Comments to the DG INFSO and DG MARKT Reflection Document on "Creative Content in a European Digital Single Market: Challenges for the Future"

A contribution by the community of Danish Composers' Organizations DKF, DPA and DJBFA, board members and owners of the Danish CRM Koda.

I. Introduction

1. About the Signatories

DJBFA, the Danish Society for Jazz, Rock and Folk Composers, is a society of professional songwriters and composers founded in 1973. To date, the organization represents more than 1.200 members and thus constitutes the largest of all the associations of Danish composers. DJBFA's objective is to safeguard members' professional and economic interests. As such, DJBFA negotiates agreements and contracts on behalf of its membership and frequently takes part in collective bargaining with binding effect on the members. DJBFA works to create better conditions for Danish songwriters and composers and as such represents their interests vis-à-vis national and EU legislators and regulators on cultural policy questions.

DPA is a creators' union founded in 1918, which today represents 600 Danish authors within all genres of popular musical culture, from hard rock over cabaret to music created for children. Our members subscribe to the same objective: The fight for our right to fair remuneration, when our creations are being used. DPA promotes and facilitates the creation of new music and lyric, assists members in their professional life by providing economic and legal assistance, offering "up-grading courses" and inspirational seminars and providing a platform for cultural exchange with artists from other countries. As a board member of the Danish collecting society KODA, DPA steers the society's day-to-day business in the interest of right-holders, creators and publishers alike.

DKF, the Danish Composers´ Society, was founded in 1913 and with its 216 members is the smallest but oldest of the three composers organizations. It represents the interests of professional creators of art-music and sound-art across all genres. It is the DKF's mission to support composers and sound-artists in their efforts to utilize their artistic potential to the full. As such, we contribute towards creating favourable working conditions to enable artistic experiments which challenge boundaries and are driven by curiosity and courage.

2. Preliminary Remarks

The Danish Composers' Organizations welcome the Commission's Reflection Paper on "Creative Content in a European Digital Single Market" published on 22 October 2009 and are grateful for the opportunity to share their views in relation to the ideas and proposed actions raised in this document.

We would like to emphasize that as members and owners of KODA, we strongly support and fully embrace its position on the Commission's Reflection Paper. However the particular nature of our business as professional interest organizations and creators' union as opposed to the business of a collecting society requires careful consideration and therefore we are putting particular emphasis on certain points of crucial relevance for our particular business model.

Furthermore, it should be highlighted that although the future handling of rights of other creative areas are more or less closely linked to the concerns for the future of musical creation, our contribution will focus on

those areas of the Reflection Paper that have a direct impact on creators in the music environment, in particular the need for a diligent protection and consideration of authors rights in the context of the EU's intention to restructure and regulate on issues such as licensing and collective rights management. As acknowledged by the Commission itself in its Reflection Paper, the different creative areas call for different approaches, some of them requiring a combination of manifold models and solutions.

II. General Comments

1. Commission's competence for copyright issues

First of all, as a point of general nature, we would like to take up the point according to which the controversies that have surrounded the number of previous EU initiatives concerning online content "highlight the need for adequate solutions and the difficulties of designing and implementing them."

To our mind, a basic hindrance in the past for the elaboration of a consistent and balanced solution to the challenges has been that several Commission services have been in charge of dealing with authors' rights related questions, very often in discord and contradiction to each other.

We therefore strongly urge the Commission to ensure that in the future process regarding the issues raised in the Reflection Paper, a strict and diligent coordination process between the different units is put in place or alternatively that the issues are dealt with by one unit only.

2. The Fundamental Difference between Authors' Rights and Copyright

The Reflection Paper states that "copyright is the basis for creativity" and "one of the cornerstones of Europe's cultural heritage and of a culturally diverse and economically vibrant creative content sector." This statement reflects once again a fundamental **semantic inconsistency** which we have pointed out in the past time and again in the context of other Commission proposals, and would like to explain again here.

To fully grasp the mechanics of collective rights management, it is paramount to understand that there are two global rights regimes, which fundamentally differ from each other:

1) The **regime of Authors' Rights**, which is a more than 200 years old continental European concept.
2) The **regime of Copyright**, which is an Anglo-American, industrial concept.

