



27 September 2012

Karel de Gucht,
EU Trade Commissioner
Member of the European Commission
BE-1049 Brussels
Belgium

Dear Commissioner de Gucht,

UK Music, the UK music industry representative body, welcomes moves towards increasing bilateral trade and investment between the EU and US. We would therefore like to take up the opportunity of responding to the public consultation on the future of EU-US trade and economic relations. We would like to outline our view that policies and measures connected to intellectual property rights should be the priority area under which the future trade and economic relationships between the European Union and the United States are based. In doing so, we will highlight particular existing impediments between the EU and US which need to be resolved in order to achieve this priority.

Bars and Grills Exception

The first impediment is the so called "Bars and Grills" exception. This is a reference to the US Fairness in Music Licensing Act 1998 which exempts some 70 per cent of outlets in the US, such as bars and restaurants, and more than 45 per cent of shops and boutiques, from having to pay copyright royalties for the public performance of music (through the use of TV or radio) in their premises.

The legislation was found to be incompatible under the Berne three-step test as set out by Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In spite of this, the legislation remains unchanged in the US. The Temporary Settlement whereby the US paid \$3.3 million to a fund established in the EU for the benefit of rights-holders ended in 2004. Since then the US is required to send status reports to the WTO Dispute Settlement Board to indicate they are continuing to work with the EU on the matter. We have no reason to believe that this situation will be resolved soon.

The continued refusal by US legislators to change the law in this respect represents a huge threat to the perception of the importance and value of intellectual property globally. For the US to ignore their obligations under international treaties weakens the value of copyright protection. How can a creator be confident that their work is protected and fairly remunerated if the international system which underpins their intellectual property is not adhered to by the US?

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How can developing nations be expected to respect intellectual property if the countries they look up to are not seen to be upholding standards in that area?

Broadcasting Royalties

Furthermore, under existing US copyright law, there is no right for the producers of sound recordings to receive a royalty when their recordings are included in terrestrial broadcasts (eg through FM radio), while this right does exist for other right holders, as well as for the use of sound recordings in other contexts. This particular problem stems from the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). The existence of this anomaly not only means the protection for intellectual property in the production and performance of a sound recording is not as strong in the US as it is in the EU, but it also means the potential US audience for EU performers and producers is more limited. The lack of an economic dividend for analogue broadcasting means smaller EU record companies attempting to market music in the US are more likely to focus on digital exposure where they can expect some form of return. Until the US protects these rights then the EU will not receive them either, yet this is clearly non-reciprocal as producers and performers from the US will be entitled to them in the EU.

Withholding Tax

The UK's commercial music sector is largely made up of small and medium enterprises and it is intellectual property which underpins their business. Problems connected to withholding tax (tax withheld at source) can have a detrimental impact on 92% of the UK's 8,000 music businesses who employ less than 10 people. The delays and complexity connected to the withholding tax can be potentially disastrous to businesses with small or limited cash flows

In the US, withholding tax applies to income generated by performances and royalties overseas. The general rule is that any payment of "U.S. income" made to a nonresident of the U.S. is subject to the 30% withholding requirement. The tax can be claimed back but that incurs compliance costs and delays, as well as complex administration. We seek improvements to the system to make it easier to claim the tax back to ensure that those businesses that depend on intellectual property are not at risk.

American Visas

Finally, the opportunity afforded to performers from the EU to showcase both their creativity and promote their work in the US, thus driving investment in intellectual property rights, is hindered by the American visa system.

For a UK act to perform in the US, it involves a two step process – the US side and the domestic side. For the US side, each band or artist has to apply via an I-129 form (petition for a non-immigrant worker). This is typically done via a US attorney or a US company. By filling in the form (petition for a non-immigrant worker), the attorney or company will act as a petitioner on behalf of the act. A band or solo performer only requires a single I-129 petition. However, a road crew or backing band would require a second petition. Each petition costs approx \$780, although they can cost as much as \$8000. During the domestic side, all visa applicants have to attend an interview at the US Embassy in London or Belfast. They are charged on a per-person basis for fees, appointments and return of passports. The cost alone can be prohibitive; the application process is complicated, confusing and unpredictable.

Having consulted our members (see attached annex) UK Music feels that the most suitable way for us to demonstrate our collected views is to respond to the consultation in the form of a letter, as opposed to the online form. We will also be copying this letter to our relevant domestic government departments and agencies in the UK (the Department for Business, Innovation and Skills, Department for Culture, Media and Sport and the Intellectual Property Office).

UK Music would be very happy to work with you in resolving these issues in order to achieve our priorities for future trade and economic relationships between the European Union and the United States. This presents a huge opportunity to address trade barriers for intellectual property which the US has operated.

Yours sincerely,



Jo Dipple, Chief Executive

Annex

UK Music's membership comprises of:

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- The BPI representing over 440 record company members
- MMF - Music Managers Forum - representing 425 managers throughout the music industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which, on behalf of 50,000 performers and 6,500 record companies, licences the use of recorded music in the UK
- PRS for Music is responsible for the collective licensing of rights in the musical works of 85,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

