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Creative Content in a European Digital Single Market
Comments by KODA to the Commission's reflection paper

KODA would like to take this opportunity to address some of the issues raised by the Commission in its reflection paper of 22 October 2009 on Creative Content in a European Digital Single Market (the 2009 Reflection Paper).

KODA is a Collective Management Organisation representing more than 34,500 composers, lyricists and music publishers and we license musical rights to a very large number of music users. Very often we license these rights in collaboration with other Collective Management Organisations or rights holder groupings in order to make it as easy as possible for the content providers to license the rights they need for their services, e.g. music only or audiovisual content.

KODA is also part of the European Grouping of Collective Management Societies of Authors and Composers (GESAC) and we naturally also support the document produced by GESAC in this hearing process regarding Creative Content in a European Digital Single Market.

In the present hearing document, KODA would like to focus on the following three issues:

1) **Co-licensing of various types of rights embedded in creative content.**

Co-licensing

The 2009 Reflection Paper touches upon the possibility of establishing licenses that covers both copyright and neighbouring rights. KODA has rich experience in co-licensing with other Collective Management Organisations or rights holder groupings with the overall purpose of providing the content providers with the rights they need and at the same time making it as easy as possible to clear those rights.

KODA's main experience is that such co-licensing is attractive for the

content provides because it reduces the transaction cost for the clearance of those rights, and KODA is living proof that such licensing schemes established for co-licensing of rights can be based on voluntary arrangements between the rights holders and/or their Collective Management Organisations.

The reason this can be achieved on a voluntary basis is simply that co-licensing makes it possible for new services to emerge and be marketed by content providers, who – if co-licensing were not available – in many cases would not have invested the time and money in rights clearance through a large number of rights holders and/or their Collective Management Organisations. Thus, it is both in the best interest of the content providers and of the rights holders to establish co-licensing in as many areas as possible.

Four of such voluntary co-licensing schemes in which KODA participate were described in the joint submission made on 29 February 2008 by 24 organisations representing different kinds of authors and performing artists which was made in reply to the Commission's 2008 Communication on Creative Content Online in the Single Market[1]. For your ease of reference, the reply is attached to this document as an appendix.

These co-licensing schemes cover different usage types but the common denominator for the schemes so far has been that they concern broadcast content, in which one normally would find that many different types of rights in different rights categories need to be cleared. However, with the voluntary co-licensing schemes we have made it possible for the content providers to market innovative tv-products such as (1) centralized catch up tv- services, (2) establishment of broadcast content online archives, (3) mobile tv services, with more to come.

Thus, KODA greatly supports the concept of co-licensing and we believe that if it is deemed necessary, a framework could be established where rights holders and their Collective Management Organisations could discuss and develop voluntary co-licensing arrangements to the benefit of consumers, content providers and rights holders alike.

Combining the making available right and the reproduction right

The discussion in the 2009 Reflection Paper of combining the making available right and the reproduction right could not be done without jeopardizing the rights of the often different rights holders behind each of those sets of rights.

Even though content providers inevitably in some situations will experience that the making available right and the reproduction right

[1] Commission Communication on Creative Content Online in the Single Market (COM(2007)836)

have been separated and fragmented, this only happens for a very small number of the thousand of content providers being licensed (see the discussion regarding fragmentation in Section 2 below).

The fact remains that the two sets of rights in the vast majority of licenses are licensed together either through one Collective Management Society or grace of the collaboration of two Collective Management Societies representing these two sets of rights.

2) <u>Any difficulties experienced by users in pan-European online licensing will not be removed by harmonizing copyright</u>.

Harmonizing copyright will not solve issues re. cross border licensing

The current difficulties experienced by music users in pan-European music online licensing are for all practical purposes caused by the fragmentation of repertoire and certainly not caused by the fact that copyright law is territorial.

It was clarified with the Commission's 2005 Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services[2] (the 2005 Recommendation) that music rights holders were free to withdraw their online rights from Collective Management Organisations and to license these rights to the market in other ways. The intention of the Commission was to encourage "multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders."

