



## IMPALA

### Response to the UNESCO Internet Study

#### Introduction

On behalf of over 4,000 independent music companies and national associations across Europe, representing 99% of music actors in Europe which are micro, small and medium sized enterprises, IMPALA<sup>1</sup> thanks the UNESCO for the opportunity to submit comments on "internet issues".

IMPALA is a European association entirely dedicated to representing cultural SMEs and which promotes their growth and competitiveness, in the interests of entrepreneurial and cultural diversity. Known as "independents" in the music sector, these SMEs are world leaders in terms of innovation and discovering new music and artists - they produce more than 80% of all new releases in Europe today, as well as over 80% of the sector's jobs.

#### **4. How can accessibility be facilitated through increases in locally produced and relevant content in different languages?**

Each country is unique because of its diversity, and innovation, driven mainly by SMEs operating primarily at a local level with local artists. This creates an enormous potential to develop a cultural economy which is totally unique. Unlocking this potential is essential.

The question of ensuring diversity and availability of content is one of the most important issues for music SMEs - independents represent 80% of music released, yet only 20% of the market share. Citizens' appetite for culture and diversity is huge and we need to respond to this through concrete measures to increase pluralism and diversity in traditional and online media, as well as in the supply of creative works. We also need to measure performance through diversity scoreboards.

Today, the market seems to favour globalised cultural works at the expense of local productions. It is clear that the market, when left to its own devices, will not automatically deliver diversity. It is also important for Europe, and other signatories of the Convention, to be in line with the UNESCO Convention on cultural diversity. The Convention is part of EU law, to ensure the principle of fair and equitable access to the means of creation, promotion, production and distribution for all cultural operators. The EU treaty (article 167 TFEU) also states that cultural aspects shall be taken into account when implementing European law.

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<sup>1</sup> For more about IMPALA, please visit our website: [www.impalamusic.org](http://www.impalamusic.org)

The best conditions need to be put in place to allow artists and cultural and creative SMEs to flourish. This is particularly relevant in the context of the development of the digital market, where cultural and creative works play a leading role. Technological developments depend heavily on the availability of this “content”.

The main tool artists have at their disposal to turn an economic situation from precarious to thriving is copyright protection. It enables small artists and small markets to grow, thrive and produce a vibrant local culture. Without strong copyright protection, smaller actors are not able to generate enough remuneration, creative businesses are not able to invest in artists and help develop long lasting careers - soon enough the only culture to access is that of other, more dominant countries.

It is therefore vital for the development of locally produced content, that creators’ rights be reinforced. If creators’ rights are weakened, only the bigger artists are able to enforce them. If creators’ rights are reinforced, more and more local artists will be able to live from their creative activities and produce a significant body of works.

We also need to make sure that SMEs can have fair access to the market as they are essential to the development of an economy of diversity.

While music rightholders have made big efforts over the past years to make licensing easier for music services, one important concern of independent music companies is to make sure local and diverse content is available on music services. The online market is full of opportunities and the availability of content remains a serious concern, in particular for music SMEs. As mentioned above, in the music sector SMEs are crucial to diversity, discovering and developing new artists and new trends of music, producing 80% of all releases in Europe today. However, they represent only 20% of the market share. The music market is extremely concentrated, which gives an advantage to bigger companies. The recorded music market is concentrated in the hands of three companies. Over 90% of the most frequently played songs on European radio come from the three remaining major labels despite the fact that these labels are responsible for only 20% of all music releases. The Majors’ combined market share for Top 100 on radio and downloads in Europe climbs to a massive 95%.

As reported by Nielsen, there remains a strong and verifiable link between radio airplay and music sales. 99% of music operators are micro, small and medium sized. These music SMEs cannot compete on the same level as Majors and therefore do not have the same access to radio/TV and online services. This has a direct impact on what Europeans actually listen to, as offline and online broadcasters and services cannot launch or grow without the Majors’ repertoire (which is effectively ‘must-have’ repertoire). The concentration on the music market has a clear negative impact on innovation, output, consumer choice, pluralism of content and media, and creates barriers to entry.

