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Position Paper

GSMA Europe Response to the DG INFSO/DG MARKT Reflection Paper on Creative Content in a European Digital Single Market

22 December 2009

GSMA Europe appreciates the opportunity to comment on the reflection paper, which is a very good description of the current problems in the online content market in the EU, and we are supportive of the European Commission's aim to create "**a modern, pro- competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content Online**". We also welcome the focus on practical solutions to look for new business models.

1. Commercial users are an important participant in the value chain, and their incentives are rightly recognised as crucial in growing the online content market

GSMA Europe particularly welcomes the fact that commercial users are recognised as an important player in the game, and that they need access to content on simple, clear and competitive terms. We fully agree with the paper's conclusion that:

"Efficient clearance of relevant rights for online exploitation is the key issue for commercial users. **In the music sector**, collective rights management organisations (CMOs) play an important role in licensing the relevant rights for online services. However, the highly **fragmented structure of the market** hinders the development of broader, more innovative and more attractive legal offers" (page 13).

2. Mobile supports innovative legal offers to drive new business models

GSMA Europe members are keen to play their part in growing the market for online content. Increasingly, mobile devices are used by consumers to access content while on the go, and they show a desire to be able to easily access the content they want over their mobile device, wherever they may be, and with clear ideas about how they can use and move that content. The best way to do this is to encourage new legal offers which are in line with consumers' demands in terms of pricing, choice and ease of use.

3. The licensing regime needs urgent reform

The reflection paper rightly points out that the current licensing regime is very complex and fragmented. Simplification of this regime would be very welcome, and GSMA Europe has been supporting this move for a long time. The CISAC Decision by the Commission has led to a revision of the approach of some collecting societies to cross-border licensing. However the implementation of the Decision is unlikely to be a solution



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in itself, and there is a risk of further fragmentation. Considering that there has not been sufficient progress despite the Commission's efforts with non-legislative approaches, GSMA Europe agrees that legislative options be considered in order to bring about the necessary changes to the system of rights management that would foster the development of a vibrant online and mobile content market in Europe.

4. Focus on innovation

It is important to focus on the problems with rights management and to consider ways to encourage rightsholders to be more flexible and innovative in the ways in which they protect their efforts. New business models require new ways of licensing content. This would allow the current rules to continue to apply to traditional methods of consuming content, while opening up new avenues in the online sphere.

5. The paper is right to strongly question the logic behind an internet levy to compensate for illegal downloading

Levies are currently used to compensate rightsholders for using the private copying exemption in some Member States. GSMA Europe members do not believe that levies are suited to the modern electronic environment. Moreover, a levy on an internet connection would fundamentally change the rationale for levies even further into the wrong direction, and would work against the development of new legal offers. A general right to copy for a non-negotiable fee goes against the current copyright system, and is a blunt instrument which cannot by its very nature properly or proportionally compensate rightsholders for their work.

About GSMA Europe

GSMA Europe is the European interest group of the GSM Association (GSMA), representing 171 members in 50 European countries/areas and serving 600 million customers. The GSMA is the global trade association representing more than 700 GSM mobile phone operators across 218 countries and territories of the world. In addition, more than 200 manufacturers and suppliers support the Association's initiatives as key partners. For more information, visit www.gsmeurope.org.



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1. Commercial users are an important participant in the value chain, and their incentives are rightly recognised as crucial in growing the online content market

Mobile operators are one of the major commercial users of online content, and the mobile channel for delivering content is growing at an impressive rate. It is also worth noting that the market is now being catered by several players, ranging from mobile operators to handset makers and application providers; however, the consumer is more concerned about having a seamless experience, not who is providing the content, and expects to have the flexibility to easily move content from one platform to another. This requires those who provide the content that consumers demand to meet those criteria, and co-operation on new legal ways of accessing content is something that we would encourage.

2. Mobile supports innovative legal offers to drive new business models

While we would question whether “copyright is the basis for creativity”, GSMA Europe certainly agrees that the rights of creative content producers should be respected. GSMA Europe members are keen to play their part in growing the market for online content, which is expected to reach over €120 billion in service revenue by 2013 globally¹. We are forerunners in offering innovative content services in Europe and are aiming at offering a much wider range of services to satisfy growing consumer demand. We believe the best way to fight illegal file-sharing is to make available attractive content offers in terms of pricing, choice and ease of use.

