

Committee on Legal Affairs

Working Group on Copyright

WORKING DOCUMENT

COPYRIGHT IN THE MUSIC AND AUDIOVISUAL SECTORS

TO BE SUBMITTED
TO THE COMMITTEE ON LEGAL AFFAIRS
BY THE WORKING GROUP ON COPYRIGHT

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"History shows that it is an impossible task to reverse technological advantage and the change that it produces. Rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it. There is, in any case, no other choice – either the copyright system adapts to the natural advantage that has evolved or it will perish."

Francis Gurry, Director General of WIPO
"The Future of Copyright"
(speech given at the
Blue Sky Conference,
Queensland University of Technology,
Brisbane, Australia; 25 February 2011)

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INTRODUCTORY PART

1. Working Group on Copyright: composition and aim

The Committee on Legal Affairs decided, at its meeting on 5-6 October 2009, to set up a Working Group on Copyright made up of members of the committee, with the participation of members of the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education. The Working Group is coordinated by Marielle Gallo (JURI, PPE). It is a continuation of a similar body established by the Legal Affairs Committee in the previous legislature.

The Working Group on Copyright is made up of the following members:

Marielle GALLO (JURI, PPE)
 Luigi BERLINGUER (JURI, S&D)
 Cecilia WIKSTRÖM (JURI, ALDE)
 Eva LICHTENBERGER (JURI, Greens)
 Francesco Enrico SPERONI (JURI, EDF)
 Jiří MAŠTÁLKA (JURI, GUE)
 Sajjad KARIM (JURI, ECR)
 Catherine TRAUTMANN (ITRE, S&D)
 Pablo ARIAS ECHEVERRIA (IMCO, PPE)
 Morten LØKKEGAARD (CULT, ALDE)

The aim of the Working Group on Copyright is to review copyright policies within the EU legislative framework in order to examine the challenges and prospects for the future of copyright in the European Union – particularly in relation to technological advances and the information society. The result of the work undertaken by the Group could serve as a starting point for the Legal Affairs Committee's and European Parliament's future legislative activities in the field of copyright.

2. Working method and recent debates

The Working Group on Copyright is assisted in its work by a project team, coordinated by the Secretariat of the Committee on Legal Affairs. The project team meets before each Working Group meeting in order to prepare the information notes and questionnaires for the exchanges with experts.

These information notes - amended as a result of the discussions and the suggestions of members of the Working Group - contributed, under the direction of the coordinator, Marielle Gallo, to the drafting of this working document, which is to be submitted to the Committee on Legal Affairs at its meeting in September 2011.

This working document encompasses the third block of questions considered by the Working Group in the course of its recent meetings, which were as follows:

Meeting on 9 June 2010

The Working Group had an exchange of views on copyright and the audiovisual and music sectors with the following guests:

- Francisco Javier Cabrera Blázquez, analyst from the European Audiovisual Observatory in Strasbourg,
- Nicola Frank, Head of Public Affairs of the European Broadcasting Union (EBU),
- Olivia Regner, Deputy Regional Director and Regional Counsel, IFPI,
- Ted Shapiro, Senior Vice President of Motion Picture Association (MPA) and Deputy Managing Director and General Counsel EMEA.

Meeting on 15 September 2010

Tilman Lüder, Head of Unit 'Copyright and Knowledge-based Economy' in the European Commission's DG Internal Market recapitulated EU legislation on copyright and presented the general approach and state of play, in particular as concerns the music and audiovisual sectors.

This was followed by a presentation of Article 118 TFEU by Kieran Bradley, Head of Justice and Civil Liberties Units of the Legal Service of the European Parliament.

Meeting on 8 December 2010

The Working Group had an exchange of views on copyright in the music and audiovisual sectors from the point of view of consumers with the following guests:

- Lina Ehrig, Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband e.V.*),
- Edouard Barreiro, Union Fédérale des Consommateurs-Que Choisir,
- Kostas Rossoglou, the European Consumers' Organisation BEUC
- Professor Severine Dusollier, Director of the Research Center in IT and Law, University of Namur.

The Working Group was also presented with a paper "The relations between copyright law and consumers' rights from a European perspective" by Prof. Severine Dusollier.

Meeting on 12 January 2011

The Working Group had an exchange of views on copyright in the music and audiovisual sectors from the point of view of artists with the following guests:

- Luis Mendo - Vice-President of GIART,
- Tom McGuinness - songwriter, author, record & TV producer,
- Elisabeth O. Sjaastad - Chief Executive Officer, Federation of European Film Directors, and
- Dominick Luquer - General Secretary of the International Federation of Actors (FIA).

Meeting on 9 February 2011

The Working Group had an exchange of views on copyright in the music and audiovisual sectors from the point of view of the service providers with the following guests:

- David Grosz, General Secretary and Legal Affairs Director (Secrétaire Général et Directeur Juridique), Direction des Contenus, France Télécom Orange, and
- Albert Pastore - Senior Legal Counsel, Entertainment & Creative/Cultural Affairs and James Waterworth - Director of Government Affairs, Nokia.

Meeting on 30 March 2011

The Working Group had an exchange of views on copyright perspective on streaming, file sharing and the development of legal content on offer with the following guests:

- Petra Hansson, General Counsel at Spotify - the digital music service, and
- Prof. Nico van Eijk, Institute for Information Law (IViR, University of Amsterdam).

The Working Group was also presented with a paper entitled "File Sharing" by Prof. Nico van Eijk.

PART I: MUSIC AND AUDIOVISUAL SECTORS: STATE OF PLAY AND PERSPECTIVES

Development of digital technologies and media convergence allow wide and immediate access to online works across the borders. In the digital environment digital services are provided by software solutions installed on general purpose computers accessible to anyone. In recent years the range of digital content has expanded to such an extent that the possibilities for digital consumption now seem unlimited. However, the European market of digital content, because of its legal, cultural and linguistic particularities, is highly fragmented. Technologically, the Internet is without frontiers, but the online market is impeded by multiple barriers affecting the development of and the access to pan-European services and content. In Europe of today the online market remains a patchwork of national markets rather than a truly single digital market. The situation in the music and audiovisual sectors is a good example of this.

1. Examples of legal offer of music and audiovisual content online

1.1 Online stores

The example of the iTunes stores

Apple's iTunes stores operating online, which sell music and audiovisual content, are available to Internet users in a number of European countries. The operation of iTunes stores is territorially limited, because European users can only buy online works available on the national site of their country of residence, where the sale of a specific catalogue of works is permitted. The reason for which it is not available in every Member State is that many of the Member States do not offer a large enough marketplace to justify the expense and effort required to sell there. To sell music in any Member State, iTunes must first obtain the rights in the sound recordings and the musical works or the audiovisual works on a country-by-country basis, as well as to comply with varying national law requirements. Since this cannot be done on a pan-EU level, iTunes has to examine the situation in each Member State individually to determine whether the benefits are likely to outweigh the costs of distributing content into that country¹. It seems that some record companies, publishers and collecting societies choose not to make available their content on a pan-European basis², which

¹ DG COMP's note on Online Commerce Roundtable Report on Opportunities and barriers to online retailing

http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf

DG COMP's note on the "Opportunities in Online Goods and Services: Issues Paper Apple/iTunes Response" http://ec.europa.eu/competition/sectors/media/apple_itunes_contribution.pdf, p. 1.

