MCPS-PRS Alliance position on the European Commission's Consultation on a proposal for a recommendation on Creative Content Online in the Single Market

29 February 2008

Introduction:

MCPS and PRS are the not-for-profit UK collecting societies that ensure composers, songwriters and publishers are paid royalties when their music is used: from live performance to TV and radio, CDs to DVDs, downloads, streams and everything in between. Royalties create a future for music by supporting creators while they continue to write. MCPS and PRS are committed to delivering maximum royalties and world-class service. They work together in an operational alliance to get the best value for the music use of composers and songwriters everywhere.

Executive Summary:

Our composer, songwriter and publisher members have every interest in seeing their music being licensed and enjoyed as widely as possible. They are therefore fully supportive of the development and encouragement of a vibrant online market for creative content and have already shown their commitment to this in the strides they have taken with MCPS-PRS towards achieving multi-territorial licensing.

For the nascent online market to reach its full potential as quickly as possible it is vital to allow it the time and freedom to continue to develop without further intervention. Any form of prescription at this stage could both hinder and delay progress.

Introduction:

Digital Rights Management

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems?

Whilst we accept that effective interoperable DRM systems could support online creative content services, not only in the Internal Market but globally, we believe that it is licensing solutions which are key to supporting the development of such services. DRMs are merely tools which can be used to support licensing. Certainly they should not impede licensing on account of their being onerous or not being interoperable. Licensing of online music services has been developing notwithstanding the current status of DRMs.

It is important to be clear what aspect of DRMs we are referring to in this context. DRM is a generic term which encapsulates both technological protection measures - TPMs - (used for controlling access to works) and rights management information - RMI - (used for monitoring and tracking usage of works for licensing purposes). It is the latter strain of DRMs that can support licensing.

It is vital that the stakeholders in the market for online creative content services be left the freedom to develop DRM solutions which fit with and support the business models they are shaping and to the extent that such solutions may be required. DRM solutions entail substantial investment and it is entirely right that any such developments should be market led and not the subject of regulatory intervention.

Which commendable practices do you identify as regards DRM interoperability?

A number of initiatives are already in hand to develop global standards and tools for rights management systems[1] and, to the extent that they support licensing activities and the accurate identification of rights holders whose works are used, MCPS-PRS has actively participated in and invested in their development.

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[1] See Appendix 1

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

We agree that any information provided to consumers concerning interoperability and the protection of their personal data should be transparent and easy to understand.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market?

MCPS-PRS licenses online music service providers who in turn provide services to consumers. As such we license businesses and not consumers directly and do not have any direct involvement in EULAs. However, through our role in the value chain between creator and consumer we facilitate access to creative content online and in doing so we attempt to streamline the administration of our services wherever possible. This in turn should help to ensure the delivery of suitable EULAs by online music service providers.

We believe that the complexity and legibility of business to business licensing practices and procedures have a marginal impact on business plans to develop new online services. Nevertheless, as a matter of good business practice we always strive for clarity, simplicity and certainty in the construction and terminology of our licences which we write in plain English.

Notwithstanding our position in the value chain it is relevant to mention that we have been at the forefront of encouraging the new generation of websites consisting in large part of user generated content through our licensing of e.g. YouTube. Our members have not wanted to block this exciting new development but it is important that end-users should understand, just as in the case of any other EULA, the actual scope of the rights being granted. We therefore favour EULAs being expressed in the simplest and clearest possible terms as a means of maintaining awareness of and respect for copyright.

Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

The licences issued by MCPS-PRS are written in plain English and not in "legalese". We also offer smaller users, such as small websites, a Limited Online Exploitation Licence. This is shorter than our Joint Online Licence and is particularly suitable for licensees who have limited access to legal resources.

We take this opportunity to express our concerns about the Creative Commons EULAs, notwithstanding their seductive use of icons. Regrettably the underlying long form licences are the very model of complexity and so Creative Commons licences fall short of the requirement for simplicity and legibility. Their legal and linguistic complexity obscures to the non-lawyer creator the significance and full implications of what they are giving away, namely a perpetual, irrevocable licence of rights for nil consideration (in the case of a non-commercial licence), the effect of which is likely to preclude any opportunity to earn income from the work licensed even if subsequently licensed under a Creative Commons commercial licence.

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

This is a matter between service providers and consumers and we are not in a position to comment on this.

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

Licensing is the priority for achieving successful digital content distribution and, to the extent that DRMs are considered necessary and appropriate by the market to support such licensing, we agree that access to them should not be discriminatory. See our response to (1) above.

