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Regarding the Reflection Document of DG INFSO and DG MARKT on "Creative Content in a European Digital Single Market" which was received and read with great interest, the Austrian Supervisory Authority for Collecting Societies wishes to add the following comments:

Introduction

To begin with, we would like to express our firm belief in the importance of CMOs for a functioning Digital Market and a well-balanced copyright-system (in the following, "copyright" of course shall refer to the European concept of authors' rights and is not limited to the mere right of reproduction).

Over the last years it has become evident that the current system of collective rights management struggles increasingly with the reality of the Digital Market as the national borders which have been so important for the "classic" collective rights management vanish almost completely in the global information networks and are upheld only artificially (e.g. by geo-blocking), thereby hindering the full development of online distribution. However, the last years have also seen the weakening of collective rights management through the "withdrawal" of large repertoires by big rights holders (e.g. in the music market). These developments might have been of benefit for some parties. The parties who have *not* profited from this are the authors and the users. The former struggle with the lack of flexibility on the one hand (see the "Daft Punk"-Decision by the EC, COMP/C2/37.219) and the loss of bargaining power since the power of (mostly author-run) CMOs is directly proportional to the amount of represented right-holders and the size of their repertoire. The latter face - in the light of technical possibilities - almost incomprehensible difficulties in cross-border media-consumption and experience increasing uncertainty about what they may or may not legally do with copyrighted material.

Yet, these problems can be addressed by a cautiously modernised system based on collective rights management. With regard to this, three major points should be taken into consideration when modernizing the CMO system to foster the competitiveness of as well as the balance of interests in the European Digital Single Market:

1. Modernisation

The current state of the European CMO-environment in many aspects no longer reflects the reality of the cross-linked market and fails to meet the requirements of today's user. The same can be said about the current European copyright law. While some of the changes brought by the Internet and a much more open market have been addressed in some EU-Directives (most notably the Infosoc-Directive), the complete change in user-behaviour and distribution-techniques are not reflected in the current legal situation.

As mentioned on page 14 of the Reflection Document, orphan works pose a problem to the legal use of copyrighted material. Several models for the treatment of this problem (licensing by CMOs, licensing by court, licensing by a public authority) are known. The best option is probably the licensing by the local CMO (capable of the required diligent search) under the strong supervision of a public authority. This model combines the knowledge and experience of the CMO with the required state-supervision, granting the protection of the interests of non-represented right-holders in balance to the public interest or the interest of a commercial user.

An important issue is the problem of "cherry picking" respectively the lacking possibility for a right-holder to determine, which works or rights on works he wants to manage individually and which should be administered collectively. CMOs to this date have followed an "all-or-nothing"-approach over the last decades. Yet, the situation has drastically changed (cf the above mentioned "Daft Punk" decision COMP/C2/37.219). Todays technology grants enough possibilities to individually manage (the rights on) certain works as well as to determine, which (rights on) works are administered by a CMO and which individually.

Probably the most important act of utilisation in the Digital Market next to the making available is still the act of copying. Everything digital is, in fact, a copy. Every usage in the digital context produces numbers of copies. Still, the act of copying is closely bound to the bodily fixation. The application of this rule already is problematic enough with the fixation on a local hard disc. With the emerging trend of cloud-computing and decentralised networks it becomes clear, that the concept of copying in the European copyright system has to be thoroughly revised.

As mentioned on page 15 of the Reflection Document, exceptions and limitations are of increased importance in a digital world. Although some of these exceptions and limitations are harmonised, the differences between Member States are vast and the detailed regulations on national levels are almost incomprehensible for the law-abiding user. These rules have to be further harmonised and clarified - with a cautious eye on the limitations *for* these limitations, like the 3-Step-Test of the Berne Convention. Special attention should be directed to the third step of the 3-Step-Test, stating the requirement of an adequate compensation for the right-holder. Over the last years, the number of acts falling under the exceptions and limitations has increased considerably (e.g. private copying). This growth in usage was hardly (if at all) reflected in the national remuneration systems, the gap between copying and compensation is steadily growing. Since this gap will not be closed with constantly increased levies on (just a part of) storage media, the EU should consider if for instance, ISPs, who after all profit from the increased consumption of copyrighted works, could contribute to the fair remuneration of the right-holders. The immense usage complying with the limitations and exceptions within the EU is a given fact, it would be unwise to further narrow the freedoms given to the users - the "netizens" will continue their practically uncontrollable usage; not because they *may*, but because they *can* do so. It is the duty of the EU to adapt to this situation and guarantee that the right-holder receives fair remuneration adequate to the amount of this usage. As it is pointed out on several occasions in the Reflection Document, models for this compensation exist or are in discussion.

