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To: MARTIN-PRAT Maria (MARKT)
Cc: GERBA Agata (MARKT); Agnieszka Horak; Kristina Janušauskaite
Subject: IFPI position on proposed Directive on collective management
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Dear Maria,

FYI, I enclose the IFPI position on the proposed EU Directive on collective rights management.

We look forward to having a first exchange of views with you on the proposal at the PRC next week, and will be happy to continue the discussion afterwards with you and your team.

Kind regards,

Olivia

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IFPI COMMENTS ON THE PROPOSED DIRECTIVE ON COLLECTIVE MANAGEMENT

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INTRODUCTION/GENERAL COMMENTS

IFPI represents the recording industry worldwide, with 45 affiliated national groups and more than 1,400 members in 66 countries, ranging from major multinational companies to small independent labels.

IFPI welcomes the adoption of the proposed Directive on collective management. Record companies rely on collective management in the digital environment both as licensors and licensees. On the one hand, they use their own Music Licensing Companies to license collectively certain uses of music on Internet, in parallel to licensing directly online and mobile services. On the other hand, record producers also obtain licences from authors' collecting societies in order to sell sound recordings. IFPI and its members are therefore in a unique position to provide a balanced and practical view on collective cross-border licensing of on-line and mobile music services.

We support the aim of the proposed Directive to improve the governance and transparency of all collecting societies, and to facilitate further the cross-border licensing of authors' rights for music online. A key element is to ensure that the rules in the Directive are best framed to reach these objectives, and do not lead to over-regulation.

The recording industry is already working closely with its own Music Licensing Companies (MLCs) to ensure efficiency and transparency, in line with the principles included in the Directive. In particular, IFPI and the industry MLCs have agreed on industry codes of conduct and work closely to continue to improve the MLC's financial performance.

In this context, we believe that some of the rules and obligations in Title I and II of the Directive are overly detailed and risk creating additional administrative burdens for collecting societies, without improving licensing practices. In our view, the best way to improve the operations of collecting societies is to give those right holders that have a direct economic interest in the running of these societies effective control and the ample opportunity to participate in the decision making process, rather than seek to impose very detailed obligations.

The proposal should also ensure that users contribute to the cost-effective collective licensing of rights by e.g. providing accurate and timely usage reports and swift payment of agreed tariffs. Finally, introducing swift and fair dispute resolution mechanisms between collecting societies and users should contribute to effective collective licensing of rights.

IFPI also supports the effort of the Directive to improve the cross-border licensing of music rights in Europe. Record companies have been granting cross-border licenses to online and mobile music services for several years, either individually or through their MLCs. In particular, record producers have put in place collective licensing arrangements[1] that enable users located in any EU territory to obtain a multi-repertoire pan-European licence from any participating producers' collecting society in the EU. IFPI generally agrees with the approach taken in Title III of the Directive regarding the multi-territorial licensing online of musical rights. In our view, an additional useful element in order to introduce more flexibility to the licensing of digital rights in musical works in the longer term, could be to allow non-exclusive mandates between individual right holders and authors' collecting societies.

It is important to bear in mind however that while the licensing of authors' digital rights in musical works can be further streamlined, the single biggest factor limiting the growth of licensed music services is piracy - the easy availability of unlicensed free digital music. Hundreds of legal digital services offering up to 20 million tracks have already been launched in Europe through voluntary individual and collective licensing. More legal services would come to the market and develop successfully over a wider range of territories if the unfair competition from piracy was brought under control.

In conclusion, we believe that the approach of the Directive is generally adequate and balanced. It is essential though that the scope of the Directive is not widened beyond its intended aim and purpose. The "general" part of the Directive should not go beyond the collective management of rights, and the sections dealing with cross-border digital licensing should not be extended to other rights than the rights currently covered, given that the online uses of recordings are already licensed by the record companies, individually or collectively. In addition, the Directive should not be used as a vehicle to regulate issues not related to collective management of rights, such as private copying levies (these will be subject to a different initiative), and any issues relating to the rights themselves or exceptions (which have no place in a Directive on the collective management of rights).