The 2005 Recommendation thus paved the way for what has been called the fragmentation of rights, because rights in a number of situations no longer can be easily cleared in an "all inclusive license" through the Collective Management Organisations.

However, it should be noted that the 2005 Recommendation and this form of direct licensing is based on the very basic principle of rights holders' choice of how and where to license the rights. This principle is applied in all areas of licensing of intellectual property whether it be patents rights, film rights, rights in dramatic works like theatre, ballet or opera and of course also in music rights and thus, harmonizing copyright would not remove the issues that have been raised regarding cross border licensing.

[2] Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).

Co-existence between individual direct licensing and collecting rights management is possible

In KODA's view, the system on the one hand of individual direct licensing of repertoire by rights holders or rights managers and on the other hand the system of collective rights management could and should be able to co-exist.

The benefits of collective rights management lies in the very low transaction costs and the legal certainty that is achieved when all relevant rights are cleared in one single license. These benefits are naturally lost when users need to clear rights individually and direct.

If the two systems were to co-exist it should be explored whether a clear distinction could be made between areas where individual direct licensing and collective licensing would apply respectively. Since the scope of the Commission's initiatives is to focus on multi-territorial licensing, it could be natural to draw the line between multi-territorial licensing and what could be called mono-territorial licensing. For the multi-territorial licensing, the rights holders' choice as described in the 2005 Recommendation could be maintained and the market would be driven by market demand for such licensing types. For mono-territorial licensing, the content providers' access to the rights they need could be reinforced through national extended collective licensing schemes.

Extending the model laid down in the Satellite and Cable directive

The discussion in the 2009 Reflection Paper of extending the Satellite and Cable directive model to online exploitations would not automatically work for online licensing.

This is in particular the case for licensing of satellite broadcast, because experience from the current legal framework shows that some satellite channels in practice are shopping around for the most opportune way to exploit the definition of 'uplink country' and thus, have a negative impact on rights holders' remuneration (the so-called "race to the bottom"). In such a scenario, the rights clearance would rapidly become fragmented because rights holders would be inclined to withdraw their rights. Extending the satellite broadcast licensing regime to online licensing where it is even more easy to change 'uplink country' than it is for satellite broadcasting is not in the rights holders best interest.

However, it seems reasonable to discuss solutions for an expansion of the retransmission regime and how it could be made neutral of the technological means by which cable operators make the 'simultaneous unaltered and unabridged retransmission for reception to the public of an initial transmission' as described in the Cable and Satellite Directive. By way of example, rights holders and content providers in Denmark have already agreed that such retransmission,

for instance retransmission to mobile phones or retransmission by web-access, could be licensed similarly to retransmission done in cable networks.

3) **Mandatory collective management for orphan works.**

The current schemes of extended collective management in Denmark already make it possible for KODA to license musical orphan works in a number of areas. This is to the great benefit of music users who enjoy the legal certainty that all rights have been cleared in a way satisfactory both to the content provider and to the rights holder.

It is noteworthy that the Danish system of handling orphan works does not give a user free access to a work just because it has proven difficult or impossible to locate the rights holder.

To the contrary, a system of handling orphan works has been established where orphan works can get included in collective agreements and thus give the agreements an extended collective licensing effect. Such a model guarantees access to the works for the content providers and at the same time ensures reasonable remuneration for the rights owners, once they are found. Rights owners have an individual right of prohibition and can therefore prevent their works from being covered by a collective agreement.

The opportunity to use collective management helps provide security for users, who do not risk being hit with unknown and unbudgeted demands for royalties, and it also ensures that the rights owners are guaranteed remuneration for the use of their work via the Collecting Management Organisations.

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We naturally remain at the Commission's disposal for further discussion of these topics and would of course be prepared to describe in more detail the points made above.

Yours sincerely

Niels Bak
Managing Director

Appendix 1: Joint submission by 24 organisations representing different kinds of authors and performing artists, 29 February 2008, made in reply to the Commission's 2008 Communication on Creative Content Online in the Single Market.

