TMPDF

TRADE MARKS, PATENTS & DESIGNS FEDERATION

Advancing Industry's View On Intellectual Property Since 1920

Attention: Andres Mola-Arizo@cec.eu.int

28 July 2005

Dear Mr Mola-Arizo,

Thank you for Mr Leuder's email inviting us to make comments on the collective management of copyright across national boundaries.

Our comments are attached and may be circulated by you as necessary.

Yours sincerely

Sheila Draper
Secretary TMPDF

enc.

Fifth Floor, 63-66 Hatton Garden, London EC1N 8LE
Tel: 020 7242 3923 Fax: 020 7242 3924
admin@tmpdf.org.uk www.tmpdf.org.uk

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Commission staff working document

Study on a community initiative on the cross-border collective management of copyright

RESPONSE OF THE TRADE MARKS PATENTS AND DESIGNS FEDERATION

The Trade Marks Patents and Designs Federation represents the intellectual property interests of many British-based industrial companies, both large and small. A list of members is attached.

The TMPDF welcomes the opportunity to comment on the Commission's study. In essence the study suggests an approach, under which, for the on-line distribution of music,

- a right-holder would be entitled to exploit his works through a collecting society (termed a Collective Rights Manager, or "CRM") of his choice located in any EU member state;
- the CRM would be entitled to grant licences throughout the EU; and
- royalties would flow to all applicable right-holders, whether or not located in the territory of the CRM.

In the TMPDF's view, these measures might well be useful in themselves, but

(a) do not go far enough and unless amplified with other measures could have the perverse effect of limiting the development of the on-line music business, and

(b) do nothing to address the admitted deficiencies of the collecting society model in other fields that led the Commission's communication of last summer on *The Management of Copyright and Related Rights in the Internal Market* to propose legislative action.

Additional changes needed for the on-line distribution of music

Underlying the paper appears to be a presupposition that collecting societies are desirable in themselves and should be encouraged at the expense of individual licensing. Thus it is seen (second bullet at the top of page 39) as a disadvantage of the status quo that it might encourage right-holders to license on an individual basis. CRMs are but one means to an end - the granting of licences from right-holders to users. They can perform a useful service if they are able to offer a wider repertoire of works to the user, but this is at the cost of introducing the CRM as an intermediary, whose operating costs have to be borne by the user, the right-holder or more often both. If they offer a service that is useful to both parties they deserve to succeed. But they should not be favoured over individual exploitation, if that is the route the right-holder prefers. ***It should be made clear that the right-holder always retains the right to exploit his works on an individual basis.*** The granting of licenses direct to users by the right-holder himself, either in addition to or instead of licenses granted by a CRM increases competition and provides additional choice for users. There must be no compulsion or even bias in favour of collective management and any legislative provisions in member states requiring collective management need to be dismantled.

The paper proposes competition between CRMs in offering their services to right-holders. Such a change might, at least to some extent, improve transparency in the mode of operations of the CRMs. It might also lead to increases in efficiency, but it is at least as plausible that all it would do is encourage CRMs to seek to surpass one another in the size royalties they pass on to right-holders by charging more to users. That is a consequence of the fact that the arrangement as proposed would be likely to lack the most important feature of a competitive market, namely competition between suppliers in the offer of services to users. In order to obtain the full advantages that competition can offer in driving out inefficiencies and reducing costs, ***there should be competition between CRMs in the supply of licences for individual works.*** That is also important to right-holders who choose to offer their works through CRMs. They must be able to enter into non-exclusive agreements with more than one CRM. In this way they can foster competition between the different CRMs and

thereby ensure the widest promotion of their work across the EU. This competition should also add to the pressure to drive down costs to the benefit of users.

The paper seems to imply (para starting "Option 3" on page 42) that the more the CRM can charge the better. But the commercial users who would contract with the CRMs are all themselves intermediaries in distributing works to members of the public, who as the ultimate consumers, will end up paying for the licences. The paper shows scant concern for the interests of the user, both individual and commercial. There is a real danger that the arrangement envisaged by the paper will create powerful organisations that will be virtual European-wide monopolies for the rights under their control. Yet it will provide no safeguards. We believe that this is not an area that can simply be left to the general competition law. ***To safeguard the interests of users, organisations that grant licences of Europe-wide scope should be matched by European-level tribunals operating similarly to the Copyright Appeal Tribunal in the United Kingdom.*** Indeed, it would be a disaster if a CRM granting rights in a territory like the UK that has a tribunal should be able to escape its reach by using a CRM in a territory that has no such body to grant rights that extend to the UK.

It would also be desirable to recognise the status of CRMs as facilitators between right-holders and users by introducing a mandatory requirement that both sides should be represented on the governing bodies of CRMs

Other fields

This Federation has already pointed out in its response to the Paper on Collective Management that there are problems with collective management in areas other than the on-line distribution of music that require action at the European level. For instance it is possible to obtain a blanket licence to make copies of paper originals for purposes of commercial research in the UK when there appears no corresponding possibility in some other member states. In addition, the various problems of lack of transparency, inadequate governance, inefficiency, and shortage of proper supervision that the current paper acknowledges in the field of on-line music distribution apply equally to collecting societies in other fields. The Commission, having recognised the problems in its earlier paper, and proposing measures (as yet far from adequate, we would argue) to deal with them in the on-line music field, should act similarly for collecting societies in other fields, or the shortcomings it has identified will persist.

Levies

The paper mentions that CRMs draw revenue from levies on equipment and media for private copying of audio and audio-visual works. The interaction between levies and the pan-European regime that the paper envisages needs further thought. In member states with levies, the levies are collected by a CRM based in that state and are seen as compensation for the use of the reproduction right by individuals making copies under the private copying exception. If the CRM in country A loses the right to license a particular work because pan-European licensing rights have been granted to a CRM in country B in preference to the CRM in country A, then any levies chargeable by the CRM from country A need to be reduced, because it should no longer be entitled to fair compensation for the exercise of rights it does not possess. Also, the possession by a CRM of a revenue stream from levies will distort competition between CRMs for the acquisition of licensing rights because it will give it an unfair subsidy. ***The changes proposed by the paper reinforce the need to reform the levies regime applicable in some member states and the need to ensure that they are not perpetuated or extended in the digital world.***

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