

Rapporteur Notes on OECD Conference on Digital Content
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As co-founder and Policy Director of the Future of Music Coalition I was asked to serve as a thematic rapporteur to this conference, focusing on the perspective of the artistic and creative community. At the outset it is important to recognize the vast diversity of individuals who consider themselves creators and artists across the world – there is not one single “artist perspective” on these issues. Rather, there is a multiplicity of concerns that reflect a diversity of ambitions and possibilities. We believe strongly that all of these perspectives have merit and should be aired wherever possible.

As an organization that has hosted well over a dozen conferences and policy forums over the past five years, I know how difficult it is to balance identifying enough themes and perspectives to cover as much ground as possible while ensuring there is enough time for discussion to really get to the heart of very difficult and complicated issues. I give OECD tremendous credit for attempting to strike this balance, particularly in light of the international nature of the conversation. In short, while my notes may focus on perspectives that were missing from specific panels and discussions, this should not be read as a critique of the conference organizers, whom I believe did an admirable job in bringing many distinct voices to the table.

When examining the impact of digital content creation and distribution on the artistic and creative community, it is necessary to view the critical decisions facing policymakers through an understanding of the historic legal and regulatory structures that have governed traditional media. The advent of digital technologies has facilitated an unprecedented democratization of the creation of, and access to, media. On the other hand, the ownership of the existing dominant media channels that serve an overwhelming majority of citizens/consumers has moved away from private ownership to publicly traded, multi-national corporations focused primarily on delivering results for shareholders. Put simply, the massive amounts of new content and new distribution channels conflict with the unprecedented consolidation of the traditional means of reaching consumers.

In the United States, this conflict will be resolved to a large extent in policy decisions made by Congress and the Federal Communications Commission over the next few years as they come to grips with technology that has outpaced the traditional legal and regulatory structures that govern telecommunications and media. As technology eliminates the barriers between communications technologies – as we morph from a “media” age to a “post-media” age – policymakers will establish the rules of the new marketplace. These policy decisions will dictate whether the historic lessons of the media marketplace (and media consolidation) will be accurately applied or ignored.

In a world of limited outlets (television and radio stations, movie screens, retail shelf space) media companies played the important role of filtering which art, entertainment and news content would be brought to the public. These content companies were typically privately held and led by strong visionaries who balanced the need to profit with a competitive sense of artistic or journalistic ambition. Over the past two decades, the transition from private to public ownership of media firms has fed a flurry of vertical and horizontal consolidation. Coupled with aggressive political campaigns to loosen historic media ownership restrictions meant to emphasize localism, competition and diversity in media, this consolidation has led to a very small number of corporations controlling a remarkable level of properties (broadcast and cable networks, production studios, television and radio stations) and consumers.

Consolidation of traditional media channels has evolved to the point where a very small number of publicly traded corporations control the vast majority of media platforms that reach consumers: television stations, broadcast networks, radio stations, record labels, movie studios, production companies and publishers. Perhaps ironically, at the same moment that this vertical and horizontal integration reaches its zenith, consumers are seeking both alternate content and alternate ways of accessing this content.

The music community provides some valuable instruction on this point. The historic music industry is based on scarcity and the need for significant capital investment to bring a recording to the marketplace. While an artist signed a highly punitive contract that included the transfer of his/her copyright to the label and extraordinarily low royalty rates, he/she benefited from significant investment from the record company in goods and services out of the reach of the individual artist, including studio time, the cost of pressing and shipping records, and promotions. Over a period of decades, a basic balance was struck where the creative inspiration of a small number of musicians was shepherded into the marketplace by corporate partners.

The consolidation of the record industry, commercial radio and live entertainment industries conspired to tilt this relationship far out of balance. The major label system morphed solely into a numbers game, where corporate executives scrambled to hit sales targets. As the industry pursued their "next big things" the traditional artist development role of the label fell off, replaced by a "winner take all" marketplace dictated by economies of scale. Consolidated radio eliminated the concept of the local or regional radio hit, replaced instead by tightly controlled formats and a form of structural payola that established a significant economic bar to any musician who wanted to have a song considered for airplay. The numbers were striking: an album released in the major label structure had to sell roughly 500,000 copies to break even; according to Recording Industry Association of America testimony, 93% of major label releases failed to meet that threshold.