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Commission of the European Communities
Audiovisual and Media Policies Unit of the
Directorate-General for Information Society
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Denmark's Owners and Users of Rights are Building a Better Future Together

Film, music and television play a major role in any modern society. It is not without reason that the citizens of Denmark and other EU countries spend a large part of their waking hours engaged in various forms of art, knowledge and entertainment. And it is the content of these that creates cultural renewal and variety and provides a sounder base for democratic debate in society.

New technological advances provide greater opportunities for improving the effectiveness of distribution for films, music and television, for example. Existing content can be used in a number of different ways, all of which is a positive development. The debate about rights in the digital world should focus on how to create the best possible structures to support this development, which is to the benefit of society.

Effective rights clearance is beneficial to society in two ways. Firstly, it enables new and innovative products to be developed for consumers. Secondly, lower transaction costs and reasonable payment to all rights owners also provide an incentive to produce new content.

Denmark is possibly the country in Europe where collective management is the most widespread. The vast majority of content rights clearances, however, are made on an individual basis and this is how it should be. In areas where individual clearance is not possible for practical reasons, collective management plays an important role for both the owners and users of rights.

Collective management is not therefore just something that benefits the collecting societies. Collective management is for the benefit and enjoyment of authors, producers and users, and the owners and users of rights are generally agreed that this method of rights management should be maintained and built up, not knocked down!

It is for this reason that the undersigned 24 organizations representing all kinds of authors and performing artists are behind this presentation. The aim has firstly been to illustrate, using specific examples, how Denmark has been successful in meeting the challenges of rights clearance through collective management, and secondly through a more general description to illustrate the value that collective management and collective licensing systems have in Denmark.

Case study 1: All COPY-DAN rights owners have given the Danes a window on Europe
The Danish licensing system for cable re-transmission works particularly well in practice. There is a very large number of cable operators in Denmark (around 65000). All rights owners have in unison ensured that the cable operators have access to around 150 TV channels and 100 radio channels. All the rights to radio and TV channels can be acquired in one single agreement. The rights owners also ensure that outstanding rights are cleared when TV- or radio stations choose to enter into direct agreements with the cable operators. This easy access to rights clearance has been a contributory factor for Denmark in becoming the European country where cable TV viewers have access to the most radio and TV channels from other European countries.

New technology provides the opportunity for new cable TV products. Consumers and cable operators want new and innovative services, such as a "start from the beginning" service, where users can turn on a TV programme and start watching it from the beginning, as long as it has not already finished. Preliminary agreements have just been entered into for such services in Denmark, whereby in one single agreement, the cable operators have acquired all rights to the TV channels covered by the experimental scheme.

Another example is catch-up services, where TV programmes that have been shown in the past 48 hours, for example, can be viewed on demand, either in whole or as highlights. This is also a challenge for which rights owners are trying to find solutions.

These examples show that a properly functioning system of rules for cable re-transmission alone has been able to provide the basis and inspiration for innovative digital supplementary services. Such supplementary services are considered on-demand services from a legal perspective, which means that the rights to both presentation and reproduction need to be cleared. As the conditions of cable re-transmission do not apply to these services, there is an ongoing challenge to find suitable methods of handling rights clearance for such services.

The best solution to this problem would be for this type of service to be covered by the same rules that apply to cable re-transmission. This requires that the parties involved are able to agree on fully functioning solutions in these new areas. The well-functioning Danish collective licence system supported by a new addition to the Danish legislation regarding extended collective license will do the rest..

Case study 2: Denmark makes archive gold available on demand
Public service stations across the whole of Europe each have hundreds of thousands of valuable hours of radio and TV programmes, which together form a unique and valuable collection of Europe's cultural legacy. In order to be able to digitise all this material and make it available to the public, agreements have to be made with the rights owners. This insoluble problem has been discussed at EU level for over 10 years.