Multi-territory rights licensing

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

We would welcome intervention to alleviate the problems caused by the current withholding tax regime and which is proving to be a significant obstacle to multi-territorial licensing[2].

Aside from this we do not believe a Recommendation is either appropriate or necessary in order to achieve multi-territorial licensing of rights and indeed we believe that at this stage it could delay progress. Even if a Recommendation were to be introduced to address the issue of multi-territorial licensing *per se*, its scope should expressly exclude licensing of online music rights as these have already been covered by the 2005 Recommendation published by DG Internal Market[3]

Instead the market should be allowed time to evolve and stakeholders should be given the freedom to develop and test new business models before any regulation is even contemplated. Furthermore, the right of right holders to choose how their rights are licensed and managed, whether directly or collectively and, in the latter case, by which collective, should be maintained.

In our experience, whilst the 2005 Recommendation has supported and arguably encouraged the transition to multi-territorial licensing of online and mobile music rights, it has not been the driver in itself. Music right holders have always had the right to choose how their rights should be managed[4], i.e. whether to manage them directly or collectively and, in the case of the latter, by which collective rights manager(s). Some right holders, including EMI Music Publishing, had already started taking steps to re-organise the management of their online rights before the 2005 Recommendation was published. Since the Recommendation many other right holders have altered the way that their online rights are handled in Europe, which is why that environment should not be destabilised by further intervention.

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[2] See Appendix 2

[3] Recommendation on cross-border management of copyright and related rights for legitimate online music services 2005/737/EC

[4] See GEMA decisions of early 1970's

The very fact that right holders have the right to choose enables them to exert control over how their rights are managed. It is to be expected that they will only entrust the management of their rights to a collective rights manager which is able to meet their standards and expectations and which they are confident will manage and respect their rights. It is the efficiencies, standards of service and transparency that collective rights managers are able to offer which guide right holders in the choice they make.

There have been a number of announcements over the past year about the choices already being made by leading right holders[5], demonstrating their confidence in selected collective rights managers, and further announcements are expected to be made in due course.

Collective rights managers are of course sensitive to the need to streamline as much as possible the access points for obtaining licences and to make the user experience as easy and straight forward as possible without jeopardising the interests of right holders, namely to be able to appoint the collective rights manager(s) of their choice and maintain the value of their music. Collective rights managers are currently actively engaged in seeking possible models to do this and it is vital that they be given sufficient time to do so and to find a consensus without regulatory intervention.

We welcome the establishment of the Content Online Platform and we look forward to having the opportunity of sharing our experiences so far in meeting the challenges of multi-territorial licensing.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works?

The market for multi-territorial services has already started to develop and this in turn is leading the developments in multi-territorial licensing. The market now needs to be given time to continue to evolve and to create the most suitable licensing solutions without the constraints of regulation.

Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

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[5] See Appendix 3

With regard to a model which distinguishes between primary and secondary markets, we do not fully understand what is meant but we will presume for these purposes that this is one which distinguishes between a licence for a single national market and a licence covering many territories. We do not believe it is necessary to draw any such distinction at the level of business models. If a right holder or collective rights manager controls the rights for several territories then those rights can be licensed for all or any part of those territories, including for one territory only or even a region within one territory (to the extent that an online service may be so specifically tailored), according to the needs of the user. Given the flexible nature of copyright we do not believe there is any need for a licensing model which draws such a distinction.

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

The business model for licensing music has always facilitated access to all music, whether it is in respect of high volumes or in response to low demand (the "long tail"). However, the consumer's *de facto* choice has previously been limited by the physical constraints associated with packaging and selling music on CD and, before that, on vinyl records[6]. In the online environment none of the constraints of the physical world exist and it has been possible to access a much wider range of individual songs and musical works than ever before notwithstanding that the full repertoire of music has always been available for licensing through collective rights managers. This has resulted in the "long tail" phenomenon being more pronounced in the online market and scope for a more culturally diverse market than ever before with consumers being able more easily to indulge their individual tastes in music, whether for popular or niche, old or new, local or international repertoire.

The distinction between a national licence and a multi-territorial licence does not of itself have any bearing on consumers' choice of the music they consume. However,

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[6] Consumers had to buy whole albums and were not able to select and buy individual tracks in cases where they may not have liked all the tracks on an album (not all the tracks on an album were available as singles). There were also constraints on the space available in record shops for displaying records. Equally record companies were not able to store their stocks indefinitely and they would usually delete records from their catalogues after a given period of time.

the broader the geographical scope of a licence the greater the chance of there being more usages of a particular work in any particular accounting period. Therefore, given that payments for each usage on the online sphere are generally micro-payments, the distribution of the payments due to each right holder is likely to be more cost effective in the case of a multi-territorial licence than a national licence.