The failure of the consolidated major label structure stands in stark contrast to the remarkable transformation to a digital music economy. Artists grasped new technologies to record, promote and distribute their music. Reacting to collusion between the major

labels and commercial radio, consumers flocked to new technologies and products as a means to access music. In a world where 99% of cd's released sell less than 1,000 copies, musicians quickly saw the benefits of a new, disintermediated world where they could directly reach potential consumers. E-commerce solutions (CD Baby, Amazon, artist websites), satellite radio (XM and Sirius), subscription services (Rhapsody, Emusic) and digital download stores (iTunes) all emerged to provide a legitimate, licensed alternative to unlicensed peer-to-peer file trading systems. Eventually, the major labels themselves relented to some degree, licensing content for distribution over fully licensed peer to peer systems.

The basic lesson is this: when confronted with a consolidated music and radio industry, artists and consumers leveraged technology in a way that circumvented those traditional structures. This is not to suggest that we have found the proper balance – that, somehow, the Internet magically makes all discussion of media consolidation moot. Traditional broadcast media are in a critical transitional role as innovation and deployment continues. Protection and expansion of community media is vital, as is reform of existing commercial media structures. But I do suggest that technological innovation coupled with a basic policy regime that understands the need to separate the content function from the delivery function and the rights of all citizens to access the underlying networks has the potential, over time, to create a true marketplace of ideas, entertainment and political thought free from the constraints of negotiating business arrangements in order to reach consumers/citizens.

Monday sessions:

One of the overarching themes of the conference was challenges and opportunities – how to balance complicated issues of broadband deployment, take-up rates and the need for industry to obtain return on their investments. From the creative community, another aspect of that question should be added to the mix. As technology facilitates the evolution of new models for creation, marketing and distribution, what is the appropriate balance between the rights and needs of the “professional” artist, “semi-professional” artist and “amateur”?

These essentially arbitrary labels point to an underlying question: how can some benefits of the traditional structures of content distribution can be maintained at the same time that the creative community is able to gain a new sense of opportunity, empowerment and access to the market. Put another way, many artists still require significant capital investment and corporate partnership to maximize their ability to succeed in the marketplace. Where, for the artist, is the appropriate balance between allowing companies to build businesses around the marketing and distribution of digital content without simply establishing a false scarcity that would allow the flawed structures that dominate the established media landscape to be replicated in a digital future?

In the first panel, FCC Commissioner Copps and Telecom Italia's Marco Tronchetti Provera provided an interesting contrast regarding how these issues are playing out in the United States and Europe. For years, Commission Copps has been a

leading force in the debates around media consolidation and net neutrality. He understands the potentially devastating impact the vertical integration of content and distribution can have to a digital marketplace. Interestingly, Mr. Provera did not echo the kind of rhetoric heard constantly from American telecommunications giants. Rather, he, and other European telco representatives that spoke throughout the conference, seemed to accept basic questions of neutrality that are being fought by American telco and cable firms right now. This question – whether content creators should have the basic right to offer their content without negotiating terms with network gatekeepers – is one of the most significant issues facing American policymakers.

As currently defined by the FCC, and backed up by the Supreme Court, an Internet service offered via cable television lines is a “closed” service, meaning Comcast, Cox and the other cable providers have the legal authority to pick and choose what content is available over their broadband pipeline. In essence, cable companies have the legal authority to choose one e-commerce provider (Amazon or Barnes & Noble?), one music subscription service (Rhapsody or Emusic?), one webcaster (Yahoo! or Live365?). If this model comes to pass, we will not see the Internet as we know it, but rather a propriety high-speed network that “feels” like the Internet but is in reality much closer to the pre-WWW model of AOL.

