

IFPI Intervention – Public Hearing on the Governance of Collective Rights Management in the EU, 23 April 2010, Brussels

April 2010

1. IFPI represents over 1400 small and major music companies worldwide and it has local groups in 46 countries.
2. IFPI's members use collecting societies' services both as right holders and as commercial users. To illustrate the point, in 2009 record companies' European societies collected over €800 million for the industry, whereas the European recording industry paid to musical authors' collecting societies ca. €600 million in 2008 in mechanical royalties.
3. IFPI and its members have a unique and direct interest both as right holders and users to develop collective rights management in Europe in a fair and balanced manner, in particular to fully realise the market potential for European digital services. This intervention is limited to music and it presents the recording industry view as users of musical works.
4. Collecting societies' main objective is simple -- they act as intermediaries between the right holders and the users. Collecting societies are service providers that should provide (i) services to right holders, assisting them to monetise their individual rights in a cost-effective manner, and (ii) services to users lowering their transaction costs by providing access to "blanket licenses" on fair and non-discriminatory terms. Neither users nor right holders should be made to pay against their will for anything that goes over and above that core service.
5. As users the record companies are mainly concerned about whether the collecting societies are doing their part in facilitating the functioning of the existing markets and the emergence of new markets. That is not to deny the importance of transparency, accountability, and fair governance. Those issues are however best dealt by the owners of the societies - the right holders -- and by ensuring that the Commission and the national authorities enforce the already existing rules and remove national rules creating and upholding local monopolies.
6. As regards to collective licensing it is IFPI's view that the main issue that needs to be addressed relates to facilitating the licensing of rights. The biggest obstacles are (i) the lack of meaningful Pan-European collective licensing (in particular) for online rights for musical works and the musical authors' societies lack of responsiveness to markets, and (ii) the lack of fair and effective local dispute resolution. At the same token, IFPI

recognises that users, in order to facilitate licensing, must accept the obligation to act in a responsible manner in terms of seeking out for licenses and pay a market price for the rights they use. I will address those points in more detail in the following.

Rights licensing

7. Although this is a hearing on collective licensing it is still worth stressing that the single biggest problem affecting the development of legal services in Europe is rampant piracy. Even though there are a good number of legitimate services with diverse consumer offerings operating in Europe, we should not forget that piracy is the main problem to the development of the online music market. None of the legitimate services will be able to develop their full potential if they have to compete with the widespread availability of unlicensed music on file-sharing networks. Having said that, there are also difficulties affecting the licensing of digital rights to musical works, that hamper the development of legitimate on-line music, audiovisual and games services.
8. The principal difficulties relate to:
 - a. The musical authors' collecting societies' refusal to license all potential commercial users. From the recording industry perspective the issue is that record companies, unless they are distributing music directly to consumers, are unable to obtain licenses from the societies in order to provide on-line music retailers products with all rights included. This discriminates against record companies and also against on-line retailers that are unable to obtain from the record companies music with all rights cleared like their brick and mortar competitors.
 - b. The musical authors' collecting societies' inability to implement models that would allow for the acquisition of multi-territory, multi-repertoire digital rights for on-line services. This is despite the fact that (i) there already exists a model for such licensing – the *simulcasting* model – and that (ii) the European collecting societies offer such licenses for the manufacture and distribution of physical products (the so called European Central License Agreements).
 - c. The current legal and commercial uncertainty as regards to the repertoire and territories with respect to which the societies can license rights. The uncertainty is partly caused by the dismantling of the reciprocal representation agreements and the fact that administration of rights to a single work may be divided between several societies and publishers. One way of alleviating this situation could be that authors should be allowed to deal directly with publishers, rather

than compel them (by way of the societies' membership agreements) to always transfer their rights to a collecting society.

9. IFPI finds the partial dismantling of the collective licensing of musical works, caused by the major music publishers' withdrawal of their rights, unfortunate. We accept however that it would be hard to argue against the rights holders' freedom to license their rights individually if they so choose.
10. **To alleviate the above described problems with rights licensing, the Commission should consider ways to encourage, and ultimately mandate, European collecting societies to enter into reciprocal agreements. These agreements should follow the IFPI *simulcasting* model in that they should entitle all the participating societies to license in a non-discriminatory manner the repertoire of all the other societies for digital services in Europe.** Such a measure would reduce the number of licensing transactions and increase commercial certainty.
11. IFPI does not believe that there is any need to change the underlying copyright law framework to solve the problems with on-line licensing. The practice and experience with the licensing of the record producers' rights, both individual and collective, corroborates this view.

Dispute resolution

12. The other major problem is the lack of swift and effective dispute resolution mechanisms to deal with commercial disagreements between users of rights and collective rights managers.
13. Currently parties have recourse to such tribunals only in a couple of EU Members States (notably Germany and the UK). Regrettably even in those countries it is often the case that these bodies lack the necessary resources to solve often complex disputes requiring understanding of economic arguments as well as specialised copyright questions. It is of paramount importance that such future dispute resolution should be adequately resourced.
14. It is likely that already the knowledge of the existence of fair and effective dispute resolution would facilitate the launching of new services and increase legal certainty. It is understood however that such mechanisms should not be used to avoid or postpone the obligation to pay a market price for the rights for all the relevant uses and markets.