In Denmark, all the rights owners have worked together to unravel this Gordian knot. The willingness to cooperate, the far-sightedness of the rights owners, well-run collecting societies and the Danish voluntary but legally extended collective licence system are all important contributory elements to the fact that this work has born fruit.

DR and the rights owners have entered into a joint agreement that enables DR to digitise its programme archives and to make them available on demand to the general public. This agreement is the first of its kind in the world. The agreement covers all rights owners (29 different organisations, representing more than 20 different categories of rights owners).

Individual agreements in this area would quite simply be impossible in practice as the number of rights owners is enormous, not least in view of the fact that a large proportion of the rights will have been passed on to a number of different and unknown heirs. The costs, both financial and in terms of time, that would be involved in clearing all rights individually would be disproportionate and would result in the project not getting off the ground.

An agreement like this, on the other hand, is a unique example of how the rights owners and users can jointly regard the copyright situation at hand and together proceed in order to find the best possible practical solution. It is also a good illustration of how society can benefit from well-run national collecting societies in the digital world.

Case study 3: Mobile TV gets off to a quick start in Denmark
In many European countries, it has been difficult to clear the rights to broadcast TV channels for mobile phone customers through mobile networks. Not so in Denmark. As soon as the technology was available, all rights owners were jointly able to provide mobile telephone companies with access to Danish public service TV channels and a large number of European full service TV channels. This was made possible by one agreement covering all rights owners for a large number of radio and TV channels.

It was possible to use this simple form of agreement as the rights owners already cooperated very well on cable re-transmission and they were therefore able to create a fast solution using existing structures. The agreement on all rights in the largest Danish TV stations and a large number of European TV channels meant that telephone companies were able to launch a product much sooner than elsewhere.

Case study 4: Agreement in Denmark between rights owners and users on orphan works
The subject of orphan works is one that has been discussed many times at European level. An orphan work is one where the copyright holder cannot be identified or located and where it is therefore impossible to obtain the required permission to use the work. A requirement for individual clearance therefore means that users cannot have access to these orphan works.

There have been a number of attempts across the world to solve the problem of orphan works. In Canada and the USA, for example, solutions are being implemented based on the principle that a work may be used as intended following a meticulous but fruitless search for the copyright holder, but that this does not grant the exclusive right to the work and that the work must no longer be used and the normal royalties must be paid to the copyright holder should he make himself known and so demand. This model has received strong criticism from rights owners in particular as it leaves them without legal rights because they have to prove that the efforts to find the owner of the rights have not been sufficiently meticulous. It is also difficult to practically assess when a user has made sufficient effort to try and identify the rights owner.

In Denmark, this problem has been the topic of discussion in a working group appointed by the Ministry of Culture with the task of finding a balanced solution that benefits both cultural institutions and rights owners. The working group was composed of a broad range of user representatives (libraries, archives, museums and broadcasters) and rights owners (producers, broadcasters and artists). The one thing that everyone in the working group agreed on from the start was that the model used in the USA and Canada is not appropriate. The working group ended up agreeing to recommend a solution that involved entering into collective agreements with the addition of an extended collective licencing effect. Such a model guarantees access to the works for users and at the same time ensures that a reasonable payment is made to the rights owners, if they are found. The rights owners have an individual right of prohibition and can therefore prevent their works from being covered by a collective agreement.

The opportunity to use collective management helps to provide security for users, who do not risk being hit with unknown and unbudgeted demands for royalties, and it also ensures that the rights owners do not subsequently have to try to prove that insufficient effort has been made to identify him or her – instead, there is a guaranteed payment for the use of their work via the collecting societies.

The Ministry of Culture has just put forward a proposal to amend the copyright act, which follows the working group's recommendation in this area, in that it proposes the introduction of a general extended collective licence clause in the act, which will, among other things, enable collective agreements to be made on the use of orphan works.

The value of the joint licensing of multiple rights categories
It is a feature of the online use of art, knowledge and entertainment that individual types of work are increasingly less likely to be used alone. Different content is being combined and the public is contributing in new ways, which is a development that is expected to continue.