² European Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe, 9 January 2008

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22>

EU pressure ends iTunes price unbalance, 10 January 2008

<http://www.euractiv.com/en/infosociety/eu-pressure-ends-itunes-price-unbalance/article-169446>

by itself is not a breach of the current EU legislation, but by doing so, they are preventing European users from purchasing freely from sites other than national.

As a result, the content on offer varies significantly from one store to another. On the Belgium iTunes store, no audiovisual content is on offer. On the other hand, on the UK iTunes store, it is possible to buy music videos (clips) as well as TV shows and movies.

1.2 Streaming

Streaming allows watching the content or listening to it on a computer screen. A media stream can be streamed either live or on demand. Live streams generally send the information straight to the computer or device without saving the file to a user's hard disk. In case of on-demand streaming the file is saved to a hard disk and then it is played from that location. On-demand streams are often saved to hard disks and servers for extended amounts of time; while the live streams are only available at one time only (e.g. during the football game)³.

Legal streaming websites include YouTube⁴ and Dailymotion⁵ for audiovisual content, and Deezer⁶, Spotify⁷, Rhapsody⁸ and WiMP⁹ for audio files. By negotiating with the main right owners, such websites have acquired the rights¹⁰ to provide a legal listening/watching to online audio/audiovisual content to consumers. The services can be available on subscription; however they are often free of charge.

The example of Spotify: legal and free of charge streaming of audio content

Spotify provides on-demand streaming with temporary tethered¹¹ downloads and permanent downloads. Its services are available both as ad-supported (free to the end-user and funded by advertising) and on subscription or other paid for basis. There is a possibility of having online access for portable devices and temporary tethered downloads for paying users. Spotify, a Swedish invention, is currently only available in seven European countries - UK, France, Spain, the Netherlands, Sweden, Finland and Norway, but its 1 million paying subscribers make it the biggest streaming music service in the world¹². There are talks about its expansion to the US, where it would go up against Rhapsody, the pioneering US music streaming service. Spotify has deals with necessary rightsholders, including major labels (with the majority of the works in

³ Wikipedia on: streaming media.

⁴ <http://www.youtube.com/>

⁵ <http://www.dailymotion.com/>

⁶ <http://www.deezer.com/en/>

⁷ <http://www.spotify.com/>

⁸ <http://www.rhapsody.com/>

⁹ <http://www.wimpmusic.se/>

¹⁰ For example, the most recent agreement in this respect was reached by You Tube with SACEM on 30 September 2010 and Dailymotion with INA on 18 October 2010.

¹¹ Temporary tethered download is an online temporary reproduction of music work limited in time, i.e. a song file downloaded from a music subscription service that can be played only on computers registered to the account, as opposed to untethered downloads, which can be played on compatible portable devices.

¹² Spotify breaks 1 million subscriber mark, 8 March 2011 on <http://www.techspot.com/news/42715-spotify-breaks-1-million-subscriber-mark.html>

question coming from the catalogs of the so-called music industry "Big Four": Sony, Universal, EMI and Warner), in all of its launch countries. Together with them it has agreed upon a royalty paid to the artists based on how frequently their music is played.

Recently Spotify has decided to put tight limits on the music which can be listened on this platform free of charge. Spotify has also revealed plans of a new application, which would allow managing music on iPods, improve the purchasing experience and broaden access to its mobile service. This move has been seen as putting Spotify in direct competition with iTunes.¹³

1.3 Audiovisual media services

Audiovisual media services include both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services). Television broadcasting includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example is an on-demand audiovisual media service.¹⁴ Directive 2010/13/EU¹⁵ defines on-demand audiovisual media service as "*an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider*"¹⁶.

The European audiovisual sector is currently valued at 96 billion EUR with more than 1100 European films produced each year¹⁷. This sector is now experiencing significant changes, in particular with the emergence of VoD and catch-up services in the recent years.

Video-on-demand (VoD)

The term video-on-demand (VoD) covers "*a wide range of technologies, all of which allow the selection of rental- or remote purchase in a non-physical form- of video content for immediate or later viewing on various types of devices (computer television, telephone, mobile players) for limited or unlimited periods of time*".¹⁸ TV broadcasters, content aggregators and telecommunication operators are the main providers of VoD services, which are therefore accessible via different networks and

¹³ Here's Spotify's Master Plan: Tackle iTunes Head-On, 5 May 2011 on http://www.businessweek.com/technology/content/may2011/tc2011055_645076.htm

Spotify casse les prix sur le téléchargement de musique, 3 May 2011 on <http://www.lefigaro.fr/societes/2011/05/03/04015-20110503ARTFIG00711-spotify-casse-les-prix-sur-le-telechargement-de-musique.php>

¹⁴ See recitals 11 and 27 of Directive 2010/13/EU.

¹⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95 of 15.4.2010, p. 1).

¹⁶ Article 1(g).

¹⁷ See: Study on Multi-Territory Licensing of Audiovisual Works in the European Union by KEA.

¹⁸ Definition of European Audiovisual Observatory in its study on Video on Demand services in the EU.

platforms such as Internet, Internet Protocol television (IPTV), cable, digital terrestrial television, satellite or mobile phone networks. It is also possible to access VoD services via other types of devices, such as Playstation portable (PSP) Sony or Nintendo devices.

VoD services cover a wide range of business models and offers. They can be categorised as pay VoD services and free VoD services. Pay VoD services include film rentals (streaming) for a limited period of time, download to own (DTO), i.e. purchasing of a film for a fixed amount with one fixed payment for each download, and Subscription VoD (SVoD) where users can access unlimited content against a monthly payment. Free VoD services or Free-On-Demand (FoD), also called catch-up TV¹⁹ (streaming), provided by commercial and public broadcasters programmes. FoD services are funded either by advertising or by licences fees. For instance the BBC iPlayer allows UK residents to either watch live BBC TV or catch up on the last 7 days of BBC programmes.

The European VoD market has increased over the past few years, amounting to EUR 544 millions of revenues in 2008²⁰. More than 700 VoD services are available today in Europe and it is estimated that those services may generate more than EUR 2,2 billion of revenues in 2013²¹. Although considered to be still in their infancy and generating marginal revenues in the audiovisual sector as a whole, the number of European VoD and catch-up services is increasing quickly and has brought up many new issues and challenges.

Some Member States are more advanced than others when it comes to VoD platforms, supply and demand. France, the Netherlands, the UK and Germany are the leading countries in the VoD markets. On most European markets, the main business model chosen by service providers is rental. For instance, in France, 98,3 % of VoD income is generated from rental services²².

The situation of VoD services differs in terms of what is offered from one Member State to another, in some cases, such as Belgium it is very limited.

As regards the origin of films accessed, the share varies between countries. In France, for instance, although more and more French films are put on offer (at least half of the content on offer), they only represent 30% of the content accessed. US films attract more users, representing almost half of the content accessed²³.

As regards licensing practices, territorial licensing is still dominant for VoD services. In general, rights are sold on a non-exclusive basis for a short period of 2 or 3 years²⁴.

¹⁹ Service enabling users a programme to be viewed after its broadcasting live on TV.

²⁰ See: Study on Video on Demand in the EU, European Audiovisual Observatory.

²¹ See: Study on Multi-Territory Licensing of Audiovisual Works in the European Union by KEA.

²² See Harris Interactive study commissioned by Centre National du Cinéma et de l'image animée (CNC)

<http://www.cnc.fr/Site/Template/Accueil.aspx?SELECTID=614&&t=3>

²³ See "Le développement de la VoD en France"

http://www.cnc.fr/CNC_GALLERY_CONTENT/DOCUMENTS/publications/dossiers_et_bilan/305/dossier305_c_hap5.pdf 47.9% for US films and TV programmes vs. 30,5 % for French TV/films. Non-US/ non-FR content represents only 3.4%.

