

## **GIART response to the European Commission of the Commission Report on the Opportunities and Barriers to online retailing.**

### **INTRODUCTION**

GIART, the International Organisation representing the EU performers' Collective Management Societies, would like to express its comments on the Commission Report on the Opportunities and Barriers to online retailing.

First and at preliminary level, we strongly regret that no representative of performers' CMS was invited to attend this roundtable. Performers' rights haven't been evocated at all during the discussions which focused on the online music market.

This is even more shocking if you think that performers essentially contribute to the creation of the content circulating on the Internet. We have to remember that without performers there would be no exploitation of any music or audiovisual creation.

We esteem important to highlight that one of the biggest problems is that performing artists do not enjoy any real right in most of the cases as regards the legal circulation of their performances on the Internet. In fact in the majority of the cases, performers do not receive any consistent revenue from the making available right which is due to become the most profitable right in the near future (as consumers' habits have already radically changed with the advent of the portable MP3 engines and any other device connected to the Internet). Consequently we are waiting for an initiative of the Commission in order to solve this problem of discrepancy between performers' and authors/producers' rights in the online environment. Without any positive action in this sense, performers will be excluded from the economic benefits of the circulation of their performances on the Internet.

How to improve the situation?

We esteem that, as it has been stressed in the preliminary documents of the Commission as regards the proposal of Directive on the duration of the copyright and related rights, the Commission should urgently adopt a legislation granting a stronger making available right for performers, following the two examples of the Spanish and Portuguese legislations.

Following those two examples performers can have a remuneration right for the making available right compulsorily managed by the performers CMS (Spain) or an exclusive right compulsorily managed by the performers' CMS (Portugal). The two models are possible and can work but it is essential that performers' CMS could

negotiate this right on behalf of all performers. This is a question of justice and fairness.

### III.1 ONLINE RETAILING OF MUSIC

#### *A) Opportunities for the online music business*

Performers agree on the fact that Internet can be seen as a great opportunity but also a big threat for two reasons:

- The fact that the distribution of the Internet revenues is not fair as regards the performers who in most cases do not receive anything from their new Internet rights. Furthermore performers are also suffering for the decay of the off-line market in a parallel way with the development of the online one, which unfortunately does not bring news revenues to them.
- Piracy

GIART observes that some of the attendants of the round table are asking to remove the territorial barriers to better develop their business but without taking into account the protection of the rightholders, such as the performers who are essentially contributing to the creation of the content.

As concerns the pan-European licences, GIART esteems that although their necessity and suitability is not questionable, however, we cannot agree on the current concentration of the repertoires in the hands of a few societies that would finally lead to the extinction of the smaller societies. This would also be against the obligation of preservation of the European cultural diversity and would damage smaller rightholders.

We also think that even if we agree and allow the possibility for the rightholders to change their membership and representation from one society to another, we stress that this must be done under clear rules regarding the rights managed, the notifications and the periods of representation. On the contrary it will bring to a situation of uncertainty for right holders and which would be very difficult for users as they will not know who represents what and for what period.

The model of Santiago agreements is in our opinion the only viable model to answer to the demands of the users to get a pan-EU licence and to protect at the same time rightholders and the cultural diversity.

GIART therefore esteems that EU legislator should find a similar solution.

### **B) Barriers to the digital distribution of music**

First of all, we would like to stress that it is true that according to Apple licensing system in US is easier than in Europe, but on the other hand we must recognise that things are not comparable as US is one country while Europe is composed of 27 different states! Moreover, these countries use different languages and enjoy cultural diversity. This is a positive and enriching reality of Europe which must be developed, protected and taken into account when we face the on-line distribution of music and management of rights.

We also agree with Apple on the fact that the recent withdrawal of rights from collecting societies by various publishers means that the local national collecting society is no longer able to offer a so called blanket licence, but rather the various rights may now have to be sought via a myriad of different licenses from different licensors.

This is why a solution similar to Santiago Agreements should be sought because it constitutes a practical and uniform system which would better protect rightholders while making life easier for users. Another point to be stressed is that there should be tougher laws in order to oblige users to pay for content on the internet. It must be added that it is easier for a national society to enforce the obligation of payment for the content at national level than in a different country. The local CMS is in a better position to file claims in the Court and to secure the rights. This is why the model of Santiago agreements is more practical and will be more efficient.

### **C) The way forward for an improvement of online music licensing and of the online distribution of music products**

We cannot agree with the model proposed by Apple which would definitely lead to a monopolistic system which would favour users to the detriment of the rightholders' rights, fair competition and cultural diversity. Besides, the system proposed would encourage the competition for the well-known and successful right holders with a strong bargaining power with the detriment of the young or less known right holders who are in a weaker position. The latter are nevertheless the deposit for the development of the future cultural contents and IP economic growth and deserve the IP rights protection, as well.

We also strongly oppose the destruction of national EU copyrights systems in favour of a single pan-European one, as suggested by Apple. In GIART opinion this would be against the EU Treaty which states in its Article 151 , paragraph 4, that: *"The Community shall take cultural aspects into account in its actions under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."*

As to the mention by Apple of an “information deficit with respect to the identification of copyright ownership in Europe” and the creation of a “central electronic repository for ownership information into which all collecting societies and other right holders feed information in a common format, and which could be accessed by licensees, GIART would like to highlight that the organisations able to provide with the best information on right holders are the CMS, even though their information systems must be adapted and evolve permanently. The information systems of performers’ CMS, that have not been invited to participate in this round table, are more complicated than the authors’ CMS because more information is needed to identify performers’ participation to a work. Nevertheless, take into account that in the off-line environment the exchanges of remuneration through bilateral type A agreements are taking place between the CMS because of their work on compiling the information on the appropriate databases.