Legal offers and piracy

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

Licensing the use of copyrights requires co-operation between right holders and their representatives (collective rights managers) on the one hand and users of music, that is those providing online services, on the other. It is vital that Internet Service Providers be encouraged to co-operate over licensing and monetizing the use of the music which has become so central to the use of their services.

MCPS-PRS has been licensing online music services since as early as 1997, initially through separate licences issued by MCPS and PRS respectively and, since 2002 through their Joint Online Licence. The fact of licensing has helped to engender respect for our members' rights. However, Internet Service Providers have not yet seen fit to secure licences for the vast volumes of music which pass through their services, invoking the shield of Article 12 of the eCommerce Directive, and this needs to be remedied as a matter of urgency. The Commission has an important role to play by working with all the stakeholders to encourage due respect for copyright.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to followed?

We favour a licensing approach as outlined above. We are not clear on exactly how the French MOU will be implemented in practice but we take the view that the principle of terminating subscriptions of customers after three warnings should be regarded as a last resort and should only be considered where every effort to license has failed. We believe that Internet Service Providers should be responsible for taking out an appropriate licence and for ensuring that copyright is respected by their customers. In doing so they should use any device that may be appropriate to prevent infringement, including responding to notice and take down procedures and using filtering technologies.

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

See our response to (10) above. Filtering measures are still being developed and are not yet fully effective but we believe they could potentially offer an effective means of preventing online infringement of copyright and that they should therefore be one of the measures considered.

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APPENDIX 1

DRM Initiatives

TPMs can be used effectively to prevent access to material which may be protected by copyright but which has not been licensed for a particular use. The application of TPMs provides benefits to rights holders as they enable content to be managed securely and in a manner governed by the rules which they specify. A significant obstacle to the widespread adoption of TPMs however is the impact that these technologies have on the end user experience. Users are resistant to the adoption of TPMs where they reduce the flexibility for handling content in their local environment – including networked computers and portable devices.

An early attempt to achieve industry-wide consensus for the introduction of effective interoperable solutions for TPMs failed. The Secure Digital Music Initiative (SDMI), set up in December 1998, was an attempt by rights holders, technology developers and consumer electronics manufacturers to define an interoperable standard for TPMs.

While SDMI did not succeed, a parallel initiative achieved a far greater measure of success but has yet to be widely adopted. This is the suite of standards that comprise MPEG-21[7] – undertaken under the auspices of the International Organization for Standardization (ISO). A Technical Report[8] has been published that sets out a vision for a multimedia framework designed to support the management and trading of all types of digital content. Within the framework, MPEG has focused on standardizing only those components that require an interoperable solution while leaving the open market to develop competitive solutions where appropriate. This includes an interoperable standard for Intellectual Property Management and Protection (IPMP).

As well as IPMP, a crucial requirement for rights holders within the context of a multimedia framework is the need to issue licenses for the use of content. MPEG has developed a standardized Rights Data Dictionary and Rights Expression Language to enable rights holders to specify the business rules governing the use of digital content where these are required.

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[7] Motion Picture Expert Group – http://www.chiariglione.org/mpeg/standards/mpeg-21/mpeg-21.htm

[8] http://standards.iso.org/ittf/PubliclyAvailableStandards/c040611_ISO_IEC_TR_21000-1_2004(E).zip

RMI is a tool to support licensing and this also needs to be interoperable. Business partners who trade in an ecommerce networked environment need to communicate using automated electronic messaging. This can only be successfully achieved where the 'language' for the communication of vital information is standardized. For this reason, MCPS-PRS Alliance has positively supported and invested in the development and adoption of global standards and tools for rights management.

Internationally recognized identification standards, such as ISWC[9], ISRC[10] and ISAN/V-ISAN[11], have increasingly been adopted by the creative industries. The use of these standards has, for example, facilitated the necessary exchange of data between collecting societies.

Further, DDEX[12] has developed a suite of international standard messages for business partners to trade information about releases and sales of digital content. In the case of music, for example, this results in more accurate music usage reporting and accounting by users and in the fair and transparent distribution of royalties by collecting societies to right holders for the use of their music in online services.