²⁴ See Study on Multi-Territory Licensing of Audiovisual Works in the European Union by KEA www.keanet.eu/docs/mtl%20-%20full%20report%20en.pdf

2. Examples of other phenomena

2.1 Social networks

Many Internet users today are members of social networks such as Facebook, MySpace, Twitter or YouTube. Social networks has become the primary means of communication among many individuals, in particular the young generation, who can share and exchange information in the easiest possible way. However, most users may be unaware of the potential copyright issues relating to their posting of copyright protected works, such as a video or a music clip on their personal space online. Once online, it must be assumed that such works may be available to all parties, both in an intended and unintended way. In addition, some social networks, like Facebook, start to develop into places of commercial exchanges with virtual currencies²⁵.

The question concerning legal obligations arising from the use of social networks becomes increasingly important for users and websites concerned.

The example of YouTube

Founded in February 2005, YouTube is a video-sharing website on which users can upload, share and view videos (user uploaded content). It also provides a forum for people to connect and acts as a distribution platform for original-content creators and advertisers, large and small²⁶. In addition in recent years YouTube reached agreements with major companies²⁷ in order to have their copyright protected content used legally on its website. Every minute 35 hours of video content is uploaded on YouTube, this amounted to a total of 13 million hours of uploaded content during 2010.²⁸

On its website YouTube states that: "*[it] respects the rights of copyright holders and publishers and requires all users to confirm that they own the copyright or have permission from the copyright holder to upload content*". It also states to be "*committed to helping copyright holders find and remove allegedly infringing content from our site. To that end, we have created a Copyright Verification Tool that assists copyright owners in searching for material that they believe to be infringing and providing YouTube with reasonably sufficient information to allow us to locate that material*". Measures that filter any unauthorised content are the result of agreements between YouTube and some record companies. If the YouTube's Copyright Verification Tool identifies copyright infringement, the unauthorised video will be muted or blocked, either in some countries or worldwide. In case of repeated incidents of copyright infringement, YouTube deletes the infringer's YouTube account and all videos uploaded without authorisation.

²⁵ <http://blogs.reuters.com/columns/2011/03/08/facebook-virtual-currency-starts-to-reap-benefits/>

²⁶ See: http://www.youtube.com/t/about_youtube

²⁷ For example, in 2006, YouTube concluded agreements with Universal Music Group, Sony BMG Music Entertainment and CBS. The use of the copyright-protected content has been authorised through specific revenue deals between YouTube and these companies. The specific arrangements of such deals remain confidential.

²⁸ http://www.youtube.com/t/press_statistics

Despite that, YouTube experiences problems related to copyright infringements. Last year, for instance, the German Hamburg State Court ruled that YouTube must pay damages for failing to prevent the upload by its users of several videos of Sarah Brightman's performances, and therefore violating copyright rules. The Court considered YouTube legally responsible for the content uploaded²⁹.

YouTube also dedicates parts of its website to copyright education³⁰.

2.2 Cloud computing³¹

The importance of "cloud computing"³² grows in recent years. Cloud computing allows users to employ a variety of protocols, applications, and transmission technologies to store data and to harness the processing power of remote servers, often controlled by third-party providers. The "cloud" enables Internet users to store, disseminate and share content with other Internet users. Such services are used by many businesses today because cloud computing is an affordable, flexible and mobile solution: IT providers host services of many companies, which reduces costs and the access to content can be done from anywhere at anytime. Most computer and Internet users use methods of cloud computing on a daily basis in their activities. For instance Facebook, Yahoo! mail and YouTube can be considered as examples of SaaS³³ cloud computing.

The example of Amazon and Google Music (Music Beta)

Although a number of smaller cloud music services already exist, such as mSpot and AudioBox, Amazon was the first of the big technology companies to venture into this area in 2011. Amazon unveiled an online music service that lets users upload songs and play them from a range of devices. The Cloud Player was launched in the US. It is not known what agreement, if any, Amazon has reached with the four major record companies, regarding users uploading copies of their music. But it is believed that the system is based on the concept of legality of making online copies of tracks, which is known as format shifting. In the US format shifting is generally defensible under the principle of fair use. In contrast, it was pointed out that the same rules do not apply in

²⁹ See http://www.huffingtonpost.com/2010/09/03/german-court-rules-against_n_705211.html

See <http://www.edri.org/edriagram/number8.17/copyright-case-germany-youtube>

"The court's decision is the result of a long battle between collecting society GEMA, the German Society for musical performing and mechanical reproduction rights, and Google, who have been trying for over a year to renegotiate a license expired in March 2009. The negotiations have failed because there is a discrepancy between the payment expectations of the two sides. GEMA is used to the traditional method of royalty collection where a user pays at every broadcast of a copyrighted material, while YouTube, generating its revenues from advertising, does not charge users to watch videos".

³⁰ See http://www.youtube.com/t/copyright_what_is

³¹ <http://www.euractiv.com/en/innovation/cloud-computing-legal-maze-europe-links-dossier-502073>

³² The access over the Internet is in general shown in IT diagrams as a cloud, hence "cloud computing".

³³ Cloud computing can be divided into three categories of services, i.e. IaaS -Infrastructure-as-a-Service-, PaaS - Platform-as-a-Service- and SaaS - Software-as-a-Service.

the UK³⁴ - meaning, for example, that it is technically a breach of copyright law to copy music from a CD onto an MP3 player³⁵.

Still at its nascent state³⁶, Google Music service launched in the US lets users upload their song libraries to a cloud locker, then stream (but not download) music to a variety of different devices.³⁷

3. Offers infringing copyright (i.e. unauthorised downloading/sharing)

3.1 Examples

The production and distribution of entertainment media (music, TV, and movies) by digital means, while beneficial to the industry, has also brought about another challenge: file-sharing. Some other offers of the music and audiovisual content online also infringe copyright. Below are three examples:

Peer-to-peer (P2P)³⁸ are networks which connect computers across the Internet and allow users, thanks to specific file sharing protocols to exchange files. P2P networks have been developed to allow for a quick and efficient information sharing and data exchange in a professional context (i.e. sharing files which cannot be sent by email). Networks can be however used today by users and consumers to participate in the unauthorised sharing of a wide variety of digital content, including the distribution of live broadcasts of sport events. The most well known P2P websites today are BitTorrent, Edonkey or Gnutella.

Megaupload³⁹ and Rapidshare⁴⁰ are popular cloud-based file-sharing and storage services, offering a distance storage space, which allows for unauthorised direct downloading. Such websites are generally used to store movies which are still protected by copyright. Once the content has been uploaded by a user, any other user can download it from anywhere as long as he got the access link to the file. Today, specialised search engines exist to find links to such specific content, for example Filestube⁴¹ or DDL Search⁴². Free of charge access to these websites is possible but with limited applications and services. Premium subscriptions allow users to benefit from fast downloading or simultaneous downloading. For instance, on Rapidshare, a premium account costs 6,99 EUR a month and 54,99 EUR a year. On Megaupload, the more often the file is downloaded, the more points gets the user who uploaded the content. Points can allow him to "pay" his premium subscription. That means that in order to download content quickly, one should provide content to the other users.

³⁴ See also point 4 on private copying.