CMS are already working in such repository from their experience in the off-line environment.

We also disagree with EMI opinion about the 2005 Recommendation which proved to be inapplicable and which has been criticised by the EU legislator, the rightholders and also the users.

We agree with SACEM on the fact that not always it is necessary a pan-european licence because we must take into account that the users must be able to ask for a personalised licence that includes the repertoire they are really looking for; the balance must be kept in this environment and this means flexibility for users in balanced conditions for the granting of a licence and an adequate protection for every right holder under European IP system.

We also totally agree on the fact that reciprocal representation agreements are essential not only in the off-line world but also in the on-line world. It is an already working net that ensures the representation, the exchange of information and the accurate payment to right holders. This is why we esteem that the model proposed by authors’ societies which was based on the reciprocal agreements is the best system which can conciliate the protection of the rightholders’ rights with the need of users to get a pan-European licence.

## ***D) Follow-up meeting on the online distribution of music***

We note that iTunes observed that, from a commercial user point of view, being able to obtain a licence in the global repertoire, even if limited to a particular territory, is more important than having available various multi-territory licenses in limited repertoire that together may or may not add up to the entire global repertoire.

This is in other words the system of Santiago agreements.

We do not agree with the fact that competition between CMS is needed as we think that this would imply major administrative costs such as for the IT systems. The example given by EMI, which intends to appoint several rights managers for the same repertoire would be detrimental for the right holders legitimate payment. This issue must be considered not only from a commercial point of view but also from the fair payment of the IP rights. Where is the limit to lowering the prices in a competition scenario?

Cooperation among CMS, is on the contrary suitable as it would allow CMS to reduce some of their administrative costs and would be more efficient for the rightholders.

Moreover we agree with SACEM on the fact that competition among CMS would bring to a risk of "race to the bottom" of the royalty income.

As regards the question of databases, GIART opinion is that we can choose one model or the other but what is important is to ensure the interoperability and the continuous update of the data by each society. As to the access to the database by all the stakeholders, we are not against it but with the due respect of all the laws about privacy and data protection. Of course the access could be given only to stakeholders who contributed financially to the construction and maintenance of the expensive database. Performers' societies are working at developing such common databases but they still haven't solved all the problems related to the complexity of the project.

## IV CONCLUSIONS

### ***A) Online distribution of music (legal offers)***

As previously said, performers do think that Internet constitutes a very interesting opportunity but they have highlighted in many different occasions that Internet can also become dangerous because performers are not fully associated in the negotiations and decision-making procedures which have a deep impact on their lives and careers. This must change. The EU legislator should solve this problem at EU level by extending the model of making available right which was implemented in Spain and Portugal.

GIART societies esteem that the only workable solution as regards the pan-European licensing is a model similar to the Santiago Agreements. The current situation where CMS are put in strong competition among themselves is very damaging for rightholders and for the preservation of the principle of the Cultural Diversity. Furthermore you cannot ask to two or more societies who are competing to get the market, to cooperate and share information on some other issues. It's contradictory and it is proving that it doesn't work.

Besides, the maintenance and improvement of the data for the CMS implies an objective cost that is included in their general administration cost. Therefore CMS ensure the best management of performers' rights which could not be possible without the organisation and information of which they dispose. For that reason, agents that do not undertake the essential work for the distribution can't be put at the same level than CMS to operate in the on-line environment. By doing so, unfair competition would be legitimised.

The Commission should therefore revise its position as regards its position to push towards open competition collecting societies that by history and national laws have fundamental social and cultural objectives.

We therefore strongly believe that the existing system of reciprocal agreements should be preserved and maintained as it ensures that the users without discrimination can have access to a EU-wide repertoire and make it possible a better protection for the rightholders in the respect of the cultural diversity and fair competition within the Internal Market. In this sense we fully support the position of the EP as expressed in the Lévai Report.

GIART members agree with Mrs Lévai opinion contained in the report of the Legal Committee of the European Parliament according to which «...*whereas, in order to maintain a one-stop-shop, the existing system of reciprocal collection of royalties should be preserved, in combination with a degree of protection of right-holders to avoid downward pressure on revenues...*» and that that “*national CRMs should continue to play an important role in providing support for the promotion of cultural diversity, creativity and local repertoires*”

Furthermore as previously said, performers' CMS are involved in a very limited way in the multiterritory-licensing of on-line performers' rights. In fact, due to the national transposition of the making available right introduced by the 2001 Directive in most of the countries as an exclusive right which is transferred to producers by contract, the performers most of the times do not receive any remuneration for it. This situation makes also impossible for the CMS to manage such right.

GIART therefore demands the EU legislator to change this situation and to adopt a system where the making available right is submitted to collective management as it is the only way to make this right effective.

We would also like to draw the Commission attention that it is important to avoid the risk of the centralisation of the market and repertoires in the hands of a few CMS and that the major rightholders, according to the 2005 Recommendation, could give their mandate to some CMS to collect their rights all over the world as this would lead to the weakening and consequent extinction of the smaller national CMS and would also damage the position of the minority repertoires and cultural diversity in Europe.

Finally we also would like to stress that the governments of each EU country and the EU institutions must ensure the respect of the copyright and in general the intellectual

property rights because if the creative contents are not protected, Internet-based business models will not be viable.

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