DETAILED COMMENTS

We set out below our comments on specific articles of the proposed Directive.

Title I - General Provisions

[1] The so-called IFPI Simulcasting and Webcasting agreements

Article 2 - Scope

The scope of the Directive should be extended to cover not only collecting societies that are established in the European Union, but also all collecting societies that license users in the Union. Otherwise, the Directive risks creating an uneven playing field favouring societies from third countries.

Article 3(a) - Definition of "collecting society"

The definition of a collecting society should cover all organisations whose main activity is the collecting and distribution of licence fees or remuneration on behalf of one or more right holders, regardless of how their "ownership" or "control" is organised. To provide a level playing field and avoid circumvention of the rules, the Directive should cover all entities providing collective rights management services to right holders.

Title II

Chapter 1 - Membership and organisation of collecting societies

Article 6 - Membership rules

Article 6.2 states that collecting societies shall accept as members all right holders that fulfil the membership requirements. We note that in a number of Member States it is a matter for the competent decision making bodies of associations (notably the Board of Directors or General Meeting) to accept or refuse new members. It follows that an obligation to accept all applicants that meet certain criteria could be contrary to local laws applicable to civil law associations.

Articles 7, 8 and 9 - General meeting, Supervisory Function, Obligations of Managers

These articles seek to regulate the governance (Art. 7) and internal supervision (Art. 8) of collecting societies. However, national laws, without exception, already regulate and include provisions on the governance and internal supervision of societies and associations. According to our experience the problems, if any, with the internal controls of collecting societies are not due to the lack of regulation in this area, but rather due to poor implementation and lack of enforcement of the existing national rules. Rather than setting out detailed requirements on the composition and tasks of the general meetings and the board that may not be in line with the different applicable national laws, the Directive should set out general obligations to organise these functions in an effective and transparent manner so as to ensure that right holders have the tools for effective governance and supervision, and leave the detailed regulation to the existing national laws. In particular,

fair and balanced representation of the right holders' members and categories of members in the supervisory bodies should be ensured.

Similarly, while the objective of the provision (Art. 9) dealing with the obligations of senior management is fair, it is questionable whether a Directive is the right instrument to introduce detailed rules on conflicts of interests. We prefer that the Directive enables right holders to introduce internal rules in their collecting societies to deal with this.

Chapter 2 - Management of rights revenue

Article 12 - Distribution of revenues

We welcome the introduction in Article 12(2) of a uniform time limit (5 years) for the use of revenue relating to unidentified right holders. However, the Directive should stipulate that the collecting societies are obliged to make reasonable provision for any eventual future claims of the right holders concerned.

The obligation in Article 12(3) to make available to members the list of works and other subject matter whose right holders have not been identified is justified. In addition, such a list should be made available upon request to all other right holders that the society represents directly or indirectly from time to time. In contrast, imposing the same obligation vis-à-vis the general public is counter-productive and should be removed. Experience shows that the collecting societies are appealing targets for fraudulent claims for the monies due to unidentified right holders. Making a list of "orphan" works available to the public is unlikely to substantially increase the number of legitimate claims, but it is in contrast bound to increase the risk of fraudulent claims. We note in this respect that the Orphan Works Directive (Article 3.2 in Trilogue Agreement) states that the sources for identifying an orphan work should be determined by each Member State in consultation with the right holders, and that they are made available upon request to the interested users. This rule is in our view sufficient.

Chapter 4 - Relations with users

Article 15 - Licensing

The proposed Article setting out general obligations on collecting societies should be complemented with a new paragraph setting out a general obligation for users to act responsibly in their dealings with the collecting societies. In particular, users should have an obligation to report upon request all works and other subject matter they use. This should

be done in an agreed format and preferably using an industry standard format. Further, users should have an obligation to either pay licence fees and/or remuneration when there is an agreed or court-determined tariff in force.