Rita Hayes made a compelling defense of the role of protecting intellectual property in a digital world, but here again the creative community must raise the question of balance. In the traditional media structures, especially in the music industry, copyright has too often devolved into a tool for corporations to amass large quantities of content. Artists are forced to sign away their copyrights in exchange for the perceived benefits of aligning with these companies. Unfortunately, consolidation and vertical integration created a situation where partnering with a major content firm became the only way to access the major promotion and distribution chains. The advent of digital technologies have made it possible to circumvent these traditional bottlenecks, but the question remains how robust content protection can be implemented in a way that serves creativity, not the ability to reconstitute market chokepoints.

As a conference manager, I understand that sometimes schedules run long and adjustments to the agenda need to happen on the fly. That being said, it was a disappointment that the second panel was cut short. The lack of dialogue between the panelists and audience made it difficult to draw the important connections between, for example, James Love’s contention that that WIPO broadcast treaty is the wrong paradigm for access to knowledge with the marketplace challenges faced by Linda Jensen as she deals with piracy questions HBO’s central European operations.

The panel on new platforms reinforced in my mind the idea that the neutrality debate, for all intents and purposes, seems settled in much of the world. Donald Whiteside of Intel spoke of the need to pursue policies that nurture the “new”, while Luca Di Mauro discussed Sky Italia as a multi-platform content provider, needing the ability to access a variety of delivery platforms in order to reach consumers. Didier Huck of Thomson touched on a video on demand future where content protection and

interoperability would be necessary. Again, the tension for artists is evident. The tools created in part by Intel provide historic access to the means of creation. Traditional content providers, like Sky Italia, are faced with a dual challenge: a proliferation of new content coupled with a multiplicity of means for consumers to access this content. Deutsche Telekom and other access providers must be tempted to leverage their control over Internet pipes into a scheme to supplement revenues.

This, of course, is again an essential policy question: will artists have equal access to consumers via these broadband platforms, or will they have to enter into partnership agreements with larger corporations to ensure access? If these partnerships are necessary, what will the terms be? Using the post-consolidation American radio industry as a model, artists were forced to sign a major label recording contract (losing their copyright, among other concerns) in order to even be considered for airplay on a commercial radio station. In the digital space, by contrast, artist-friendly collectives like the Independent Online Distribution Alliance (IODA) and CD Baby provide the service of aggregating content to make it available for services like I Tunes. In an ideal world, Sky Italia will be able to access consumers over Deutsche Telekom's pipes, while semi-professional or professional filmmakers will also be able to compete for the same consumers. If consumers prefer Sky Italia's content, it should be because they are making better programming (and to a certain extent, it will be because of their brand identity and marketing scale), not because they are able to enter business partnerships that bar consumers from accessing their competition's products.

The afternoon session on "creation and access to content and the role of new commercial agreements" brought one of the most critical issues facing the music community to the fore: the idea that the very nature of innovation and the Internet makes it virtually impossible to have the benefits of an open Internet architecture without the downsides of unrestrained and illicit distribution of copyrighted works. It is not enough for supporters of the traditional business structure to wish for a world where both scenarios are possible – in an open, disintermediated Internet, innovation will always be one step ahead of efforts to shut down specific services. In 2000, when Napster was born, the Future of Music Coalition stated that the only antidote to an illegal Napster was a legal Napster; ie, not only can the industry "compete with free," it simply has no choice.

Over the past five years, a remarkable story has emerged as a legitimate marketplace for the digital distribution of music has begun to take hold. In America, independent labels have surged to an 18% share of the music marketplace. Consumers are accessing music through a variety of technologies, using a variety of applications, with a variety of price points. Snocap is a natural part of that evolution. Snocap recognizes that some consumers simply like aspects of the peer-to-peer experience, and the industry is responding by licensing works. Eventually, our hope is that the solution to unlicensed peer-to-peer is not the creation of a proprietary "walled garden," but rather a licensed (and monetized) industry structure that allows artists and consumers ample opportunity for direct interaction.

Justin Kniest's Fabchannel gives real insight to the potential untapped future of the music economy – giving fans access to live events at a scale never before possible. The evening keynote, Jonathan Taplin, was a key producer of the legendary 1970's concert film, "The Last Waltz". Because of the prohibitive cost of production, very few musicians or musical events ever made it to film. Certainly, the time involved in filming, editing and manufacturing made it virtually impossible for a music fan to see a favorite band on film in the same general time period of a concert tour. Fabchannel is an indication of how this paradigm can forever be changed. For a fraction of the relative cost of producing a film like "The Last Waltz", Fabchannel webcasts and archives live concert events from one of Amsterdam's most popular rock clubs. With an archive of hundreds of concerts, music fans across the world are able to get a sense of a band's live performance.