³⁵ <http://www.bbc.co.uk/news/technology-12890677>

³⁶ <http://www.bbc.co.uk/news/technology-13350345>

³⁷ <http://www.technewsworld.com/story/Googles-Cloud-Crescendo-72443.html>

³⁸ OECD report on Piracy of Digital Content

<http://www.oecdilibrary.org/docserver/download/fulltext/9309061ec003.pdf?expires=1300893490&id=0000&accname=ocid194994&checksum=D4643C882261481D8525421C0026BFB4>

³⁹ <http://www.megaupload.com/>

⁴⁰ <http://rapidshare.com/>

⁴¹ <http://www.filestube.com/>

⁴² <http://ddlsearch.free.fr/>

Megavideo and Allostreaming are unauthorised streaming websites as they did not legally acquire the rights to give access to the content they put on offer. Such websites are free of charge but in order to benefit fully (transfer speed) a subscription is required. For instance on Megavideo website a premium subscription amounts to 9,99 EUR per month/59,99 EUR per year.

3.2 Impact of file sharing and unauthorised downloading on the European music and audiovisual content sector

According to a study from Markmonitor of January 2011⁴³, the top-three websites enabling unauthorised downloading copyrighted files, i.e. Rapidshare, Megavideo, and Megaupload collectively generate more than 21 billion visits per year.

Although it is difficult to assess the scale of the impact of unauthorised downloading on the online audiovisual market, recent studies show that such unauthorised access to copyrighted audiovisual content, and in particular films, have increased significantly with the development of broadband technologies.

There is a number of studies addressing the effect of the unauthorised downloading. The conclusions of those studies differ widely, from those showing that unauthorised downloading has an increasingly negative effect on the sector⁴⁴ to those which argue that the effects of the unauthorised downloading can even be positive⁴⁵.

4. The private copying exception

With regard to EU law, Directive 2001/29/EC⁴⁶ introduced in Article 5(2)(b) an optional exception⁴⁷ for reproductions made by a natural person for private use and for ends that are neither directly nor indirectly commercial on a condition that the rightsholders receive fair compensation (private copying). In the 2007 preliminary report⁴⁸ on the application of Directive 2001/29/EC the Commission found with respect to the private copying exception that it was implemented by all Member States

⁴³ Traffic Report: Online Piracy and Counterfeiting January 2011 Markmonitor http://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf

⁴⁴ See: TERA Consultants, Building a digital economy: The importance of creating jobs in the EU's creative industries, 2010 p. 3; OECD, The Economic Impact of Counterfeiting and Piracy, June 2008; A. Adermon, C.-Y. Liang, Piracy music and movies: A natural experiment, Uppsala University, October 2010; Canadian Intellectual Property Council, The True Price of Peer to Peer File Sharing, February 2011.

<http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Building%20a%20Digital%20Economy%20-%20Exec%20Summary.pdf>

⁴⁵ http://www.ivir.nl/publicaties/vaneijk/Communications&Strategies_2010.pdf ;

http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorised_translation.pdf ;

http://www.trendmaze.com/media/1038/swedish_music_industry_2000-2008.pdf

⁴⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

⁴⁷ Copyright exceptions provided for in Directive 2001/29/EC have to pass the three-step test.

⁴⁸ Preliminary report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) of 30.11.2007.

with the exception of Ireland and the UK. However there are substantial national variations: *"In Italy, for example, private copying is permitted only in relation to audiovisual works or sound recordings. Finnish law stipulates that the private copy must be made from a legally obtained copy, while in Germany the source should not be manifestly illegal. Finally, the "uploading" of works or sound recordings does not fall within the scope of the private copying exception"*. The Commission noted also that Member States courts held that the Directive does not provide for a right to private copying, quoting the Belgian *Test Achats* case and the French *Mulholland Drive* case⁴⁹.

⁴⁹ Case relating to the lawfulness of private copy. See Court of cassation, civil 1, 19 June 2008, Mr Perquin, Consumer Association UFC Que Choisir vs. Universal Pictures Vidéo France et al.

PART II: STAKEHOLDERS' PERSPECTIVE

1. Artists

The approach of artists to copyright in the digital world does not seem to be uniform. One thing, however, is clear for artists in the music and audiovisual sectors alike and that is that their creative effort has to be remunerated correctly and their rights, moral but more importantly economical, have to be respected. Each creator is an "entrepreneur of mind" and copyright is one of the sources of revenue. The impression artists generally get today is that there is a newly created misconception that culture is free merchandise and that it is often forgotten that the act of creation is a hard personal investment, with majority of the artists not being at the top end of the market. This investment needs to be rewarded appropriately in order for an artist to make living and to cover for its future needs, such as a pension. In addition, the creative effort is often a costly group effort, for instance performing a song requires involvement of a performer, musicians, song writers, composers, technical crew, etc.

Some artists note that nowadays copyright seems to represent to people "corporate greed", corrupted collecting societies and hindered access to content. They point out that the problem does not lie with copyright itself but rather with the way in which the rights are exercised. Further, they point out that in the digital world there is a need to establish a creator/consumer partnership since the consumer does not pay anymore for the piece of plastic, a tangible good, on which the music or movies are distributed but for the creative effort of an artist and for marketing and distribution of the work. There are no conflicting positions between artists and consumers and policy makers should not give in to the idea of choosing between the two. Instead, the ultimate goal has to be creating a situation in which there is creative content offered legally online for a reasonable price to the benefit of both artists and consumers. It is also important to make efforts towards ensuring that copyright provides reasonable remuneration for artists. In this context a reflection on the contracting terms and conditions binding artists in their professional relations can be useful.

Artists generally also agree that enforcement of their rights is vital. Some see the unbalance between the digital growth and the theory and practice of effective enforcement. Vast majority points out to the fact that, although they rejoice at the fact that people are interested in their work, piracy makes their life hard.

There are, however, artists who search for alternative ways of accessing their music, such as Radiohead which in 2007 released its albums on the Internet⁵⁰ proposing to its fans to pay for the downloaded music what they think fits. Radiohead had it gains even though not everyone decided to pay⁵¹ but for the new release it changed the

⁵⁰ http://www.msnbc.msn.com/id/21228905/ns/technology_and_science-tech_and_gadgets/t/ahhh-radiohead-creates-internet-anarchy/

⁵¹ http://www.msnbc.msn.com/id/21228905/ns/technology_and_science-tech_and_gadgets/t/ahhh-radiohead-creates-internet-anarchy/

scheme a bit and decided to make a downloadable version of the album available against a payment of GBP 6.⁵²

It should also be noted that some rights holders organisations, in particular in the music sector, consider that despite the greater availability of legal music offers online and more innovative business models, the sector remains overwhelmed by peer-to-peer (P2P) unauthorised activities¹³. In their views, ISPs should play a greater role in policing the content passing through their networks.

On a more specific level, artists point to the different aspects of copyright, often depending on the type of creative activities exercised by them. Among various ideas is the extension of copyright duration for performers, effective enforcement of copyright, unification of variety of rights across Member States. High on artists' agenda is the collective management of rights⁵³, which is considered in principle beneficial in distributing revenues to artists but not without reservations. In this context it is interesting to note the initiative of Younison⁵⁴ "Call for Action to protect European music artists", which calls for modernisation of the collective rights management framework and for ensuring that all artists are accurately and efficiently rewarded for the commercialisation and use of their creative works across the EU.⁵⁵ It should however be noted that some stakeholders have a different opinion in this respect⁵⁶.