Paragraph 2 should treat exclusive rights and remuneration rights on an equal footing, and apply the tariff criteria of "value of rights in trade" for both. In fact the criteria of "value of rights in trade" was first introduced by the CJEU in case C-245/00[2] that dealt with equitable remuneration for the use of sound recordings in broadcasting. Unlike fair compensation (for private copying) the amount of the equitable remuneration for the broadcasting and communication to the public of sound recordings is not and should not be set by law. The amount of equitable remuneration should be based on the value of rights in trade, as stated by the CJEU. There is therefore no reason to distinguish between exclusive rights and rights to remuneration (and discriminate against the latter) on this point. Article 15.2 should be amended to reflect this.

Chapter 5 - Transparency and reporting

Articles 16 - Information provided to right holders

The obligations set out in this Article appear reasonable, except for point (a) that requires collecting societies to report on a yearly basis personal data to right holders. This obligation is in our view unnecessarily burdensome and goes beyond what is required by the applicable data protection Directives.

In a general way, we think that the decision on the level of detail with which collecting societies should report to right holders is best left to the right holders themselves. Instead of setting out detailed obligations on the collecting societies such as those provided in Article 16, the Directive should ensure that right holders are in a position to effectively participate in the collecting societies' decision making, so that they can determine what is reported, how and when.

Article 18 - Information provided to right holders, members, other collecting societies, and users on request

The obligations set out in the Article to report the repertoire, rights and representation agreements are overly broad and not justified with a view to achieving the objectives. Collecting societies should be obliged to report rights data only to users that have a real and direct commercial interest in the data requested.

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[2] Case C-245/00 SENA v. NOS, 6 February 2003, and case C-192/04 Lagardère v SPRE and others (GVL), 14 July 2005.

Title III - *Multi-territorial licensing of on-line rights in musical works by collecting societies*

We do not have specific comments on the Articles 21 to 32 in this section, except for Article 33 (see below). However, we wish to make the following observations:

- We urge the Commission to include in Title III a requirement on authors' societies collecting societies to allow their members to grant them non exclusive mandates for digital rights. Exclusive mandates prevent the right holders who wish to do so from licensing their rights themselves directly to users, in parallel to any licences granted by the collecting society. This hinders flexibility and prevents a healthy limited competition between direct and collective licensing to the benefit of the users and of the digital market as a whole. Requiring authors' societies to allow non-exclusive mandates as a condition for multi-territorial licensing would increase flexibility in licensing, facilitate direct licensing, and enable the reconnection of split copyrights.
- The conditions set out in Title III will favour the creation of a small number of hubs with the power to issue multi-territory licenses. However, this concentration will increase the market power of the collecting societies concerned. Going forward, due care should be exercised to ensure that the hubs do not abuse their market power, vis-a-vis the individual right holders, other collecting societies or users. For instance, the hubs should not be allowed to discriminate against any potential licensees, including e.g. record companies or audio-visual producers that wish to commercially exploit rights or sell further licensed products.

Article 33 - Derogation for online music rights required for radio and television programmes

We see no justification for the special treatment proposed in Article 33 for broadcasters' on-line services. Providing special privileges in the on-line environment to organisations engaged in traditional broadcasting is unjustified and would distort competition between the new digital media companies and the old broadcasting undertakings. The article should be removed.

Title IV - Enforcement measures

Article 35 - Dispute resolution for users

IFPI fully supports the introduction of effective dispute resolution mechanisms at national level, including for users. In countries where dispute resolution mechanisms exist the parties have been able to bring the disputes concerning the conditions for authors' societies' on-line licences to the relevant tribunals. Unfortunately such tribunals only exist in very few countries in the EU.

The introduction of such dispute resolution bodies in every Member State would be welcome. To ensure that such national bodies have the required expertise and that their decisions follow the same fair principles throughout the internal market, these bodies should consist of dedicated judges that have special knowledge of IP matters, and the decisions should be made following the criteria of "fair value in trade" endorsed by the CJEU, as mentioned above.

To ensure that parties use the opportunity to resort to courts and other dispute resolution procedures in good faith, users should be obliged to pay through to the collecting societies at least the uncontested amount of the contested tariff and the balance between the tariff and the uncontested part to escrow. A new paragraph 3 incorporating the above should be added to Article 35.