To use my hometown of Washington, DC as a model, one of the most popular venues for independent music is called the Black Cat. Washington, unfortunately, does not have a strong non-commercial music radio station. Further, it has a weak alternative print scene. Bands that play at the Black Cat are essentially never on the radio in Washington (as opposed to some other American markets, where thriving college and non-commercial radio stations provide much more equitable platforms). Seven years ago, bands playing at the Black Cat had to rely on print advertisements and word of mouth to attract crowds. Now, satellite radio, music oriented websites and blogs, Internet radio stations, peer to peer file trading services and on-line digital music stores all provide opportunities for consumers to learn about these bands. Fabchannel's model provides one more potential platform – an opportunity for a music fan (or, in business terms, a potential customer) to actually "sample" a band's live show. In the immediate future, clubs will understand the value of expanding this service to include the ability to purchase a digital copy of that evening's performance. Part of what is so exciting about Fabchannel's model is the potential implications for local music scenes – the entire chain of businesses that are impacted by consumers' decisions to attend live music events.

In America, one company is the dominant force in concert promotions and ownership of concert venues. Up until two months ago, they were part of the Clear Channel broadcast empire. I asked the panel if they were concerned whether a lack of strong government oversight may endanger the ability for Fabchannel to reach consumers; the puzzled looks from the European members of the panel made it clear that such a possibility seemed impossible in Europe.

For the record, therefore, I will reiterate: under existing United States law, the cable industry (the dominant provider of broadband to the home) has the legal right to pick and choose what content they would offer over their platform. Major telecommunications players like Verizon and AT&T have talked publicly about how their business models are based in part on having the ability to charge content providers for preferential treatment on their networks. In a market where one company already dominates the live music industry, it seems reasonable to assume that the concert provider and the broadband provider would have a real incentive to establish a business relationship based on limiting customers' access to the preferred concert provider in

exchange for a cut of the profits. In Europe, this may not be an issue. Network unbundling and basic understanding on network neutrality could make this moot. If Fabchannel was an American company, however, or hoped to build a business around reaching American consumers, I'd be very, very worried.

Tuesday

Tuesday opened with an excellent panel on "new ways to access knowledge and content: content digitization by commercial players." This panel reinforced in an important way that discussions about digital content should not simply revolve around business strategies and consumers – rather the digital revolution is doing historic things in education, government services and culture. Jens Redmer made a very effective presentation on behalf of Google Book Search, Europe, although I still get a pit in my stomach thinking about the implications of their aggressive move. A good friend and best-selling author commented over lunch this week that Google was going to put all authors out of business; while I would like to give Google the benefit of the doubt, I must confess that I am wary of the business agendas of virtually any publicly traded corporation.

I am thankful that OECD invited the Creative Commons to the discussion. While their work is still in the formative stages, it is very important to recognize that a great deal of content is created not for pure monetary gain but to further our culture. It also is important to recognize that the traditional copyright structures, particularly in the music industry, have not necessarily benefited the economic interests of creators. Alternate copyright and licensing models are an important part of the discussion of the role of intellectual property in the digital age.

The next panel focused on the question: "Are digital media and the Internet changing creative supply?" From our standpoint, this offered a fascinating contrast between musician Max Pezzali, EMI's Adam Klein, and the IMCA's Philippe Kern. The answer to the panel's question is: of course. The broader question for artists is what type of business relationships will they have to establish in order to fully access the consumer market.

Max made it clear that technology is changing the way he is creating, marketing and distributing music. The old rationale for major record labels no longer holds – whereas three decades ago it required significant capital investment to rent time in a professional recording studio, manufacture vinyl records and ship these records on trucks in huge quantities, artists now own the tools to create music themselves and make their work available to an infinite number of potential consumers. In this model, labels need to reconceptualize their role in the value chain.