There is no inherent diversity and big companies have no economic interest in providing it.

While Europe needs “champions”, it also needs to grow the “missing middle” and to look after local artists performing in their local language.

The question of ensuring the regulatory framework delivers diversity and availability of content is one of the most important issues for music SMEs, and concrete measure in this respect would be welcome. Measures which we believe would help level the playing field include the following:

- New competition rules prioritising SME competitiveness, diversity and consumer choice;
- Competition law needs to be modified to stop major copyright owners from carving up online opportunities at the expense of smaller copyright owners;
- “Must carry” obligations for online service that have become essential facilities like YouTube/Google. This content must also be easy to find, therefore we believe that online services should also be subject to “must be found” obligations.
- Supporting projects such as Merlin<sup>2</sup>, a worldwide digital rights agency representing the rights of music SMEs, set up by independent music companies to deal collectively with the digital shift;
- A non-discrimination principle for SMEs;
- Diversity obligations for online services and platforms, including an obligation to license from SMEs and an obligation to refuse to give placement and output type guarantees to the major content owners;
- Making parallel terms for SMEs a commercial and regulatory reality;
- Conducting sector enquiries where there is a particular concern about the competitiveness of SMEs and whether or not there is a level playing field;
- Creating a cultural diversity scoreboard to measure cultural diversity in terms of production, distribution, consumption and the mobility of cultural works;
- Making cultural diversity impact assessments an essential part of all competition decisions.

## **6. What are the current and emerging challenges relevant to freedom of expression online?**

Artists’ freedom of expression is not properly understood and it is not fully applied online. When artistic works are made available against artists’ will, and the artists ask for their rights to be enforced (i.e. applied), some people are quick to call this ‘censorship’ and an ‘attack on freedom of expression’. Artists know a lot about freedom of expression, and they strongly value this right. If anything, making a copy of an artist’s work available against the artist’s will should be considered an attack on the artist’s right to freely express his/herself as he/she chooses. In light of this, copyright and copyright enforcement play an important role in allowing artists to freely choose the way their work is disseminated. Copyright is often wrongly accused of being in opposition to freedom of expression, when in fact both go hand in hand: copyright is the best way for artists to retain their independence and be rewarded fairly for their work, hence helping safeguard artistic freedom.

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<sup>2</sup> <http://www.merlinnetwork.org/>

The artist's freedom of expression would be meaningless without the associated right to the protection of his/her moral and material interests resulting from his/her work.

In her 2013 report<sup>3</sup>, OHCHR's Special Rapporteur in the field of Cultural Rights Ms. Farida Shaheed's noted at point 82 that "a highly debated issue is whether the moral rights and copyright systems have evolved in such a manner that the balance between the rights of authors and artists on the one hand, and the need to promote creativity and access to culture on the other, is no longer achieved".

The idea that copyright law hinders creativity is an idea central to what is known as "free culture" (led among others by professor Lawrence Lessig). UC David professor of law Thomas W. Joo took a closer look at this movement's claims in his December 2011 article 'remix without romance'<sup>4</sup> and found that many of the factual claims made by the 'free culture' advocates are incorrect. For example, weakening copyright rules would not increase 'participatory' culture. Regarding sampling in hip-hop, often used by 'free culture' advocates as an example of copyright acting as a barrier to creation (something referenced in Ms. Farida Shaheed's 2013 report<sup>5</sup>, point 82), Thomas Joo demonstrates that this is not true since the earlier, most 'sample heavy' hip-hop albums, were made at a time when legal rules and business practices concerning samples were similar to today. Artists making those albums were very aware that they had to clear and license samples of other artists' works. Joo's conclusion is that "copyright law has not prevented the development of sampling".