Users of copyright-protected material do not just want to clear all rights within a specific rights category. Neither do they want to clear several or almost all rights. What a user needs to do is clear all rights.

It is a major problem for the users of copyright-protected material to clear rights one category at a time. This is partly because it is not definite that agreements can be made with all the rights owners concerned and partly because the different limitations in the individual agreements may place unnecessary restrictions on the use of the rights.

All four case studies described above involve close and effective cooperation between the rights owners. It is vital that this cooperation is supported in the forthcoming legislation and it is of critical importance that no obstacles are placed in the way of cooperation between rights owners at national level.

The value of national licensing
The reality today is that a large part of rights usage takes place in individual member states. This also applies to the Internet. It is therefore natural that the most innovative solutions are created at national level. Consequently, it is vital that initiatives to promote pan-European licence agreements in no way undermine the national collecting societies.

For example, it would be disastrous for the national collecting societies if repertoire is withdrawn so that there are no longer one-stop shops at national level.

Danish rights owners also want to help facilitate pan-European licences, but it is vital that a possible future pan-European licensing scheme will be of supplementary nature, and is run on a voluntary basis. There is a need to safeguard well-run national schemes.

The value of the Danish extended collective licensing system

The extended voluntary collective licensing system is a Nordic legal device that has been part of Danish copyright law since 1961. The collective licence has proven to be a highly suitable instrument for protecting the rights of copyright holders in relation to the mass use of their work, while at the same time satisfying the needs of users for the easiest possible access to the use of protected works. The collective licence means that a user who has entered into an agreement on the specific use of a certain type of work with an organisation that covers a significant proportion of the copyright holders for this type of work, is granted the right under law to use other works of the same type and in the same way, even if the copyright holders of these works are not represented by the organisation.

Item no. 18 of the preamble to the infosoc directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) indicates that the directive is without prejudice to the arrangements in member states concerning the management of rights, including collective licences. As the directive otherwise deals with the exceptions that the individual member states may have regarding copyright laws, it can therefore be deduced from this that the Commission does not consider the extended collective licence to be a restriction of the copyright holder's rights, but rather a method of managing rights.

In practice, it is a problem that with the mass use of works in particular, it is difficult to clear the necessary rights with all the rights owners, as they are not represented by one single organisation. An organisation of rights owners can only enter into agreements on behalf of its members. This means that rights owners who are not members of the organisation, including foreign rights owners, are not covered by an agreement between a user and a Danish organisation. The collective licence solves this problem by attributing a collective licence effect to certain licences, so that agreements in specific areas of application are extended to include copyright holders who are not directly represented by the organisation entering into the agreement.

The collective licence model is therefore of great benefit to both users and rights owners. Users can be sure of supply and do not have to worry about whether they have access to use individual works as the organisation concerned guarantees this. At the same time, rights owners can be sure that they will be paid every time their work is used; rights owners do not have to monitor the market themselves and enter into agreements with each individual user. This also means that Danish and foreign rights owners who are not represented receive payment for the use of their work, which would otherwise be difficult or impossible for them to administer or prevent.

The flexibility and speed of the collective agreement system naturally has a beneficial effect on both royalties and transaction costs. It keeps down administration costs in relation to rights

clearance for both users and rights owners alike as it is only necessary to contact one or only a few places in order to obtain access to all protected material.

All rights owners have an individual right of prohibition in most areas in which agreements can be made with collective agreement effect. This right of prohibition ensures that the individual rights owners retain control over their work and can continue to decide for themselves whether to allow or prevent their work from being used. The collective agreement model is therefore the best way of ensuring certainty of supply for users without placing any compulsion on the individual rights owners.

There is therefore every reason to protect the collective agreement model, which has demonstrated is worth since 1961 and continues to be vital in order to facilitate quick and easy rights clearance, particularly in relation to new forms of mass digital use. At a time when new platforms are constantly being launched and where users are keen to be able to experiment all the time with new forms of use (and hard to keep from doing it without permission), the proposal for a new general collective licence could help to ensure that rights are never considered to be an insurmountable obstacle that prevents use, but instead are seen as something that can be dealt with quickly and easily to the benefit of everyone in society – both users and rights owners.