The vast majority of European languages with the exception of English uses one unique word to describe what is actually at stake: Authors Rights, which literally translates into "Urheberrechte" (German), "Droits d'auteurs" (French), "Ophavsret" (Danish) etc. The inconsistencies become very apparent at international hearings and conferences, where the European terms translate into the Anglo-American term "copyright". The concept of copyright is, however, diametrically opposed to the Authors' Rights' concept, which signifies the right granted to the creator of an artistic piece of work. These inconsistencies entail a fundamental confusion of concepts, which as such hinders the finding of a fair and equitable solution to the rights management challenges we are facing in the digital age. To clarify:

The Authors' Rights regime does not allow a 100% "buy-out" of rights via the collective management system. Thus the creator is protected against himself and his permanent or interim poverty. Some CRMs – as for instance Koda - only allow 1/3 of the yearly economic revenue from a composer's work to be transferred via the CRM to a third party, which must be a recognized, professional music publisher. Other countries allow a 50/50 share. The Authors' Rights concept ALWAYS refers to the primary right granted to the creator, who has sometimes signed away parts of the economic revenue generated by his/her works to

a publisher in return for the aspiration that the publisher will promote and work for an optimal exposure and distribution. In consequence, this makes the publisher's right a secondary right, which is always derived from and depending upon the primary creation.

The copyright regime allows for a 100% buy-out, which leaves creators of music with a level of economic and moral control close to zero, similarly to the level of control granted to for instance creators in the world of film making. The copyright concept usually refers to the Publishing house or corporate business entity that has bought out the right from the original creator, who in turn looses all his rights once the work has been signed away even if it proves to be a valuable asset. This may well be acceptable to major stars and famous artists, but the copyright regime is detrimental to all small and medium size composers and to the highly praised need for cultural diversity and innovation.

To the creative community this basic semantic confusion appears to be a fundamental hindrance for politicians and regulators to elaborate a fair and equitable European solution suitable to accommodate the interests of all stakeholders concerned in the creative value chain and to thereby tackle the challenges of the digital age. Particularly, it disguises the fact that the author, as the primary creator, and the publisher, who derives his right from the creator, both of which are defined as "right-holder" in political speech, might have completely different, sometimes opposing, interests, priorities and objectives. It also prevents politicians from understanding that the without a solid protection of creators or "Authors", who are the very source of Europe's culture, we will slowly cut ourselves off from a continuous innovative and creative contribution from the sources with detrimental effects for the rest of the value chain. The promising and brave new world of content online distribution, so desperately looked towards as the sheet anchor out of the economical crisis will be in vain.

Hence, if the Commission is serious about its responsibility to protect the basis for creativity, cultural diversity and Europe's cultural heritage, it needs to acknowledge the fundamental difference between the Authors' Rights and the copyright regime, and hence **we call on the European legislator to ensure the anchorage of the Authors' Rights concept into any new future pan-European creative rights legislation**.

3. Creative content versus competition and Internal Market principles

We agree with the Commission's introductory remarks in the Reflection Paper regarding the importance to making available "high quality creative content", but to our opinion this does not go well in hand with the objective and a one sided support for a "global competition for attractive creative content", unless "attractive" is defined by artistic value and not by numbers, corporate control and ratings only. "National initiatives" may well be the very basis to allow for the crucially important European cultural diversity to continue flourishing. We doubt that "re-invigorating of the single market project" will be the most effective tool to accomplish and promote the incredibly valuable, inbred European cultural diversity.

We appreciate the call for "encouraging new business models and promotion of industry initiatives" so long as these forces are not the only ones to define what is "fair remuneration" for creative works. In the analogue world creators were always left with the minor part of the revenue of their works. This must not be a lesser percentage in the digital environment, where a lot of the costs necessary in analogue production world have become superfluous.

Professionally produced content must be followed by an appropriate remuneration for professional creators, but, and this is essential, based upon free negotiations between equal partners, individual or collective, and not solely by the demand of industry, users and consumers. We agree that "different trends and considerable challenges arise depending on the type of digital content". Therefore we strongly believe in a mixture of multiple solutions.

4. Commission's statements regarding the music industry

The Commission's assumption that "authors and composers own the rights in their composition or the song" is only partly correct. As stated previously, this is only the case in the context of the Authors Rights regime, where creators own never less than 50% of their rights, while in the copyright regime, creators may have sold their rights to a 100%. Contrary to the Authors' Rights concept, the copyright does not grant an applicable moral right to the creator.

Licensing of musical compositions and sound recordings are no more complicated than licensing/acquiring goods/rights for other businesses, unless one is not willing to pay the fair price for the good/right necessary to run the business. We are not against replacing the territory-based rights management system with another valuable solution, but we are strictly against a replacement by a system that will allow the control of a few corporate entities over the market place, as this would severely jeopardize the EU's cultural diversity and hence go against the UNESCO Convention, which has been signed by the EU.