Offers such as “Orange Monkey”² and “TDC Play”³, which allow customers to access and download music from a platform created by their mobile operator, show that simplicity in access and alternative pricing models are paramount when making offers attractive for the public. Orange Monkey allows a user to browse through hundreds of thousands of tracks on the online music player, drag and drop tracks to create playlists and share them with friends or listen to music from any mobile, whatever the make and model. The payment model is based on the prepay model with a certain number of voice minutes and text messages included. Access to the music module is included in the offer and as such the customer does not pay per music track. Access to TDC Play requires that the user is already an existing TDC mobile or broadband customer, or has another subscription, which includes access to TDC Play. The playlist contains about 2 million songs for free. The fact that it is well-known brand names offering access to music in these ways reassures the customers that they are listening to music in a lawful environment.

3. The licensing regime needs urgent reform

The reflection paper in its comprehensive and useful analysis points out that at the moment very complex licensing regimes are in place, which make the clearance of rights a complicated, opaque and expensive process for commercial users. The Commission’s 2005 Recommendation on cross-border licensing, in our view, actually risks increasing the

¹ Juniper Research: “*Mobile Content Strategies & Business Models: Scenarios & Forecasts 2008-2013*”

² <http://shop.orange.co.uk/mobile-phones/price-plans/pay-as-you-go#>

³ <http://musik.tdconline.dk>



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uncertainty and complexity of the situation. Mobile operators are looking to engage with the new formations, but we see a threat of further fragmentation of the repertoire and additional layers of rights clearance, such as is the case with the proposed CELAS offer. There has also been a lot of uncertainty created by the CISAC decision, as collecting societies attempt to change their practices to come into line with the Decision and, in part, the Recommendation. However, it is unlikely that the implementation of the Decision in itself would result in a significant simplification of cross-border licensing arrangements. GSMA Europe welcomes the recent joint statements made by the participants of the Online Commerce Roundtable organised by DG Competition. The commitments made are aimed at the right direction and we encourage the Commission to make sure that these are in fact implemented in practice.

Despite the Commission's efforts in the past years to dismantle the territorial fragmentation and to improve the governance structure of copyright management in Europe, there has not been sufficient progress and the system remains complex, fragmented and inflexible to the needs of commercial users wishing to experiment with new business models. This may be construed as a failure of ex-post and soft-law approaches, which have had a considerably negative impact on the development of the online and mobile content market in Europe. It may be more effective, especially given the need for timely solutions, to work with rightsholders to see how they can open up their works to pan-European use within the current system of copyright management. However, GSMA Europe is skeptical as to the likelihood of this happening and therefore supports that legislative options be considered as well. Any legislative solution should cater for the needs of commercial users by ensuring that multi-territory licensing is streamlined, and by creating incentives for CMROs to provide their services in a more efficient, transparent and flexible manner. GSMA Europe continues to recommend that a system of alliances of collecting societies, as proposed in our response⁴ to the 2007 consultation on the 2005 Recommendation, would be an interesting idea for further exploration. We think further examination is necessary to see how the suggested amendment of the Satellite and Cable Directive would produce the type of "one stop shop" for rights clearance that mobile operators would like to use.

4. Focus on innovation

It is important to focus on the problems with rights management and to consider ways to encourage rightsholders to be more flexible and innovative in the ways in which they protect their efforts. New business models such as advertising-funded streaming services require new ways of licensing content, and relatively new concepts such as that of "copyleft" could help to unleash different ways of getting value from content online. This would allow the current rules to continue to apply to traditional methods of consuming content, while opening up new avenues in the online sphere.

Further harmonisation on the limitations and exceptions to copyright protection may be a positive first step for EU action. The ideas expressed in the paper on aggregation of rights and a single EU database (pages 16-17) are ones that could be worthwhile to address.

⁴http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/collective_cross-border/gsmenpdf/EN_1.0_&a=d



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5. The paper is right to strongly question the logic behind an internet levy to compensate for illegal downloading

GSMA Europe supports the doubts raised in the paper about the use of a levy on consumers' internet connections as a way of compensating rightsholders for illegal downloading. We do not believe that levies in general are an adequate solution to the issue of private copying⁵, and a levy on a consumer's internet connection moves in the opposite direction from a solution which is suited to the current online situation. Any such levy would be confusing both legally and for consumers, as it moves even further away from the current rationale for levies (which are used to compensate rightsholders for legal private copying), and appears to condone the practice of illicit downloading. Several practical problems with a general "licence to copy" are rightly identified in the paper, and GSMA Europe shares the concerns raised about the effect on innovative legal offers to access content, the blunt, indiscriminate and unfocused nature of such a levy, and the compatibility with current legislation. The focus of the exercise must remain on how to encourage consumers to use content in a responsible fashion, and to allow commercial users more choice, competition and clarity in clearing rights so that rightsholders can benefit from reaching a much bigger audience online.

⁵http://www.gsmeurope.org/documents/gsme_response_fair_compensation.pdf