators between telephone, broadband and content services (e.g. IP TV, VoD and SVoD channels subscription) or the

turnover of the various subsidiaries in the respective TV groups. This weakness in the statistical tool, which is not provided for by the European Audiovisual Observatory publications, has a significant impact on the setting of business models and robust data figures forecasts.

Political concerns

The audiovisual sector and more generally the creative industries have historically been relatively successful in alerting the politicians, with more or less success their analysis, to their claims, and their needs. Over the last 10 years, other stakeholders have emerged and made themselves heard in this area. This was the case of telecom operators and now consumers. The analysis of the value chains in the study shows that with mass access to high speed broadband Internet and the emergence of social networks the interests of different value chain participants do not always align. Compromises have to be found at the political level, in shaping legislative responses. With that in mind, it is in the pursuit of a consensus or, at least, some attainable common ground, that this work commissioned by the European Parliament becomes necessary.

Multiplicity of stakeholders involved

A diversity of stakeholders characterises the digital dimension of the audiovisual and music sectors. The numerous models and channels of distribution have multiplied the stakeholders involved - from originators to aggregators. At the same time, telecom operators and more recently device manufacturers involved through the connected TV have developed their own market integration and penetration strategies. While content remains more than ever king, new systems for production, distribution and control of catalogues and traditional value chains involve new operators who compete for a share of the market and value. Established distribution and service models are threatened with collapse by the advent of high speed broadband, digital formats and digital distribution or 360° distribution. Consumer behaviour adds a further layer of complexity: fansubbing[13], P2P file sharing, exchanges in social networks and streaming, they can all have an influence on the exploitation strategies of each category of rights, windows and territories.

The creation of any content flat-rate system must take into account these divergent interests.

Deadlines

As per the terms of reference, this study was to be completed within 4 months. The limited timeframe made it difficult to collect exhaustive information and interview all the stakeholders in all the Member States and make in depth analysis on specific issues of the business model.

General appraisal

This is a challenging assignment for several reasons:

- Given the fact that the music industry globally and in Europe in particular is in a deep and potentially terminal crisis, this study is critically important;
- Equally, given resistance in many areas and for many reasons to graduate response type legislation understanding the possibilities and limitations of alternative models is highly desirable;
- There is a great deal of data and opinion to collect and process;

[13] The practice of adding subtitles by consumers.

- Obtaining useful, objective input from rights holders and rights users presents challenges.

These points are also valid in the audiovisual sector. The creative industries are confronted with a sea change in the consumption habits of their consumers (music more than movies) made possible by the same technologies that facilitate piracy: separating the two is difficult, and not necessarily in the immediate interest of the different stakeholders, as they jockey for their positions in this new world.

The establishment of any type of content flat rate system, whatever its scope, involves in depth analysis of the collective management system. The structure of collective management systems in Europe raises highly controversial political issues and many legal uncertainties which have not yet been resolved in EU law.