Communication on the Management of Copyright and related rights in the Internal Market

Comments by the International Federation of Film Producers Associations, FIAPF

About FIAPF

The International Federation of Film Producers’ Associations, FIAPF, is the only worldwide organisation representing the film and television production industries. FIAPF currently has 27 member organisations in 24 countries in Asia, the Americas and Europe. In Europe, FIAPF counts the majority of EU countries as its members.

FIAPF has been involved with European legislative and regulatory initiatives since the creation of the European institutions. Through the last two decades of harmonisation efforts by Brussels, FIAPF has been present in all the key debates leading to the drafting and implementation of important new legislation, including the “Television Without frontiers” directive, the Rental and Lending rights directive, the Cable and Satellite directive and, more recently, the Copyright directive.

FIAPF is also a registered NGO at the World Intellectual Property Organisation (WIPO) and participates in the work of standard bodies such as MPEG, ISO (ISAN) and Europe’s DVB.

A legislative approach must be limited to harmonising existing collective management regimes

FIAPF is concerned that a legislative approach in the complex field of collective management should be contained within appropriate and realistic policy goals. Whereas our organisation supports the Commission’s idea of bringing the modus operandi of Europe’s collecting societies more in line with competition rules, we would staunchly oppose any attempt to extend the field of collective management to new areas.

The context is a sensitive one: as the digital broadband economy struggles to find a workable business model and to contain pandemic levels of piracy, some voices around Europe have been advocating the recourse to legal license as the solution to a complex industrial and technological challenge.
FIAPF is firmly opposed to removing the dynamics of enterprise and revenue maximisation from the digital economy and replacing it with a collective management framework and across-the-board levies. Neither legislative precedent, nor the nature of broadband uses appear to support such an approach, which the industry is united in rejecting because it believes it would flatten revenues and dry out sources of investment in creative content throughout Europe, thereby giving our competitors more strength.

FIAPF believes copyright legislation and robust enforcement, combined with attractive business propositions backed-up by secure end-to-end delivery technology, will provide the answers to the digital challenge in the medium-term.

The role the Commission can play in helping bring about a positive market outcome in broadband, is not negligible: the copyright directive enshrines technical protection measures as the basis for a functioning digital rights management economy. The Commission’s current efforts to stimulate inter-sectorial coordination for the launch of DRMs is also crucial. FIAPF hopes such efforts will be continued when the new Commission has been put in place later this year. There is much the Commission can do to incentivise all stake-holders in the digital economy to develop a constructive dialogue and adopt common standards which will deliver both interoperability and content security as the two key prerequisites for the successful roll-out of digital broadband services.

Last year, FIAPF produced a Technology Statement outlining the worldwide film industry’s preferred solutions to the broadband challenge. A copy of this document is attached. We hope it will make a useful contribution to the current work of the Commission in this vitally important area of making the broadband economy work to the benefit of both end-users and rights-holders.

**Possible areas for legislative intervention**

As stated above, FIAPF broadly agrees with the Commission’s conclusion that a degree of harmonisation may be required to bring about an Internal Market for collective management, where collective management already exists. At present, national and individual standards and practices vary greatly and these variations are not always to the advantage of the end users. The legislative framework adopted to bring about such harmonisation should be light touch regulation aimed at establishing non-discriminatory markets across the EU.

**Establishment and status of collecting societies**

FIAPF supports the Commission’s aim that whatever the variations in the legal/corporate status of collecting societies in the EU, these should not be used as justification for discriminatory effects. For the sake of convenience and efficiency, local monopolies (de jure or de facto) may not be avoidable. Whereas these monopolistic structures may sometimes be a necessity, it is all the more important that they should be made to comply behaviourally with Articles 82 and 86 of the treaty.

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1 The philosophy of FIAPF, shared by all its constituents, is that collective management should always be a last resort, when individual management sustained by market demand, would prove to be a practical impossibility. FIAPF is one of the founding organisations of the international producers’ collecting society AGICOA, which collects royalties owing to producers worldwide for the retransmission by cable networks, of original TV signals carrying their content. In this case, FIAPF recognise the need for a collectively-managed approach and embraced – indeed actively promoted – this solution.
It is a function of the growth in film and programming exchanges in the EU that a growing proportion of the rights administered by national collecting societies are from other countries’ producers and rights-holders. It is important that this balance be reflected in the governance of these organisations, which should give fair representation to extra-national rights-holders. This will check the tendency of some of these organisations to give undue privilege to local rights-holders even when the bulk of the rights is substantially non-national.

