FEDERATION INTERNATIONALE DES ACTEURS
INTERNATIONAL FEDERATION OF ACTORS
INTERNATIONALER SCHAUSPIELERVERBAND
FEDERACION INTERNACIONAL DE ACTORES

Guild House, Upper St. Martin's Lane
London WC2H 9EG United Kingdom
Tel: +44 20 7379 0900
Fax: +44 20 7379 8260
E-mail: office@fia-actors.com
Website: www.fia-actors.com

President TOMAS BOLME
DOMINICK LUQUER General Secretary

Study on a Community initiative on the Cross-border Collective management of Copyright

Preliminary comments on the European Commission Staff Working Paper

The International Federation of Actors (FIA) represents more than one hundred performers' unions, guilds and professional associations around the world. Our members, who speak out for all performers – with the exception of musicians and visual artists - in both the music and the audiovisual sector, have a vested interest in the on-going European debate focusing on the collective management of copyright and related rights.

Having received a copy of the Commission staff working document focusing on a possible Community initiative on the cross-border collective management of copyright, we wish to express a number of observations on both procedure and content.

We have serious reservations in relation to the course of action adopted and enforced on all interested parties. The Commission's paper, incidentally only available in English, raises significant concerns and three weeks is by all means a rather inappropriate time limit for our organisation to consult with our membership and reply constructively – especially when those weeks happen to overlap with traditional summer breaks in most European countries. We therefore call on the EU Commission to allow more time for a proper analysis of this important document and to make additional linguistic versions available as soon as possible.

As to the content of the working paper, and without prejudice to further, more detailed comments on this issue, we wish to put forward a few preliminary observations.

In relation to traditional, off-line uses and the cross-border distribution of royalties, we are surprised to read on page 55 that the so-called "Option 3" – i.e. giving to each right holder the choice to select a collecting society anywhere in the Community to licence the different uses made of his/her work across the EU - should also become the desirable long-term model in the business.

We do not believe that this option is appropriate for off-line licensing, given that much off-line use is still (and is quite likely to remain) national in scope. It would not only be unpractical but actually rather detrimental to the economic interest of right holders. Collecting societies would have to negotiate with scores of operators exploiting content nationally in 25 countries, with significant costs that can be reduced today by way of reciprocal agreements.

Furthermore, local off-line content providers would also need to negotiate national use with a plethora of collecting societies – potentially from several different countries, representing the same categories of right holders and for the same use - to be able to fully exploit an EU-wide repertoire.

That being said, we share the impression of the Commission that reciprocal agreements should be modernised, to ensure they are as valuable to non-resident right holders as they are to resident artists, and we reinstate our view that B agreements should be discontinued. Right holders should be able to seek out the services of another CRM if they so wish, as it is already the case in various countries.

More generally, we are surprised by such an extensive use of competition-driven principles in the field of collective management. While caution should always be used to avoid any abuse of dominant position, we believe that efforts should also be made to balance the content providers' need for extra-territorial licences and one-stop shops with the need for copyright to fully achieve its goal, i.e. ensure that right holders can control the exploitation of their work and derive a fair benefit from it.

We note that the Commission paper only explicitly refers to "authors" in the music sector. However, implying that Option 3 should become the appropriate solution "in the business" makes us believe that this is in fact what the Commission is envisaging for all right holders, including performers. We believe in this regard that neighbouring rights in both the audiovisual and the music sector are not sufficiently harmonised and enforced within the EU for any such option to be convincing.

The Commission working paper seems to tip the balance in favour of content providers[1], though at pains to explain how the much-preferred "Option 3" would in fact be rather in the best interest of right holders. Several considerations already make it possible to query whether this is indeed the case.

1. The ability of right holders to choose freely to move to a competing collecting society if not properly satisfied by their first choice is not likely to materialise, especially for the less successful ones. Provided that collecting societies will effectively grow (re: shrink) into a handful of powerful CRMs, most performers will have no other option if they wish to receive some level of remuneration but to stick to the society they are members of. Star performers would gather in a few prestigious CRMs, which would carry much bargaining clout, while other artists would have to rely on less effective societies, at least until they acquire higher status. In other words, Option 3 is likely to bring about discrimination within the profession, which is not acceptable.

2. Although seemingly commendable, giving performers the possibility to choose one society to manage their rights universally would engender a situation where some of the former may decide do so while others may not. Unless performers were made to choose one society for the necessary multi-territorial on-line management of their rights – which would run counter their freedom to decide the scope of the license they wish to give – on-line content providers would be left with the uncertainty as to which society represents which performers, there would be two parallel systems and reciprocal agreements would still need to be maintained, which does not seem compatible with the spirit of Option 3.

[1] *Incidentally, the paper mentions data provided by Edima in relation to the direct cost of negotiating a single licence. While we do not wish to indulge on those figures, we believe that one should take all profits into account, i.e. not just those related to downloads but also to additional, customary sources of income – namely from advertising – which are boosted by the content which is made available.*

3. Performers are likely to shop around much less than anticipated in the Commission working paper. The majority of them has very strong bonds – including linguistic - with their national collecting society and will not confide in other societies in other countries. Furthermore, we do believe that performers must have a strong role in the administration and control of their collecting societies, which ties in tightly with their ability to trust the management by those societies of their vested interests. This would hardly happen if they were to choose societies in foreign countries, merely on grounds of their perceived "efficiency". As a result, those CRMs would end up being run by technicians, with little or no knowledge of the industry, which, in turn, would seriously compromise the reliance that is needed to run this service efficiently.

4. Although the Commission claims at times in its paper to be seeking the best interest of right holders, it builds on the alleged deficiency of two tentative systems developed by the industry (i.e. the "Santiago agreement" and the IFPI agreements) to rush to hasty conclusions. We believe that the Commission has not given evidence that similar agreements cannot provide a workable solution for off-line cross-border licensing. More efforts should be made to help right holders develop workable answers to the claims of content providers, and apparent shortcomings in attempted models should not consequentially become the reason to swing for an "Option" 3 solution. On the contrary, we see merit in the Santiago agreement and believe that more should be done to encourage CRMs to adopt and implement similar solutions for the on-line cross-border licensing of the rights of their members.

It is unclear whether Option 3 is also based on the assumption that a handful of societies will finally manage the rights of different categories of right holders – which does seem very questionable. What seems certain is that, given that Option 3 does away with reciprocal agreements, content providers would still need to deal with a large number of collecting societies for the same categories of right holders, given that none of them would be able to offer a global repertoire.

The belief that they will eventually shrink down to just a few is not supported by solid evidence. Neither is the Commission providing evidence that this type of competition will bring the benefits it is so generously describing in its document. Competition in other sectors rather shows a burgeoning of operators, each offering "packages" that are hard to match with one another, making decisions by consumers often less assertive and responsibilities rather ambiguous.

Finally, we struggle to understand by the working document what kind of action is currently envisaged and would welcome additional clarity in this respect. The document rather dimly mentions a "proposal", without specifying whether the Commission is envisaging a directive, a decision or rather a set of recommendations.

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