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worldwide

IFPI¹ Position on the Commission Communication on the Management of Copyright and Related Rights in the Internal Market

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IFPI's welcomes the opportunity to comment on the Commission's Communication on "The Management of Copyright and Related Rights in the Internal Market" (the Communication).

IFPI's Member Companies are both users of and right holders in collecting societies. Record companies resort to authors' collecting societies to acquire licenses to use musical works. At the same time, record companies license collectively their own rights for uses such as broadcasting and public performance. Record companies are also now resorting to collective management for the licensing of new uses such as simulcasting and certain forms of webcasting.

Collective management is an important tool for record companies, both major and independents, and the royalties collected by producers' own societies form an essential part of the record companies' income. IFPI and its members are therefore in a unique position to provide a balanced and practical view on the licensing of rights and on the required legal framework for collecting societies.

We have a number of serious concerns regarding the content of the Communication and the approach it takes. Firstly, the Communication seems to put into question both the right holders' ability to license their rights voluntarily and their freedom to decide whether to license their rights individually or collectively. Secondly, the Communication proposes specific community intervention in the form of a Directive to regulate certain aspects of the establishment, functioning and supervision of collecting societies. On both fronts, *the*

¹ IFPI represents over 1500 major and independent record producers and distributors in 76 countries worldwide

Communication fails to make the case for intervention, including the setting out of the potential or existing Internal Market problems.

Any government intervention in the way the rights are licensed—including forced community-wide licensing—must be avoided. Most of the options examined by the Communication in this context raise problems of compatibility with international Conventions and existing EU Directives. Furthermore, the Communication effectively ignores the fact that *multi-territorial licensing, including licensing for new services, is already taking place at an increasing pace.* Any intervention at this stage would not only be against the recognised exclusive rights of authors, performers and producers it would also undermine all the initiatives undertaken by right holders to license legitimate services. Furthermore any intervention would jeopardise the substantial investments made to foster the emerging new markets (investments in the digitisation of content, in the deployment of robust DRMs, in the development of new and innovative services, etc.).

As regards to the need to engage into the harmonisation of the specific rules applicable to collecting societies, we remain unconvinced of the need for intervention in this area. We would maintain that at EU level the effective application of the existing general legal framework, including competition rules, suffices.

ISSUES RELATING TO THE MANAGEMENT OF RIGHTS IN THE INTERNAL MARKET (CHAPTERS 1 AND 2 OF THE COMMUNICATION)

As regards to the collective licensing of rights, the starting premise should be the *freedom of right holders to choose whether and when to have their rights licensed collectively.* It needs to be kept in mind that collective licensing of rights is not automatically the best option for right holders or for users. In general terms collective management of rights is in the best interest of right holders and users in situations where individual licensing is not viable or where it is more practical for right holders to license their rights collectively.

Considering that each individual right holder owns, to begin with, the complete bundle of territorial rights, individual licensing, as much as voluntary collective licensing, provides a vehicle that is perfectly suited for the granting of multi-territorial licenses. Both systems provide the means to meet the needs of the users while ensuring the right holders capability to negotiate and obtain a market based remuneration for the real use of works, phonograms and performances.

An argument used by those that advocate for the establishment of compulsory licenses, or mandatory community wide licenses, is that new services have a cross border dimension, and they require multi-territorial licenses. This, it is alleged, needs to be facilitated by legislative intervention. Such claims seem to underpin also the approach adopted in the Communication. We maintain however that such allegations are unsubstantiated and guided

by a very specific goal: to have access to content without having to pay a fair market price for it (and if possible without having to pay for the exploitation in each of the countries where the rights are exploited).

It should be stressed that the licensing of on-line services involves the exclusive reproduction and making available right and that these services will be at the heart of the music industry business, in the same manner that the sale of physical formats has been so far.

A forced intervention in the form of compulsory licenses, or similar mechanisms would not only be incompatible with the copyright system but would also constitute a major interference with the functioning of the industry, with its contractual practice and business models.