FIAPF is not opposed to the practice of collecting societies setting aside funds for purposes other than the remuneration of rights-holders. In most countries, these “general interest” funds serve a useful collective purpose of stimulating industry training and creativity. However, the rules constitutive of such funds are currently un-harmonised, resulting in substantial discrepancies between countries, a lack of transparency and a tendency to discriminate against non-nationals in the availability of such funding. At the very least, collecting societies should be expected to make available information about the percentages set-aside and allow an easy scrutiny of the purpose and use of such funds.

**Relations to users**

FIAPF is supportive of the idea that collecting societies should be expected to grant licenses and that these should be granted under appropriate and reasonable conditions. Such rules would provide stronger guarantees for producers and other rights-holders in cases when the collecting agencies have strong bargaining powers deriving from a monopolistic position in one market.

Following the same logic, it would indeed be desirable for collecting societies to be entirely transparent regarding their licensing terms and the tariffs applied thereof.

**Relations to rights-holders**

FIAPF believes transparency and representativity are essential prerequisites for collecting societies in Europe to function fully as efficient services to the various sets of rights-holders.

Clarity and transparency should prevail in the presentation of data on royalties collected, deductions made by the collecting societies, distributions rules and actual distributions. Collecting societies should be made fully accountable for their financial operations. Annual audited accounts should be a standardized practice across the EU, with the possibility for rights-holders to scrutinize and request clarification and explanations and challenge the organisation’s performance if required.

Right-holders’ representation should also be truly reflective of royalties collected; in other words, voting rights and representation in governing bodies must give appropriate representation to the rights-holders whose works are used and remunerated.

Another important aspect is the mandate. Collecting societies should be beholden to checks and balances to prevent them from exerting undue power in negotiating unreasonable mandate terms with rights-holders. Shorter mandates should always be an option for rights-holders if they so choose. The advantage of this approach is that it creates a natural pressure on the collecting society to make the case for its continuing existence by persuading the right-holder of the validity and efficiency of its action. It would also strengthen the hand of the right-holders in terms of their ability to influence decision in the governing bodies where they are represented. Of course, such dynamics would be more pronounced and effective where the rights-holders would have a choice between more than one society to represent their rights. However, even when monopoly is the only option, the power of the right-holder to withhold or renegotiate mandates after a period of time could be used positively as a check on the efficiency and transparency of the collecting society.

**External controls**
Although it is theoretically possible that the development of strong internal accountability systems would suffice, external controls may be necessary to prise open a collecting societies’ sector that has often been entrenched in opaque practices for many years, often encouraged by their monopolistic positions. Internal safeguards need therefore to be combined with external supervision.

External controls should operate in such a manner as to a) ensure the gradual application of some common standards of transparency, accountability and fairness over time and b) provide a streamlined procedure whereby rights-holders who believe they have grounds to complain about treatment by a collecting society, will get a fair hearing and expedient intervention, if justified. It is worth pointing out that few Member states today provide such supervisory/recourse structure for national collecting societies and non-national rights-holders will often find that their case cannot be taken up with anyone outside the collecting society, a situation which makes the managers of such structures both judges and juries in their own court.

Relations between collecting societies

At present, no supra-national structure is in place to arbitrate conflicts between collecting societies in different Member states. It may therefore be helpful to consider developing a EU-wide framework of rules for dispute resolution between collecting societies.

Conclusion

FIAPF welcomes the Commission’s proposition that legal harmonisation may be necessary to render the functioning of Europe’s collecting societies more transparent, accountable, fair and efficient.

FIAPF also reminds the Commission that any such legal framework should aim solely at improving the existing systems of collective management, where they are already in operation. Collective management should remain a restricted field of rights’ exploitation; individual rights’ exploitation through market demand should remain the model, with collective management substituting only where individual contract could not practically be applied. FIAPF believes the digital broadband economy should not be subjected to collective management, whose success will rest on market dynamics backed up by strong copyright law, good enforcement measures, technological solutions and attractive business applications.

End

June 2004