Some artists also point out that digital market raises the importance of issues, which are not directly related to copyright, such as lack of appropriate financing and payment structures for access to digital content online or contractual terms and conditions (e.g. for performers or movie directors) relating to the use of their work or financial conditions which artists too often negotiate being in a non-equitable position. There are also artists who point out to the need to develop public services and training to help artists to acquire the competences and skills to make the best possible use of new technologies, to promote their work and activities and to contribute to the development of new business models.

⁵² <http://www.guardian.co.uk/music/2011/feb/14/radiohead-new-album>

⁵³ See Working Document on copyright territoriality, collective management and remuneration of 15 September 2010 for detailed consideration of the Working Group on Copyright with respect to this subject.

⁵⁴ <http://www.younison.eu/news>

⁵⁵ The six point programme, available at <http://www.younison.eu/about>, states: "1) All European authors' societies must be subject to the same transparency and accountability requirements for the exploitation of our creative works; 2) All authors' societies must provide artists with complete and precise information on revenues collected on our behalf using existing technologies (for example audio fingerprinting). If technically possible, authors' societies should provide online access to this information for all artists; 3) Revenues collected by authors' societies should be efficiently redistributed to artists with the same frequency at which they are collected on our behalf; 4) Artists should be free to choose their collecting society based on which one offers the best service for their requirements; 5) New rules that enable the licensing of full music repertoires across the EU should be introduced while respecting individual artists' rights and encouraging new business models; 6) A Global Repertoire Database should be created for publishing and sound recording rights to enable the online exploitation of full repertoires across the EU" On the last point it should be noted that the idea of a global repertoire database has been voiced recently also by Francis Gurry, Director General of WIPO, who proposed that the project could be developed based on WIPO's structure and experience.

⁵⁶ <http://www.younison.eu/news/read/32>

Finally, there are artists who point out to the emerging idea of existence of a new category of content creators, i.e. Internet users, and a new category of content, i.e. user-generated content. That seems to raise a more fundamental question of a potential redefinition of art resulting from the civilisation and political change. The technological development in the communication sphere allows everyone, more than ever, to play active and not only passive role and the old slogan "Everyone is an artist"⁵⁷ becomes true through the Internet art (blogs, music compilations, graphics, videos, etc.).

2. Providers of the legal offers

Convenience and a move from ownership to access

End-users can find the content of their interest through file-sharing and peer-to-peer applications, which are free. However, a number of end-users chose to pay a subscription fee or pay for individual works available online. At the same time, despite the apparent struggle with the right clearance, some economic operators interested in providing legal offer of content online have thrown themselves into the digital adventure.

The reason is perhaps the emerging assumption that customers do not want to do all the research work needed in order to find exactly the right version of the musical work they are looking for at the quality that they require. Furthermore, younger people brought up with the Internet do not have the same attachment to a physical record and its cover. They merely want to consume music how they want to, when they want to. Thus if users are given the opportunity to realise the quality and added value of the legal service (including a vastly improved quality of the user's experience, legal certainty, lower risk of computer viruses, etc), as opposed to illegal file sharing, they are often willing to pay for it.

The obstacles

The primary obstacle for providers of legal offers of music and audiovisual content, such as iTunes or Spotify, is to obtain suitable publishing licenses from rights holders (artists, directors, record companies, film studios, production companies, national collecting societies etc.), with the lack of a multi-territorial or pan-European system forcing them to negotiate and oftentimes create business models for each Member State individually.

The situation is particularly complicated in the music sector. When it comes to the licensing of music it is practically impossible to approach every single recording artist individually in order to secure a publishing license; there are essentially three layers of licensing: 1) the *record label* holds agreements with the recording artists via individual recording agreements, obtaining a license for which is subject to time costly and resource intense individual negotiation; 2) the *national collecting societies* hold the mechanical rights (i.e. the right to make a copy) and public performance rights in the musical compositions and lyrics, primarily for works in the local

⁵⁷ Joseph Beuys.

languages used in a specific territory, and negotiations are necessary also with them since their official rates ("rate cards") are oftentimes higher than the actual rates attainable; and 3) the *publishers*, with whom individual negotiations are necessary for mechanical and public performance rights with regard for instance to the popular Anglo-American repertoire, which is being pulled back from the collecting societies⁵⁸ mainly for commercial reasons (these multi-territorial licensors have a very strong bargaining position which they use to inflate their rate cards). In order to offer a pan-European service, a legal offer provider would therefore normally have to negotiate on three levels in 27 territories. To this could also be added the four multiterritorial-licenses for music, which would have to be obtained from the so-called "Big Four" record companies.

With regard to so-called "split rights", where there are several different composers involved in one single work, the digital service provider is fully dependable on the rights holders or publishers to receive information on how the rights are split and how to pay the fees. In addition to the fragmentation of music licensing, there is also the potential problem of unresolved disputes between the different rights holders to one individual work.

Record labels will deliver digital files, containing the music or audio file and the meta data, i.e. title of the track, name of the artist etc relating to the music or audio file. When it comes to national collecting societies and publishers, the service might be different and it is therefore oftentimes difficult for digital service providers to know exactly what works they are representing, and their repertoire crosses over most of the record labels. For a digital service provider to withdraw from their service the individual works from the total number of works licensed from record labels, because a license has not been received from a national collective society or publisher, therefore amounts to yet another difficult, if not impossible, licensing problem.

Furthermore, the service providers have no practical recourse to deal with the situation where rights holders push on the risk of paying more than once for the same licence to the digital service provider, or where the rights holders demand off the chart royalty rates. It takes too long and costs too much to litigate and there is no court with a pan-European jurisdiction.

Moreover, because the record labels nowadays have virtually no costs for distribution of the works, publishers and collecting societies are arguing that record labels today percentage wise get too much of the "license cake", and that they therefore compensate for this perceived loss by pushing the price for a license in negotiations with service providers over and above the 100 per cent of the original situation.

Because of the fragmentation and these commercial considerations there is a risk that service providers will focus exclusively on the commercially attractive Anglo-American repertoire, for which they might pay a lot but they would however know exactly what the license covers, to the detriment of music from non-English speaking

⁵⁸ The "pulling back" has been facilitated by the 18.10.2005 Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services 82005/737/EC) and by the 2008 Commission decision in the CISAC case.

countries, which would not be considered commercially viable. In the end it is the consumer who suffers since the music on offer will be limited.

It is suggested that some of those difficulties could be remedied by the setting up of a comprehensive data base containing information on who owns what rights in a musical work in order for the licensees to know exactly what license negotiations are about. The statutory rate cards allowing the potential licensees to know what exactly they have to pay for could also be introduced, as is the case in the US.

3. Intermediaries (ISPs)

3.1 Who are Internet Service Providers (ISPs)?

Article 2 of Directive 2000/31/EC⁵⁹ defines a "service provider" as "any natural or legal person providing an information society service". An information society service is defined in Article 1(2) of Directive 98/34/EC⁶⁰ as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

Internet Service Provider (ISP) is most often a company that supplies Internet access and other Internet services to individuals and business customers. ISPs can provide several forms of Internet access, from traditional modem dial-up connections to DSL and cable modem broadband services to wireless LAN or wireless broadband networks. ISPs can be telephone or cable companies, which provide subscribers with Internet access, while contributing to network infrastructure. ISPs can also be Internet access providers on a global scale as well as small independent ISPs, dedicated to the local market.