There are a multitude of examples to prove that ***record companies, either directly or via their collecting societies, are granting the multi-territory, multi-repertoire licenses required by the providers of new digital services.*** Indeed, in the last 18 months labels have made available on line the overwhelming majority of their repertoire, across a wide variety of services offering consumers great flexibility in the forms to access music, usage rules and prices.

A burgeoning online music market started taking shape in Europe since 2003 through nearly 40 legitimate services, including OD2's brand partners and several independent services. Following the US example, European-based services have now widely introduced the pay-per-download option whereby consumers are able to buy single tracks. This sharply increased the number of customers for legitimate online services in Europe, which reached over half a million people across all services. This figure is expected to rise further now as services such as iTunes, Napster and Rhapsody are entering the European market in 2004. The amount of available repertoire on these services grow sharply during the first part of 2004 from a total catalogue of 220,000 to nearly 300,000 different tracks across the various legitimate services. When Napster launched its UK version in May this year it had available more than 500,000 titles (rolling out to 700,000) licensed from all the majors and from independents.

The music to mobile market has also benefited in Europe from an increase in licensing deals. This market continues to take shape as record companies embrace the ringtones market as well as downloads to mobile and conclude direct licensing deals with the service providers.

Music downloads are fast becoming the dominant online format, but the industry is also adapting its procedures in order to simplify substantially the licensing of other forms of internet music distribution, notably ***Simulcasting*** and ***Webcasting***. IFPI developed and rolled out two important one-stop licensing initiatives in 2003 to facilitate the licensing of legal streaming services. These initiatives – reciprocal agreements between record producers' collecting societies – enable the participating societies to grant blanket licenses to music

service providers clearing producers' rights and covering repertoire in all of the participating territories.

The granting of multi-territorial licenses by record companies enables music service providers to offer their services across different European countries. For the time being, it seems that on line music services tend to roll out their operations on a country/language/local repertoire specific basis even if they cover a multitude of European territories (e.g. Vitaminic Music Club, MTV Digital Downloads, Tiscali). These are however business/commercial strategy decisions by the music service providers and they are independent from questions of copyright protection and the management of rights.

Finally, as regards to the initial slow pace of the take-up of the legitimate on-line music markets it is important to note that *building a successful legal online business* is a far more *complex undertaking* than the setting-up of unauthorised on-line distribution models—a fact that is often forgotten outside the music industry. This includes steps from the most basic first steps such as the digitising of the content to the need to develop consumer-friendly DRM, establishing 'usage rules' (which in itself requires clever and costly technological solutions) and secure payment systems, etc. Two further strategic issues have contributed to the slow down of the development of the digital music market to date. Firstly, widespread piracy on the Internet has made it difficult for the legitimate services to break through, thereby significantly increasing the economic risk involved in these services. Secondly, the relatively low penetration of broadband Internet connections in many European countries has considerably slowed down the growth of the legitimate online music market.

Therefore there is *no need for Community specific legislation to facilitate Community-wide on-line licensing. Such an intervention would be extremely harmful now when the on-line market is developing at an increasing pace* and when so much effort and resources has been invested in it by all the different parties interested in developing legitimate services in Europe. It is also clear, and the Commission itself recognises it, that obliging right holders to grant licenses in the on-line environment, providing for the exhaustion of the rights, or reducing such rights (reproduction and making available) to a right of remuneration will be *against the EU existing international obligations (both in the WTO and WIPO), against existing EU Directives and against the jurisprudence of the ECJ.*

THE NEED FOR REGULATION OF CERTAIN ASPECTS RELATING TO THE ESTABLISHMENT, FUNCTIONING AND CONTROL OF COLLECTING SOCIETIES (CHAPT.3)

IFPI believes that direct government intervention in the operation of collecting societies or in the way they are structured is not necessary or desirable. *Laws and regulations that govern economic activity generally—including competition and company law—provide a largely workable framework for collecting societies.*

For instance, the Communication itself recognises the important role of EU competition law in the regulation of collecting societies and of their relations with their members and users, and amongst themselves. We have ample evidence of the role of the Commission and the ECJ in this respect.