We understand the legal considerations underlying the Commission's CISAC decision, but we find it very hard to understand how one can, in practical and economic terms, justify a decision the consequence of which is the promotion of an oligarchy, the emergence of a few collecting societies that will control the online licensing process. How can 2 or 3 licensors be less of a trust or monopoly than CMRs in 27 individual Member States mutually obliged by the CISAC reciprocal agreement system to render "national treatment"? If legislative intervention is deemed necessary, we strongly urge the Commission to take into consideration the strong cultural dedication and safeguarding of a manifold European cultural diversity performed by the CRMs. But most importantly, such a possible future legislation MUST be based on the European Authors' Rights concept and NOT upon a replica of the Anglo-American copyright system!

5. Comments regarding the main challenges as identified by the Commission

We appreciate the Commission's approach which consists in analysing the different challenges faced by the three main groups in the value chain, consumers, commercial users and right-holders. Only a full understanding of their respective interests will allow for the elaboration of a solid solution for the future development of the EU's online content markets. We would like, however, to highlight a couple of points:

- ***Consumer access***

We agree in principle with the Commission's position on consumer access, however, we do have reservations regarding the remarks on user-created content. There is a tendency today to neglect professional (and professionally paid) artists, and to celebrate media created amateurs instead. This happens alongside of the internet´s numerous possibilities of artistic self-expression, irrespective of the level of quality. In this landscape, the need to safeguard the professional creator/performer´s means of making a living out of his creative output and to protect his moral rights becomes increasingly adamant. The support for consumers' wish for individual self-expression on the one hand should not, on the other hand, lead to a decrease of the level of protection and respect for the rights of professional creators and performers. The right to a fair remuneration of all artistic expression, whether amateur or professional, must remain a fundamental principle. In that respect we furthermore believe that while the media is essential in facilitating self-expression and hence in promoting cultural diversity, it is also important that the media takes a responsible approach towards precisely this task – the channelling of quality and diverse creative content. We cannot support the trend towards the so-called "cult of the amateur", but would highly welcome a future media situation whereby Europe's diverse musical richness can be accessed widely, be it amateur or professional.

It should also be emphasized, that access and consumption has to be legal. While the Commission is well aware of consumers' wish to have the "feels-like-free" experience from their consumption of artistic content on the web, it is crucial to consider the piracy angle as a priority and to ensure that first and foremost creators are remunerated for the content they contribute. To be clear: We are against models like the "three-strikes approach" as implemented in France for instance. Artists and consumers should not be alienated and seen as antagonists. Instead, we believe that it is for the creative business community to come up with workable business models that allow for a stronger engagement of consumers, improved awareness-raising about the effects of piracy and the provision of access to the wealth of content Europe has to offer at affordable prices, as this cannot be for free. At the same time, we feel that the Commission has the responsibility to give the fight against piracy a higher priority and hence we feel that in the context of the Reflection Paper, this aspect should be emphasized much stronger.

- ***Protection of right-holders***

While we appreciate the Commission's assessment of the needs of and challenges for right-holders, it strikes us that the Reflection Paper seems to consider only the publishers as "right-holders" and appears to be geared towards the interests and needs of the majors only. Therefore, we would like to insist once again that the category of right-holders is not limited to publishers, on the contrary: With the exception of a few global stars, the vast majority of right-holders are relatively/absolutely unknown creators with territorial/local reach, who for different reasons, including language, consider the management of their repertoire through their local CRM as the most efficient way to exploit their creative content. The importance of linguistic differences should not be downplayed, it cannot be disregarded as mere historical tradition. The issue of language correlates intimately with territoriality to all stakeholders except to the small handful global entrepreneurs. Territoriality also promotes and supports genuine cultural diversity.

It is, furthermore, important to note the difference between the rights management systems in the area of music on the one hand and film/audiovisual on the other hand. Rights management in the film industry is largely based upon the copyright concept, and hence creators rights are treated as industrial rights. By contrast, rights management in the music industry is based on the concept of authors rights, giving musical creators a much higher degree of control over their rights. So rather than limiting the degree of autonomy creators of musical works benefit from, this should be extended to other creative fields.

Finally, it should be emphasised that the general support by CRMs in developing online rights and adapting licensing schemes is ONLY contradicting the interests of commercial users insofar as these only seek paying as little as possible so as to be able to maximise their profits. But this does not comply with the call for "fair remuneration" – at least not from a general artist's point of view.

III. Specific Comments on the Proposed Options

- **Creation of a streamlined pan-European and/or multi-territory licensing process**

We appreciate the Commission's intention to simplify the cross-border rights management process for online uses to allow for a more rapid development of cross-border internet services. However, great care needs to be taken to update the current system in a way which, first of all, does not undermine the value of the existing system and, secondly, does not make content "available on the cheap". The Commission needs to ensure that any future system is not built upon the lowest common denominator. It should honor cultural and artistic quality and not commercial quality alone. Any future system needs to respect international obligations regarding the promotion of cultural diversity. And it needs to ensure that CRMs

can continue exercising their important cultural role through the application of the "national treatment" as well as safeguarding remuneration also for non-mainstream repertoires. But first and foremost it MUST be built upon the concept of Authors' Rights and not upon copyright or else it would not be acceptable to and supported by the vast majority of European creative artists.