There are several types of ISPs having different roles in the process of delivering and accessing content online. An ISP acts as an intermediary between individuals or business computer systems and the Internet. The ISP feeds outgoing information to the Internet, and also feeds incoming Internet traffic to the Internet connection. ISPs can take several forms and offer a wide variety of services apart from Internet connection, such as email, hosting services and access to software tools.

The service provided by some ISPs is mainly passive, limited to the transmission of third party data or the providing of Internet access to users. However, ISPs can also act as host providers storing content uploaded by users, which is then available for access by any end-user.

⁵⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive) (OJ L 178 of 17.07.2000, p. 1).

⁶⁰ Directive 98/48/EC amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 217 of 5.08.1998, p. 18).

Recent discussions with major ISPs operating in the EU market have revealed that some ISPs claim their increasing contribution to the creative process of audiovisual and music works: from the act of creation to its financing and online dissemination.

3.2 ISPs' position on copyright in the digital environment

Implementation of technical measures

In recent years ISPs have been called upon to take greater responsibility for monitoring their networks and to implement anti-file sharing technologies in order to reduce online infringement of copyright. In particular, they have been called to implement technical measures, such as content filtering, protocol blocking and blocking access to known infringing websites. Although some ISPs are willing to support the implementation of technical measures⁶¹, most ISPs argue in response to such expectations that network based technical measures are inappropriate from a technical, legal, economic and social point of view. They also consider the measures to be ineffective because they cannot, in their views, significantly inhibit or prevent copyright infringement. Most of ISPs also consider that such measures are harmful to networks, as they can reduce their speed and flexibility, creating congestion, while introducing new breaches and points of vulnerability. Furthermore, such measures are easily circumvented and become quickly obsolete with the development of counter measures from copyright infringers.

ISPs argue that it is necessary instead to implement new business models, which could give consumers timely, affordable and convenient access to legal digital content⁶². They see regulations based on the “three strikes” approach, such as the so-called “HADOPI”⁶³ French law, to be disproportionate and contrary to the objectives set out in the Digital Agenda.

Multi-territorial (or pan-European) licensing and the development of a digital single market in the EU

ISPs consider that the current copyright legislation should be revised as some areas of traditional copyright rules are now obsolete and unable to address the technological developments of the digital era, in particular the ways to exchange, circulate, access and disseminate online content. They consequently argue that the current legal framework does not facilitate efforts to develop new business models adapted to the possibilities offered by the digital environment. Most ISPs believe that the current licensing scheme is highly complex, costly and inefficient from the business point of view, thus undermining the competitiveness of the EU digital market and its stakeholders with regard to the US market. While the EU has a larger population and GDP, its digital music market is only one third the size of the US.

⁶¹ Vittorio Colao, Chief Executive Vodafone, “Facebook is wrong to back a light touch for the web”, FT, 5 June 2011, <http://www.ft.com/intl/cms/s/0/e78517f6-8fa9-11e0-954d-00144feab49a.html#axzz1QMv4Yslv>

⁶² Analysis of technical measures to suppress online copyright infringements, EuroISPA, 2 June 2010.

⁶³ Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&fastPos=1&fastReqId=1885736834&categorieLien=id&oldAction=rechTexte>

In order to redress this situation and foster the development of a dynamic digital single market in the EU, ISPs consider that multi-territorial/pan-European rights licensing may be an effective way for EU service providers to supply their services to all EU consumers and for the latter to access digital services in any Member State. Licensing on a pan-European basis would thus facilitate EU innovation and new commercial offers for EU consumers. It would further contribute to making access to legal digital content easier and more attractive across a digital single market. While supporting the use of pan-European licensing, some ISPs stress the need to avoid the creation of a single EU-one stop shop. In this respect, they argue that it would be more beneficial for the EU market to have several licensing entities granting EU-wide, repertoire-specific licenses. This would reduce the risks of monopolistic leverage or distortions while making licensing for the whole EU territory feasible for both large and smaller operators. With a view to further simplifying the licensing process, some ISPs also propose that reproduction and performance/communication rights are licensed together and that all services' uses, which are available to consumers, are licensable upfront ("full-scope" licensing). This would create transparency and certainty for both service providers and consumers.

ISPs do not seem to consider alternative forms of remuneration, such as compensation through an online subscription fee⁶⁴, as a sustainable solution. In their views, such alternative forms of remuneration could jeopardise and seriously hamper the introduction of innovative business models. They prefer market driven solutions instead.

As regards the current debate on the revision of the copyright legal framework in the EU, some ISPs also stress the need to improve the coordination and consistency of existing EU legislative instruments (E-commerce Directive and Directive 2004/48/EC⁶⁵) as well as to ensure a more uniform implementation of their provisions in the Member States. This would foster the development of the information society's services. In addition, some ISPs draw the attention to the interaction between copyright, competition and fiscal laws for the development of a dynamic EU digital single market.

3.3 Role and liability of ISPs

One of the most important and debated issues is the role and potential liability of ISPs, including the extent to which ISPs should be held accountable for copyright infringement in an online context, i.e. when copyrighted content is transmitted, disseminated and made accessible online in breach of copyright laws.

EU law⁶⁶ provides for a limitation on the liability of Internet service providers under certain circumstances whose services are used to infringe intellectual property rights

⁶⁴ However, some ISPs propose that on-line subscription fees should replace the private copy levy in countries where it exists.

⁶⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the "IPRED Directive") (OJ L 157 of 30.04.2004, p. 45).

⁶⁶ See E-Commerce and IPRED Directives, both currently under review.

and does not impose on ISPs a general obligation to actively monitor illegal activities. However, ISPs can be obliged to cooperate fully with national authorities in accordance with national law. In particular national authorities can oblige ISPs to inform them of alleged illegal activities undertaken or information provided by recipients of the service. ISPs are also encouraged to follow the codes of conducts established at national or EU level.

With the exception of some ISPs¹⁰, most of European ISPs firmly support the idea that intermediaries should continue to be immune from liability for third party content posted without the intermediary's knowledge and that Member States should not adopt inconsistent interpretations of the E-commerce Directive.

ISPs reject the idea that they should monitor their customers' Internet communications on the off-chance that someone may be distributing copyrighted work which they do not have permission to use. They also reject any law enforcement role, advocating proportionate solutions that respect personal data, as the way forward to ensuring the development of new business models able to meet today consumers' needs and expectations. Ensuring the widest possible availability of legal online content, i.e. attractive legal alternatives meeting consumers' needs and expectations, is in the ISPs' view the best way to combat online copyright infringement.

The debate on the liability of ISPs for online copyright infringements is still open. On the one hand, some Member States have tried to pass laws modeled after the French HADOPI⁶⁷, while recent judicial decisions⁶⁸ tend to impose on ISPs technical measures to tackle online copyright infringements. On the other hand, the UK example reveals that such measures provoke significant opposition from ISPs and consumers. However, some ISPs are willing to contribute to the fight against online copyright infringements⁶⁹.

4. Consumers

4.1 Digital consumers

Recent years are characterised by two changes: a shift in the role of consumers and their entry into copyright discourse.⁷⁰

Digital technology has been pinpointed as a key factor in boosting the "amateur culture", where content is produced not for money but for the love of doing it. Picturing the consumer as a passive recipient has become too simplistic. The Internet is changing consumers' requirements and consumption patterns. Internet users in

⁶⁷ See the example of United Kingdom and Digital Economy Act adopted in April 2010, which raised considerable controversy.

⁶⁸ See the Belgian court judgment leading to a question for preliminary ruling in C-70/10 (Scarlet v SABAM). The opinion of AG Cruz Villalón delivered on 14 April 2011 points to the potential conflict of the court's order to install a system for filtering and blocking electronic communications in order to protect IPR and fundamental rights. The Court of Justice decision is awaited.