In reality, a music economy with no barriers to entry leads to such a plethora of content that consumers will require filters. One future role for labels is applying their brand to a given piece of music, essentially validating the worth of a particular release.

In the American market, this is already happening, as labels like Merge, Matador, and Saddle Creek are recognizable brands in certain genres of music. A second role is assisting the artist with marketing and business strategies. Many professional musicians are very interested in making a living off their art, but do not have the skills or inclination to put the necessary focus on their business affairs. In that setting, labels have an important role in marketing and sales.

I am concerned, however, about something Mr. Klein said. When articulating the value that a major record company like EMI can present to artists in the future, he discussed the importance of having the ability to negotiate with Yahoo!. This, of course, is the great fear – that the future business structures will replicate the flawed structures of today. Replace the name “Yahoo!” with “Clear Channel” (to name just one radio company) and you get the idea. It is absolutely essential that the future relationship between artists and record companies be defined by the value that the label brings to the artist, not the requirement that the artist sign up with a label in order to have an opportunity to reach an audience. This is a nuanced difference, but a critical one.

Phillippe Kern and the IMCA play a very important role in this. Independent labels deserve the right to fairly compete in the marketplace; in fact, as small, entrepreneurial risk-takers, they probably deserve a leg up as a matter of public policy. Instead, in the terrestrial world they are often at a competitive disadvantage against the larger labels. In some respects, they serve as incubators for major labels, investing resources in identifying and growing acts, then seeing these acts move to major labels because artists believe the smaller labels are not able to compete. An ideal digital marketplace will remove many of the fundamentally unfair market barriers that have benefited the large copyright aggregators.

This conversation dovetailed well with the next breakout session, focusing on Content Diffusion. In some ways, the conversation did not break much new ground – at some level, Digital Rights Management (DRM) solutions are already in place and the broader questions are how to redefine fair use for a digital age and who will control DRM. In a conference such as this it is difficult to give speakers the amount of time they deserve, but I would have been especially interested to hear more of Leonardo Chiariglione’s vision for DRM, Sarah Deutsch’s thoughts on net neutrality, and a more robust discussion of Stan Liebowitz’ analysis of the impact of file trading on the music industry. In particular, I’m interested in knowing Dr. Liebowitz’ thoughts on the impact of radio consolidation on major label sales and what the specific impact of peer-to-peer file trading was on the growth of the independent music sector. Of course, it is FMC’s contention that peer-to-peer was a somewhat unstoppable reaction to a basic market failure and, as stated earlier, the only response to illegal peer-to-peer was to established legal, licensed services.

The concluding policy roundtable was remarkable from my standpoint for the absence of discussion of the huge issues facing the American creative community. Again, this seemed to stem from a sense that the essential underlying challenge to the American creator – policies that guarantee the ability to access potential consumers –

seem essentially settled in many parts of the world. In fact, because we are so caught up in the middle of two critical policy debates in this country that seem less relevant to the OECD conference, much of the other issues raised in the policy roundtable went right past me. Certainly, much of this was cultural – without extensive experience or history with the issues or the participants, it was somewhat difficult to follow the subtext of their messages. Plus, the roundtable came at the end of two very long days of discussion.

In conclusion, OECD should be congratulated for programming two very interesting days of discussion. On behalf of the Future of Music Coalition, I appreciate the opportunity to provide feedback and perspective. While it is not possible to synthesize the diversity of creators' perspectives into a single voice, it is possible to pull out some common themes:

- Technological innovation creates unprecedented opportunities for content creation and distribution. It is critical that policymakers view these developments as significant positives, not only in economic terms, but cultural, educational and political as well.
- The priority for policymakers must not be to assist traditional telecommunications, media or content companies replicate their business model in the digital world; rather, for these companies to survive and prosper, they must demonstrate additional value beyond their historic ability to dominate markets governed by scarcity.
- The greatest risk to the creative community is not access to information; rather it is the replication of vertical integration partnerships that dominate traditional media outlets today.
- Policymakers in the United States seem to have a great deal to learn from their colleagues in Europe and elsewhere who have dealt with issues like network neutrality.

Thanks again for the opportunity to contribute to this important and informative conference.