Collecting societies benefit both rights owners and users

The important results achieved in Denmark in recent years have only been possible because there are national collecting societies that work well and are trusted by both rights owners and users.

Copyright is an individual right – a right enabling copyright holders to either permit or prevent the use of their work. So it has always been and so should it continue to be.

The collective management of copyrights has only been possible because the rights owners have decided that their rights would be managed better if this is done collectively. If all rights owners thought that they could do better themselves, there would be no such thing as collecting societies. This should be remembered and respected.

The fact that collective management is as widespread as it is, is simply because in many areas it is the only way to make copyrights work in practice. It is the only method of ensuring that users have a wide variety of content in terms of works and at the same time guarantees rights owners a suitable payment for the use of their work.

The collecting societies are essential for providing users with quick and easy access to protected works, while at the same time ensuring the payment of suitable royalties to the rights owners. Collective management guarantees that the general public has access to a wide variety of protected works and does not have to be content with just the selection of works for which the supplier has the time or can afford to clear the rights.

Collecting societies have often been criticised by the EU and in some cases this criticism may have been justified. We do not want to defend collecting societies that are not managed effectively and transparently. But such criticism must not be applied to collecting societies that are well run and which are able to produce results in the form of innovative agreements and solutions to great benefit for the society.

The lack of understanding of the activities of collecting societies within the EU system risks resulting in rights owners considering it necessary to withdraw their repertoire from the collecting societies because the societies are no longer able to manage the rights for the benefit of the rights owners. This will also happen if the collecting societies are subjected to unconsidered and rigid regulation.

Establishing competition between collecting societies is a dangerous path
Collecting societies will always, and even more so in the future, be exposed to competition with the rights owners. If rights owners are able to manage their rights themselves in a way that provides greater financial benefit, they will do so, which is sound and healthy competition.

There is much talk today of also creating competition between the collecting societies, but this is a dangerous path to follow.

Having collecting societies compete for customers with the same repertoire makes no sense. No rights owner will accept in the long term that they allow several agents to licence their work in competition with each other. Just as it would not be normal to commission several estate agents to sell the same house. This will inevitably result in greater uncertainty in terms of access to repertoire and it will become considerably more costly to ensure the clearance of rights. It is clear and legitimate that users have a natural desire for the lowest possible prices, but this must be ensured through effective national arbitration mechanisms (such as the Danish Copyright Licensing Tribunal) and it cannot be secured in the long term through competition for users.

Making the collecting societies compete for rights owners so that the rights owners can go to the collecting society that offers the best financial terms sounds reasonable, but this form of competition has some major costs for society. Dividing up repertoire will make it much more difficult for users to obtain access to all the rights they need, resulting in a great deal of repeated work. Users will actually be put in a difficult position, as they do not often have the opportunity in practice to sort through the content.

The Danish Association of Visual Artists
The Danish Artists’ Association
The Danish Council of Artists
Danish Visual Authors
The Danish Union of Visual Artists
Danish Designers
Danish Playwrights' and Screenwriters' Guild
Danish Film Directors
The Danish Society of Jazz, Rock and Folk Composers
The Danish Arts and Crafts Association
The Danish Songwriters’ Guild
The Danish Association of Fiction Writers
Danish Cartoon Authors
The Danish Association of Cinematographers
The Danish Writers Association

The Danish Union of Journalists
The Danish Conductors Association
The Danish Composers' Society
The Danish Metal Workers' Union
The Danish Musicians' Union
The Danish Organists and Cantors Association
The Danish Actors Association
FAF
The Danish Association of Stage Directors
KODA
KODA-DRAMATIK
NCB
The Association of Danish Scenographers
The Danish Association of Theatre Technicians
Danish Illustrators
The Committee for Protection of Scientific Work (a committee under The Danish Confederation of Professional Associations).