[9] International Standard Musical Work Code – http://www/iswc.org

[10] International Standard Recording Code – http://www.ifpi.org/isrc/

[11] International Standard Audiovisual Work Number – http://www.isan.org

[12] Digital Data Exchange – http://www.ddex.net

APPENDIX 2

Withholding Tax

celas

the first place for licensed online and mobile music use

CELAS operates out of MCPS-PRS Alliance and GEMA offices in the U.K. and Germany:

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Mr C McCreevy
European Commissioner for Internal Market & Services
European Commission
B-1049 Brussels
Belgium

9 July 2007

Dear Sir

Withholding Tax - a barrier to competition within the EU

You will be aware that the MCPS-PRS Alliance and GEMA have been in the vanguard of implementing the Commission's 2005 Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, having always taken the view that the "option 3" upon which the Recommendation is built is in the best interests of our respective writer and publisher members.

We have been keeping Mr Tilman Lueder fully informed of our progress so far on implementation, including in relation to CELAS, our joint venture together for multi-territorial licensing of the EMI catalogue and our advanced licence negotiations with a number of major digital service providers for the CELAS repertoire.

We are very troubled by the fact that the current regime of withholding tax applied in each Member State is inhibiting the free cross-border and multi-territorial trade in online music rights in the Internal Market. The double tax jeopardy inherent in the regime when more than two territories are involved is proving to be a hindrance to the full and effective implementation of the Recommendation. This issue does not appear to arise in relation to trade in physical goods or even services.

In its Statement of Objections against CISAC and its European members dated 31 January 2006 the Commission alleged that the network effect of bilateral agreements between national royalty collecting societies (collective rights managers [CRMs]) was

anti-competitive and therefore illegal. In response to this the Commitments[1] offered by the societies are intended to result in multi-territorial licensing not only of online rights, as contemplated in the Recommendation, but also of satellite and cable retransmission rights.

Per contra, the withholding tax regime is predicated on bilateral arrangements. The current regime encourages the retention of bilateral agreements by making it far more attractive for the right holder's national CRM to license music uses in its own territory than a CRM from another Member State to do so, not only in terms of the administrative burden of meeting withholding tax requirements but most critically on account of the absolute amount of tax for which right holders would otherwise be liable.

Consider three different scenarios to illustrate the issue:

1. A songwriter, music user and CRM all resident in the UK;
2. A songwriter and CRM resident in the UK and a music user resident in Italy;
3. A songwriter resident in the UK, a music user resident in Italy and a CRM, representing the songwriter, resident in Germany.

1. A songwriter, music user and CRM all resident in the UK:

When the UK songwriter's copyright work is exploited by a user also resident in the UK under a licence granted by a CRM in the UK, the songwriter is subject to UK income tax on his net royalty income and there are no withholding tax implications.

2. A songwriter and CRM resident in the UK and a music user resident in Italy:

When the UK songwriter's copyright work is exploited by a user resident in Italy under a licence granted by a CRM in the UK, the songwriter's royalty income is potentially subject to double taxation, that is tax in both Italy and in the UK with the tax due in Italy being withheld by the user from the payment made to the CRM on behalf of the songwriter.

Double taxation treaties have long been in place between countries to prevent such double taxation. They are by nature bilateral agreements between two countries and contain anti-avoidance rules that ensure the parties act on a purely bilateral basis. Whilst they are effective in preventing double taxation, the administrative burden they impose on the individual songwriter, the user and the tax authorities in both Member States should not be underestimated. However, this is something that all the parties, including the CRMs on behalf of their songwriter members, have become accustomed to handling.

3. A songwriter resident in the UK, a music user resident in Italy and a CRM, representing the songwriter, resident in Germany.

The new issue that arises under the Recommendation and indeed in the context of all multi-territorial licensing is that of triangulation. If the UK songwriter chooses to entrust his rights to a CRM in Germany and the German CRM then attempts to license the UK

[1] The Commitments were published in the Commission's Notice in the Official Journal of 9 June 2007.

songwriter's copyright work to a music user resident in Italy, then under current tax rules the transaction is subject to the provisions of the double taxation treaty between Germany and Italy. This means that the user in Italy will be obliged to withhold tax on the royalty payments made to the CRM in Germany. When the CRM then passes those royalties on to the songwriter in the UK the songwriter is then obliged to pay UK income tax on such income.

Whilst limited relief may in principle be available to the UK songwriter by reclaiming some of the tax withheld by the Italian user, the cost and administrative burden of doing so will often outweigh the benefit of any such relief. The tax withheld will therefore often be another cost worth between 25% and 33% of the gross royalty value deducted from the songwriter's income. This will have most impact on smaller songwriters who are less likely to have the experience and capacity to reclaim the tax withheld.