⁶⁹ See footnote no 62.

⁷⁰ For analysis and further references see Jens Schovsbo "Integrating Consumer Rights into Copyright Law: From a European Perspective", Consumer Policy (2008) accessible via <http://www.library.sso.ep.parl.union.eu/lis/site/content.form?id=221758&q=>

general increasingly access, consume and possibly modify digital content. They increasingly possess the skills required to make active use of digital technologies and of content acquired online. This opens up new avenues for creative people and blurs the existing boundaries between those who create and those who consume⁷¹. Furthermore digital consumption patterns, interests and needs are subject to constant and rapid change.

Those who remain consumers in more traditional sense do not, for their part, see the reason for the existing territorial restrictions on access and wish to access content online as simply as they would in the offline world. If one can buy a CD in any shop on the EU territory, why should the same not apply to the online environment?

4.2 Consumers' perception of copyright: examples of recent studies

It is often argued that for consumers copyright appears to be far too complex, fragmented and rigid, leaving them uncertain as to what is copyright protected and what they are allowed to do with the content they acquire legally. It is also argued that there is "too much copyright" and that there is a lack of balance between the interests of rightholders and consumers.

A recent survey by the UK consumers' organisation Consumer Focus⁷² reveals that a majority of consumers in the UK do not know what they are allowed to copy or record regarding content they have legally acquired. According to this study, less than one in five consumers knows that in the UK it is illegal to copy a CD or DVD they have bought on to a computer for their own use, the so-called "format-shifting"⁷³. Only 15% think that it is illegal to copy them to an iPod. Almost 40% of those using either an iPod or MP3 player admit to copying CDs onto their player. Such figures reveal how little account consumers give to copyright law in their daily life. They also point out to consumers' needs and interests and to the forms of use of in which they use purchased content.

Another study evaluating digital consumer behaviour and attitudes and their implications for intellectual property policy⁷⁴ found strong evidence in favour of the following statements: (i) there are myriad choices when consuming content and consumers are confused about what is legal and not legal, (ii) attitudes and behaviours towards property in the online and physical worlds are very different, (iii) it has never been easier to break copyright law.

⁷¹ For a summary of various trends see "The pirate inside us. In the depths of copyright", Deutsche Bank Research of 24.8.2010:

http://www.dbresearch.com/PROD/DBR_INTERNET_ENPROD/PROD000000000261828.pdf

See also the Gowers Review of 2006.

⁷² <http://www.consumerfocus.org.uk/assets/1/files/2010/02/Consumer-Focus-Time-to-change-the-tune1.pdf>

⁷³ Format-shifting is the practice of copying material from one format to another. Format-shifting is a common practice for music. An old example was copying a vinyl record legally acquired to an audio cassette so the music could be played on a walkman or in a car. Today digital technology permits an audio CD to be copied on to the embedded memory of a portable music player, such as an mp3 player or a mobile phone.

⁷⁴ Copycats? Digital Consumers in the Online Age, CIBER report for SABIP, May 2009: <http://www.ipso.gov.uk/ipresearch-copycats-200905.pdf>

Consumers and unauthorised downloading

Contrary to the common belief that consumers want to access all content free of charge, some studies reveal that consumers are more likely to choose original copyright works over unauthorised copies, provided that they are available at an affordable price. According to a recent study of BASCAP⁷⁵, there are several reasons encouraging unauthorised downloading by customers:

- Price: the financial impossibility to afford the good or content comes in the first position (77%), the consideration that the price of the good is exaggerated comes in the second position (66%).
- Accessibility: the market segmentations and the territorial restrictions as well as the absence of a developed and user-friendly legal offer cause a delay or impossibility to access works legally. These factors can lead users to seek alternative and pirated distribution channels since their access expectations have not been satisfied in an appropriate and legal manner. From a consumer point of view, unauthorised downloading can be considered as demand not met by appropriate supply.
- Perception of legitimacy of the infringing behaviour: according to the study of the Digital Watermarking Alliance⁷⁶, a significant percentage of consumers (between 25% and 50%, depending on the context) perceive the infringing behaviour as legal.

However, it is also important to note that in many cases consumers pay for unauthorised access to content. The presumption that unauthorised content is free of charge no longer holds true. The reasoning that "if I pay, it must be legal" is no longer valid. This also demonstrates that copyright infringement is not necessarily based on the unwillingness to pay.

Consumers' associations call for a balanced legal framework which covers the different interests of consumers and rights holders. Copyright should be, in their views, clear and understandable for consumers, who are touched by copyright issues on a daily basis. They highlight the need to have a better access to a wide range of content, which gives consumers the possibility to acquire cross-border content at any time, at fair prices and under transparent conditions of use. Some associations also call for the possibility to extend the current principle of exhaustion applicable to tangible goods to non-tangible works.

Finally it should be noted that the full assessment of the efficacy of measures adopted against unauthorised downloading, like HADOPI, has yet to be made as data which serve as the basis for arguments both in their favour and against such measures differ.

⁷⁵ Business Action to Stop Counterfeiting and Piracy, Research Report on Consumer Attitudes and Perceptions on Counterfeiting and Piracy

⁷⁶ http://www.digitalwatermarkingalliance.org/docs/papers/DWA_WhitePaper_PiracyDeterrence.pdf

However, according to a recent survey⁷⁷ 50 % of Internet users state that Hadopi encourages them to use works that comply with copyright regulation and 41% acknowledge that Hadopi encourages them to change their Internet usage habits. Moreover, 72% of the Internet users said that either they or a member of their social circle have received a Hadopi warning declare that they have reduced or completely stopped their illegal usage following the warning. This shows that laws tackling online copyright infringement seem to have the potential to affect the consumer behaviour.

4.3 Consumers and the private copy exception

Consumers' associations argue that the notion of users' rights is absent from the current copyright framework. In particular, they indicate that only a limited number of permitted uses are allowed as exceptions and limitations to rightholders exclusive rights. The optional character of the private copying exception and the divergence in the way Member States have implemented it into national law have resulted in significant uncertainty as to its scope.

According to BEUC⁷⁸, the current legislation fails to immunise the permitted uses of copyrighted content against restrictions imposed by contractual agreements⁷⁹. Associations like BEUC therefore call for the revision of the current framework with the aim of immunising copyright exceptions, particularly the private copying exception, against restrictions imposed by contractual agreements, specifically end-user licensing agreements, or technical protection measures. Consumers' associations also argue that the exceptions are currently interpreted too narrowly and do not cover legitimate acts of private copying undertaken by consumers (see the example of illegality of format-shifting in the UK).

⁷⁷ HADOPI, cultural property and Internet usage: French Internet users' habits and points of view, 2nd survey – Overview and figures, Tuesday 10 May 2010.

⁷⁸ BEUC response to the consultation on Creative content in a European digital single market. Reflection paper, p. 7 at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/assoc/beuc_en.pdf

⁷⁹ For instance the so-called "click-wrap" agreements, which take form of "take-it-or-leave-it" contracts, whereby the end user has to manifest his or her assent by clicking an "ok" or "agree" button on a dialog box or pop-up window.

PART III: ANALYSIS AND CONCLUSIONS

1. Internet and digitalisation of content and its consumption have brought about important changes to the music and audiovisual sectors. They offered new potential and opportunities for all, old and new, market participants, but at the same time established themselves almost as a curse for the actors traditionally present on the scene, and thus, Internet and digitalisation became a double edged sword for the music and audiovisual sectors.