The Communication rightly indicates that the establishment and functioning of collecting societies is regulated at national level to a greater or lesser extent in most Member States and that differences exist in the approaches taken. While this is undisputable, we still remain unconvinced that there is any evidence of these disparities having an effect on the functioning of the Internal Market, in particular regarding the issues identified in the Communication as requiring a legislative approach (Chapt. 3, Sect. 5).

As regards to the *establishment and status of collecting societies* (point 3.5.1) the Communication itself recognises that the efficiency of a collective society is not “linked to its legal form” and indicates that compliance with national rules, the principle of non discrimination and EU competition rules (in particular when a special status is granted to the collecting society under national law) should suffice to address any potential problems.

We note that the Member States establish different requirements, or none, in terms of the persons that can establish a society, the necessary “proof of efficiency” or the need to represent a significant number of rights holders. Experience has shown however that these are requirements, which when not established in legislation, the right holders themselves address in the appropriate manner, in particular in countries where collecting societies have existed for some time, such as the majority of the EU Member States.

As regards to a possible intervention regarding the *relation between collecting societies and the users* (point 3.5.2), we should stress again the role of competition rules. Transparency of collecting societies vis a vis the users (in as much as vis a vis their members) is a key element for the proper functioning of the licensing market. The publication of the general tariffs and the obligation to license users on fair and non-discriminatory conditions are important elements in this context. These practices are however largely already undertaken by the societies either voluntarily or on the basis of existing obligations in national laws. When problems arise, for instance concerning alleged discriminatory or abusive licensing conditions, such problems can be addressed by competition law at national or, when relevant, EU level.

As regards to the *relation between collecting societies and the right holders* (point 3.5.3), we would like to stress the obvious: collecting societies are set up by the relevant right holders, who also pay for their operations. It is therefore the right holders concern to ensure that collecting societies perform in a fair and efficient manner. Transparency towards the right holders is best ensured through the increased involvement of the right holders in the running of the collecting societies, in particular for matters such as the reporting of the costs, collected revenues and distributions. In addition, the proper application of competition

law rules should offer adequate tools for right holders to address any harmful behaviour by the societies (for instance as regards to the conditions of membership and mandate).

Finally, as regards to the *external control of the societies* (point 3.5.4), we agree that it is important to be able to resort to dispute resolution mechanisms when negotiations between societies and users fail. We also believe that it is important to avoid such dispute resolution bodies becoming merely instruments for users to avoid or delay payments to right holders, or for users to have access to the rights on non-commercial terms. Indeed, tariff setting bodies should be obliged to decide the relevant rates by applying “willing buyer, willing seller”, or equivalent, legal standards and the dispute resolution mechanisms should be arranged in a manner that ensures swift and economic settlement of disputes. This is essential among other things to avoid situations where dispute resolution is used as a tool merely to avoid payments to right holders.

While we recognise the important role that governments play in this area, we fail to see the gain of engaging into a harmonisation exercise at Community level. This is particularly the case in view of the fact that the different models followed in different Member States (from specialised tribunal to ministerial supervision or supervision by the ordinary courts) are intrinsically linked with their specific administrative and judicial systems.

OTHER ISSUES: DRMs AND PRIVATE COPYING LEVIES (CHAPTER 1.2.5)

IFPI agrees that DRMs are an essential tool to protect and manage rights, individually and collectively, on-line and off line. They are also key in developing new on-line products and services. The music industry is investing heavily in DRMs but a lot can still be done to have a more widespread and accepted use of DRMs. For this, the cooperation of all parties (right holders, the hardware and software industry, the CE and the IT industry) is necessary. This should happen against the backdrop of the legal framework already set up by the “Information Society” Directive, including the relation between technological measures and levies that has been adequately set by the Directive: levies go together with private copying exceptions but need to take into account the application or non-application of technological measures (art.5.2b).

We believe that it is now for Member States to apply these rules as they all have different private copying systems (no general exception and no levies in UK and IRL, more or less wide exceptions in other countries, different levels and application of levies). IFPI agrees that the Contact Committee established by Article 12 of the Directive may be a good framework at EU level to ensure consistency in the approach of Member States to this issue. For the rest, we believe the Commission has an important role to play monitoring the implementation of the Directive and making sure its rules are properly applied.