The idea that copyright is somehow a barrier to people's access to culture is, we believe, being promoted by commercially-driven interests. The very principle of copyright seems to be increasingly challenged by a wide range of voices, from online services to 'free internet' activists, to telecom operators and device manufacturers. We believe some of these attacks are planned and funded by very large interests, with the aim of paying less for music and other creative works, whilst taking rights from smaller creators and the public, often without any room left for negotiating payments. Creators cannot match the lobbying forces of online operators. In order to promote artists' freedom of expression, copyright is an asset which needs strengthening, not weakening.

## **20. How can ethical principles based on international human rights advance accessibility, openness, and multi-stakeholder participation on the Internet?**

The right to protection of the moral and material interests resulting from one's artistic production should serve as a guiding principle to rethink how we engage online. To ensure multi-stakeholder participation, all artists should be able to exercise this right equally. In online music this is currently not the case. Online services do not treat all artists as equals when it comes to the terms determining their remuneration and small actors are often forced to accept discriminatory terms.

There are many examples of discriminatory practices against independents. In early 2013 for example, the new Myspace Music service launched with no agreement in place with Merlin, the above-mentioned global digital rights agency

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<sup>3</sup> <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ArtisticFreedom.aspx>

<sup>4</sup> [http://connecticutlawreview.org/files/2012/04/3.Joo\\_.pdf](http://connecticutlawreview.org/files/2012/04/3.Joo_.pdf)

<sup>5</sup> <http://www.ohchr.org/EN/Issues/CulturalRights/Pages/ArtisticFreedom.aspx>

for independent labels and artists. More recently, YouTube (which owned by Google) approached independent music companies with a 'take it or leave it' contract for its new music streaming service. The YouTube contracts on offer to independent labels were on highly unfavourable and non-negotiable terms, and undervalued existing rates in the marketplace from existing music streaming partners. These contracts were different from those sent to Majors, with which YouTube negotiated separate agreements over the course of several months. At the end of June 2014, IMPALA lodged a complaint with the European Commission against YouTube, focusing on a series of breaches of European competition rules. IMPALA's stance is that YouTube, in this instance, is effectively creating artificial barriers to the digital market<sup>6</sup>.

A general non-discrimination principle is needed to advance accessibility, openness, and multi-stakeholder participation on the Internet. Given the similarity of the issues faced in this regard faced by small cultural actors vis-à-vis online music platforms, and the complainants of the Google search case, it would be fitting to create a general non-discrimination principle which would apply to search and data, as well as to services licensing music. Equal treatment should be the rule on the internet. Music and data from smaller actors should not be treated differently to that of bigger players.

### **23. How can ethics, - i.e. the simultaneous affirmation of human rights, peace, equity, and justice - inform law and regulation about the Internet?**

For law and regulation about the Internet to be informed by ethics, we need to rethink how we engage online. A range of issues - all rooted in a lack of ethics in the online world - have had harmful effects on people and businesses across the online world, from the disrespect of people's data and privacy, to biased search results, and recurring abuses of dominant positions by internet giants. These issues can be addressed through the creation of a regulatory framework based on a more ethical way of engaging online. To develop this principle in a way that is specific to the cultural and creative sectors, ethics should inform regulation through the concrete implementation of the UNESCO Convention principle of fair and equitable access to the means of production, dissemination and distribution of cultural activities, goods and services. The online world needs a regulatory framework which implements this in very practical terms. The non-discrimination principle for example (which is called for in our reply to question 20) could ensure fair and equitable access to the means of dissemination and distribution of cultural goods online.

Other 'rules of engagement' online should be revisited in this respect:

- Setting "must-carry" obligations (obligation to license all repertoire)
- “Unbundling” dominant players, especially those controlling multiple points in the ecosystem.
- Devising a new rulebook for all online players, in particular “essential facilities”.
- Stopping censorship-style negotiating tactics - preventing services from threatening to remove content.
- Ensuring citizens have full control over their data and personal privacy.
- Making sure generic top-level domain names (such as .music) are run by community led initiatives and not just sold off to the highest bidder.

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<sup>6</sup> <http://www.impalamusic.org/node/325> / <http://www.impalamusic.org/node/331>