The Austrian Supervisory Authority for Collecting Societies shares - to some extent - the views and opinions about the harmonisation of copyright law in general, resulting in the

creation of a “European Copyright Law”. The benefits in creating a single European copyright title regarding transparency and legal securities are evident. However, “doing away with the necessity of administering a bundle of 27 national copyrights” must not mean “doing away with the CMOs in 27 different Member States”.

This modernisation however has to be carried out with the right amount of caution. It is questionable if the centralisation of collective rights management really is the answer to the above mentioned problems. While national borders may become increasingly obsolete in the online world, the offline market still requires a lot of knowledge about local markets, close (personal) contacts between rights holders, users and CMOs and a flexible as well as transparent and cost-effective administration. These requirements are met by the CMOs in the different Member States, a centralisation would almost certainly lead to less transparency, loss of contact and ultimately a less cost-effective, bloated administration. CMOs should be forced to adapt to the (not so) new situation - however, not by open competition but by regulatory instruments.

2. Supervision

A CMO’s biggest immaterial asset is her credibility.
This credibility is derived from the (ideally all-encompassing) size of her repertoire, the mass of her represented right-holders and above all the transparency of her actions and administration.

A stately supervision of CMOs helps to strike the balance between the interests of the right-holders and those of the (commercial or private) users.
The Austrian Collecting Societies Act of 2006 established a system which so far has proven successful in granting this balance. It guarantees, that CMOs make their actions and administration transparent to the public (and give even more insight to their beneficiaries), it acts as an intermediary in disputes between CMOs and other CMOs or between CMOs and right-holders and it supervises among many other things the distribution of their income to their beneficiaries according to fixed rules which exclude arbitrary procedures.

The Austrian model has shown over the past years how the system of collective rights management has profited from a supervision system. Likewise, the European Market would experience the same benefits. A mandatory governmental supervision system would furthermore ensure that certain requirements regarding licensing and distribution are met throughout Europe, providing the same chances and benefits to a right-holder in Bulgaria as obtained by a right-holder in Spain. Furthermore - the foreseeable increase of CMO-managed mandatory remuneration systems, as mentioned on page 19 of the Reflection Document will require even stricter supervision, as a considerable part of the generated revenues for right-holders will stem from these sources.

3. Information

With the ribbon-cutting ceremony on the “information superhighway” copyright law, until then a rather specialized field of law for a small number of people, has entered into the lives

of every European who took the ramp onto the Infobahn. The popularisation of copyright law was however not reflected in copyright law itself. To the interested user and right-holder, copyright law, its limits and limitations remain all too often a mystery. Copyright law will however always remain a rather complex and difficult to understand field.

It is not only the task of the European Union to ensure the functionality of European Digital Market for Creative Content, it is also her duty to inform the citizens who have to (and more often than not *wish* to) observe the rules of copyright about the basic principles of copyright law, provide answers to the most frequent questions and generally aid European right holders and users alike in finding their way around the vast and rocky plains of copyright in a digital environment. Member States should therefore be encouraged to establish competence centres aimed at users and right-holders alike to provide copyright-related information, aid and answers to the vast amount of copyright-related questions that are raised when dealing with copyrighted material. In addition to this, information ownership and licence information could be provided to the public by these entities - we wholeheartedly endorse the corresponding idea drafted on page 17 of the Reflection Document.

Closing remarks

CMOs have played an important role in the development of the market for creative content in the last decades. These entities which can sometimes look back on a history of more then hundred years have perfect knowledge of the national and international European market, they provide vast experience in dealing with right-holders, users and beneficiaries and they have established a network for licensing and dissemination of royalties which is unequalled.

It is mandatory to not only acknowledge this asset to the EU but to put it to further use. For this, there have to be several modernisations and harmonisations in the field of European copyright. Above all, the planned additional remuneration systems and the reality of the online markets require a strong system of governmental supervision to guarantee transparency, legal security and a balance of interests within the European Digital Single Market.

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