- **Establishment of an online database**

As representatives of the creative community, we in principle support the Commission's proposal to establish an online database to make ownership and licensing information freely available with a view to facilitate multi-territory and multi-repertoire licensing and overcome the current market fragmentation. In fact, the idea to improve access to ownership and licence information is not a new one. Authors' Rights Societies have been working for many years to create common data sharing systems (see for instance CISAC's CIS system) and a rather advanced system has been in place in the Nordic area for years. While we believe the best way forward to be the establishment of a voluntary central repository, we see the main issue for the realisation of the Commission's plan to be some stakeholders' reluctance to share information in fear of losing control, as well as questions of control over the database.

- **Extension of the scope of the Satellite and Cable Directive**

The Reflection Paper raises the idea to extend the scope of the Satellite and Cable Directive to online exploitations. In creators' minds and probably also most local secondary right-holders, the principle of "territory of destination" is absolutely mandatory and hence we do not support an approach that aims to make the applicable law the law of the country of origin. The country of destination principle, which benefits all stakeholders, is key to ensure that a balance is struck between territorial income and taxation levels and systems. On the other hand, the application of the country of origin principle as proposed by the Commission will inevitably trigger a "race to the bottom" with respect to creators' remuneration, as has already proven to be the case when the "uplink country" principle determines the tariffs contrary to applying the principle of the "country of destination". The principle of "uplink country" contradicts the well merited Subsidiarity Principle, and seriously undermines the sound basis for artists' living.

- **New legislation of future online licensing procedures following the CISAC decision**

Referring to the CISAC decision, the consequences of which for contractual licensing practices need to be taken into account, the Commission sees advantages in determining the parameters of future online licensing by legislative means. Doubts remain as to this view considering that it was precisely Commission legislation, namely the 2005 Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, that has triggered the fragmentation of repertoires and even worse, has created a state of total and utter confusion and mess. The CISAC decision has worsened the situation and raised even more question marks as to the applicable rules for the management of rights for online exploitation, not to mention the increase in costs and administrative burden for most stakeholders involved. In light of these developments, we would strongly urge the Commission to revisit the Santiago and Barcelona agreements and include them in any future policy debate, given that these agreements are based on the very idea to promote the granting of multi-territorial licenses.

- **Greater involvement of ISPs**

Encouraging a greater collaboration with ISPs and other companies providing access technologies is surely an approach that we support very much. In fact, much would already be achieved for right-holders, if ISPs would recognise that a major part of their economic benefits is derived from "transporting" valuable and

attractive creative content. While direct licensing with ISPs does form major challenges in itself, this would be a favourable solution for right-holders, which could come into play together with a range of other applicable business models tailored to the different creative areas. The application of a percentage of the ISP/TELCO revenue or a "flat rate" for each MB/GB transported could form a sound basis for a healthy eco-system on top of which a multitude of other payment systems could be built. Such a system could be comparable to the concession fees to be paid by broadcasters to acquire the right to broadcast. The Danish TDC-Play model provides a good example for such a business model that works in practice. To our knowledge, it is presently the only functioning model which actually generates revenue to right-holders. We find it essential that any new business model for rights management must be based upon a collective model and not upon a commercial and private business.

- **Extended or mandatory collective management systems**

The exact meaning and contours of the proposed "extended" and "mandatory" systems remain unclear to us and how it would benefit right-holders, who already benefit from exclusive rights. Therefore, we would appreciate the Commission's clarifications in that respect.

- **Governance and transparency of CRMs**

Creators welcome the Commission's proposal to reflect on measures focusing on the governance and transparency of collective rights management organisations. While recognising that improvements are needed in many respects, we do believe that the world of CRMs has a number of good model examples to offer, a closer analysis of which for any future measure would be advisable. As far as governance is concerned, we would like to highlight that good governance of CRMs to us means that the power and control mechanisms of CRMs must uncompromisingly rest upon a majority held by the primary right-holders. We strongly oppose to any structure in which the total or majority control over the respective CRM would be held by major publishers/labels. To secure the rights of all authors, CRMs work on the basis of the solidarity principle between all creators and collecting societies and hence it is important to ensure a balanced power structure between primary and secondary right-holders. For the CRMs to thrive, so must its creators and subsequently so will the secondary right-holders, the publishers, since their success depends upon the work done by the creators.

We would be happy to discuss our position in further detail with the Commission and remain available for further questions.

Copenhagen, 5 January 2010

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