2. Established actors and new entrants are not necessarily affected in the same way. One of the most important economic effects particularly impacting the traditional industry is the disruptive consequence Internet has had on the production and distribution channels as we used to know them. The role of traditional intermediaries between artist/creator and end-user/consumer changes, new ones come to play. In some cases the content created by artist/creator passes via online platforms directly to the end user/consumer. Those shifts have serious economic consequences but also social and cultural implications, such as increased user autonomy, participation and diversity.

3. Furthermore, digitalisation of content affects market behaviour, in particular on the user side. An example of such new market behaviour is the observed shift from ownership to access. Already now there is a belief that "music has gone from being about ownership to being about access (...) People listen to more music than ever from a bigger diversity of artists. They do not care so much any more about actually owning physical CDs, or even downloading, they care about being able to access whatever they want, whenever they want it, wherever they are".⁸⁰ This can be a general trend for the future as people move from computers to hand held devices.

4. Finally, in the times of flourishing social networking and social media the issue of user-generated content has been brought to the forum. Creativity has never been reserved for professional artists and the recourse to work of others is often a part of the creative process.

5. The current regulatory framework does not seem adequate to respond to these changes and the challenges, which they bring for all market participants. Shortcomings which can be identified include: 1) fragmentation of the EU market and a complex and fragmented legal framework both at Member States and EU level; 2) existence of unnecessary artificial obstacles and additional costs to the development of new online businesses and difficulties in the development of and effective access to legal offers online, 3) disparities in the availability of such offers in various Member States – attractive offers are successfully marketed in some MS, but not accessible to users in/from others.

⁸⁰ Daniel Ek, CEO and founder of Spotify in "Music labels fight pirates through Spotify", "The Times", 23 February 2009.

6. This situation asks for reflection about a possible intervention of the EU policy makers and legislators, which action should aim at the following: 1) elimination of the existing barriers and fragmentation and levelling of the differences applicable to the digital environment across Member States; and 2) guaranteeing the free movement of digital content in the internal market. The action should assist in the ultimate opening up of the market, developing the sectors, creating competitive legal offers, achieving the single digital market for creative content. The solutions have to be designed with open mind, taking into account the perspective of further technological changes in the future, which will happen even faster, bring about new technology-driven services and result in further change in everybody's market behaviour. And last, but not least, it should also deliver on the promises of effective distribution of fair remuneration to creators and of fair and effective distribution of income within the cultural sector in general.

7. How to achieve it? The role of copyright for the online music and audiovisual sectors is pivotal, even though looking at copyright only for solutions is too simplistic. Many issues have high importance to economic operators. Those include market entry conditions, in particular for SMEs, and the overall legal and economic environment, which facilitates, on one hand, the setting up and running of a successful, cost-efficient and viable business online for entrepreneurs and, on the other hand, the use of the services provided online by consumers. A well-functioning supply of legal digital content responding to the demand of users is a key precondition to the successful development of a European digital market in music and audiovisual services. Business models which focus on quality, convenience and access should therefore be given more space for growth and any future regulatory framework should take this into account.

8. Concerning copyright, none of changes brought about by the Internet and outlined above seem to put the legal concept of copyright, i.e. the protection of a creator's work and his right to exploit it economically, fundamentally into question. It therefore has to be clearly determined what the "copyright" problem is. It seems that today the cause of tensions between stakeholders is not really the copyright in itself but rather the way in which it is interpreted and the way in which the economic rights exercised under copyright are managed.

9. The solutions related to copyright can be designed as short, medium and long term. They do not need to result in a separate set of "digital" copyright rules. But they must lead to the simplification of legal environment by bringing coherence into EU law.

10. The following can be proposed as solutions to the fragmentation of the market and to increase the legal offer: (i) the reform of licensing system aiming at its simplification and facilitation of the recourse to multi-territorial and/or pan-European licensing, with due account being taken of the various particularities of the music and audiovisual sectors; such reform should lead to unique, simple, uniform licensing system; (ii) the development of the EU/global repertoire database; and (iii) the reform of the collective management of rights aiming at rendering it more transparent and run in the spirit of good governance.

11. The issue of infringement is important. However, the claim that it has never been easier to break copyright law has to be examined in the light of the fact that the ease with which one can break copyright owes much to the technological specificity of online world. Finally, it has to be observed that technological development which stands behind the development of the digital market is at the same time responsible for online infringements of copyrighted works. Strong enforcement should therefore be balanced by solutions aiming at giving certain flexibility to users in some fields.

12. In this context Directive 2001/29/EC has already introduced the exception concerning temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process⁸¹. The practical application of this exception may deserve adoption of some interpretative measures. There may also be a need for a clear and sufficiently broad definition of the private copying exception which would include legitimate acts of private copying and be more adapted to the current use that consumers make of the content they accessed online. In order to determine necessary changes there is an urgent need for the Commission to fulfil its reporting obligations under Directive 2001/29/EC and present to the legislators the long time overdue comprehensive report on its application⁸².

13. The issue of user-generated content has to be taken up by policy makers. Therefore the possibilities of establishing more flexible, easier and legitimate ways to users-creators to use copyright protected material for their creative works online should be explored.

14. Long-term the current plethora of national regulations, including those resulting from the implementation of EU directives, is untenable. Online world without frontiers and the successful creation of digital market calls for creation of a more unified EU copyright system. This option, which can be expected to be a time consuming and difficult process, should be explored without further ado.

15. Solutions to the current copyright-related issues should ultimately lead to re-establishment of the perceived lack of balance resulting from today application of copyright and the perception of copyright as a burden. Copyright should not be regarded as a stumbling block for creativity, business and users. It must be a block that builds and enables all parties to thrive. Reform of copyright should be designed so as to set in place the "enabling" legislation.

16. Without those solutions, of which some are called for by the Parliament to no avail for years now, EU should not only stop dreaming about being a world leader in the digital market place but also say farewell to the creation of a single digital market in the EU.

17. We continue to live in technologically exciting times. Science and technology keeps opening up worlds to us that previously we could not imagine. As put by one author: "A planetary culture is emerging, based on youth culture (rock and roll and youth fashion), movies (Hollywood blockbusters), high fashion (luxury goods), and

⁸¹ Article 5(1) and recital 33 of the Directive.

⁸² The review should also examine the private copy levy in the light of the recent case-law of the Court of Justice and the application of technological protection measures.

food (mass-market fast-food chains). No matter where you travel, you can find evidence of the same cultural trends in music, art, and fashion. For example, Hollywood carefully factors in global appeal when it estimates the success of a potential blockbuster movie. Movies with cross-cultural themes (such as action or romance), packed with internationally recognised celebrities, are the big money makers for Hollywood, evidence of an emerging planetary culture. (...) But the emergence of a planetary culture does not mean that local cultures or customs will be wiped out. Instead people will be bicultural. On one hand, they will keep their local cultural traditions alive (and the Internet guarantees that these regional customs will survive forever). The rich cultural diversity of the world will continue to thrive into the future. In fact, certain obscure features of local culture can spread around the world via Internet, gaining them a worldwide audience. On the other hand, people will be fluent in the changing trends that affect global culture. When people communicate with those from another culture, they will do so via the global culture.”⁸³

⁸³ Michio Kaku, *Physics of the future. How science will shape human destiny and our daily lives by the year 2100*. Allen Lane Ed. 2011, p. 334-335.