Additionally, for the CRM there is a massive administrative burden which arises from the fact that the EU member states have implemented a range of different WHT exemption and release regulations and procedures. Not only has the CRM to comply with bilateral procedures and regulations applicable between the country of residence of the CRM and the country of residence of the user, but also those regulations applicable between the country of residence of the CRM and the country of residence of the songwriter.

This issue arises in the case of each and every one of the tens of thousands of songwriters whose rights are managed by each CRM. It is the songwriters themselves who will ultimately bear this expense. Furthermore the procedures involved will impose a significant additional administrative and financial burden on the tax authorities.

The effect on CRMs

The current withholding tax regime therefore deters rights holders from joining CRMs outside their own Member State and, *per contra*, it positively encourages them to join their own national CRM for fear of their royalty income being subjected to double taxation. This cannot be reconciled with the fact that under the Recommendation rights holders have the express right to choose which CRM to entrust their rights to. The purpose of the Recommendation is to allow rights holders the freedom to choose the CRM offering the most attractive and efficient services and this freedom should not be defeated by the residency of the CRM for tax purposes. This is also contrary to the objectives of the Commission's Statement of Objections.

It should be understood that this same issue would arise even if Option 2 were to have been adopted by the Commission as the withholding tax regime is geared towards bilateral arrangements only. Both Options 2 and 3 envisage multi-territorial licensing in one form or another to meet the needs of the borderless internet environment and yet the withholding tax regime does not support this.

As well as effectively denying rights holders any real choice between CRMs, the current withholding tax regime has the effect of making it extremely difficult for CRMs in different Member States to merge in order to provide benefits for their members through economies of scale since the members of one of those CRMs will inevitably fall foul of the anti-avoidance procedures.

The other anti-competitive consequence is that it becomes virtually impossible for a CRM to offer a package of rights across the EU on behalf of third parties, such as the CRMs in the USA. Any cross-border licensing of these rights by an EU based CRM will result in withholding tax on the payments to the US societies. This effectively locks the US societies into their existing network of bilateral agreements which only allow the incumbent local society to administer their works in each separate EU territory, an effect

that was objected to by the Commission in its Statement of Objections against CISAC and its European members.

Conclusion

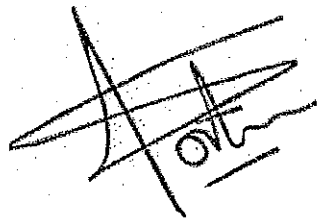
Whilst taxation is generally a matter under the control of individual Member States, there are in fact several examples of EU wide tax arrangements including, for instance, the VAT rules regarding the application of VAT to online services and the rules governing transfer pricing between and within EU states.

It is vital to the growth and success of the market in online music rights within the EU that multi-territorial licensing should be encouraged, as has been acknowledged in the Recommendation. One of the reforms that would facilitate this is the harmonisation of the withholding tax regime in such a way that withholding tax should not apply to transactions within the EU.

We urge you to take this up within the Commission in the first instance as a matter of urgency. We would be pleased to attend meetings to discuss this in more detail and to assist in whatever way may be required in order to achieve the necessary result.

Yours sincerely

Signed by and on behalf of



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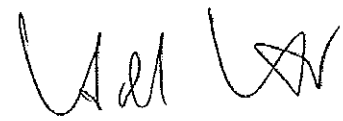
Steve Porter
for and on behalf of
MCPS-PRS Alliance Ltd

Signed by and on behalf of



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Dr Harald Heker
for and on behalf of
GEMA

cc MrTilman Lueder

APPENDIX 3

Announcements over the past year about the choices already being made by leading right holders:

1. EMI Music Publishing appointed CELAS, a joint venture between MCPS-PRS and GEMA (Germany), to manage its online and mobile rights across 40 European countries, including the entire EEA, in its Anglo-American repertoire with effect from 1 January 2007;

2. Warner Chappell authorised GEMA, MCPS-PRS and STIM (Sweden) in January 2008 to offer pan-European digital licences in its Anglo-American repertoire;

3. peermusic has appointed MCPS-PRS) to represent its Anglo-American repertoire and SGAE (Spain) to represent its Latin repertoire, in both cases for pan-European online and mobile licensing with effect from 1 January 2008;

4. Universal appointed SDRM (France), through a joint venture with SACEM (France), in January 2008 to grant pan-European digital licenses of their English and French language repertoire;

5. ARMONIA, announced in 2007, brings together the repertoires of SACEM (France), SGAE (Spain) and SIAE (Italy) for multi-territorial licensing.