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Reply on Commission Staff Working Document  
Study on a Community Initiative on the Cross-Border Collective Management of  
Copyright, dated 7 July 2005

Introduction and General Remarks

The Commission launched the above mentioned document and kindly opened a consultation process which will already be closed on 28 July 2005, three weeks later. The document is on one side a study and on the other side it is considered as the draft Impact Assessment which will be included in a proposal of a Community Initiative which is announced for coming October. We regret that the delay for submitting comments is very short and falls into the main holiday season. We would be grateful for your understanding that we will possibly have to add further comments after the summer break. In particular smaller players find themselves in a difficult situation.

The need to reflect more intensively on your 60 page document also results on the fact that the community initiative announced here remains rather unclear. From the three options which the Commission detects the third is favoured and the measures to take could be as proposed at the end of the executive summary "a series of principles that Member States would have to adhere to in order not to stifle the

emergence of Option 3 as a competitive model for the cross border management of copyright works.” Until recently the Commission announced an entirely different proposal in roadmap page 35 of the Commission work program. A horizontal tool was to be expected so far, with the aim to create a level playing field in the EU for collective management covering areas as the rules on establishment of collecting societies, the relations to other market players and dispute settlement. As it is known, we have not opposed to such initiative and have expressed this in our submission to the consultation on the Communication, dated 16 April 2004. The destiny of this project which also has the support by the EP (report of 11 December 2003 – A5-0478/2003) is unclear.

By this study we learn that something else is in preparation. The new tool aims to promote one single industry, namely the downloading services of music by creating a set of rules on collecting societies in the music field. Therefore, the study concentrates on observations on music collecting societies. But at the same time it is announced that these rules or principles will also apply in future for the other sectors and maybe even for other rights and uses. However, those sectors are not part of the study.

We are certainly not in a position to answer in matters concerning other repertoires and would like to stress that our comments are entirely related to EVA societies. Given the intended extension of the scope of the tool we have to take the opportunity to respond to aspects of general interest and we already make aware about particularities in our field and the fact, that the three problem fields detected by the Commission, (1) problems in flow of cross-border revenues (2) refusal to let authors choose their society and (3) market failure to find a solution are definitely not the case in our field.

The study’s point-of-departure is an evaluation of the EU market of music downloading in comparison with figures from the U.S. It is explained in the executive summary on prominent position that “action is now required at EU level because revenue achieved with online content services in the US” were higher than in the EU. It is most unfortunate that the study which takes such a central role in the Commission document is not available because it is a private sector study, - commissioned by one of the stakeholders - that is not published. EVA reserves comments on the figures and findings on the study.

So far it appears surprising that obviously total income figures of the U.S. and EU are directly compared although size and population differ considerably as might other

factors. And so far the figure show that we are dealing with a small market segment - even in the U.S.

There is also a lack of evidence on several findings of the study, for instance about the failure of reciprocal agreements and that the envisaged tools could have any effect to increase the revenue flows in the EU. The cultural dimension and the need of protecting the patrimonial culture are not taken sufficiently into account and there appears to be a need to deepen knowledge of the markets the collecting societies are working at.

We are looking forward to provide the Commission with any required information on our member's activities.

### Culture and Creativity

The European Union has repeatedly expressed its will to support the cultural diversity for instance by supporting the UNESCO initiative to create a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions. In its Communication, dated 27 August 2003 "*Towards an international instrument on cultural diversity*" (COM 2003 520 final) the Culture Ministers Meeting in May 2003 is cited who made it clear that Europe has to safeguard and promote cultural diversity because it is a continent of culture (page 4). Therefore, the EU actively participates on the development of such an international instrument and the Commission received its mandate in November 2004 by the Council. One important issue of the draft Convention is the possible exclusion of culture from being treated by other International treaties as an ordinary economic good.

The corresponding regulation within the EU is article 151 of The Treaty which in paragraph 4 says that:

*"The Community shall take cultural aspects into account in its actions under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."*

On the 25 February 2005 Ján Figel the Commissioner for cultural affairs expressed:

*“I will ensure that the specificity of culture is respected under other European policies, for instance in the areas of competition and the internal market. Indeed, culture is not a product like any other.”*

Collecting societies for visual arts are linking authors and their estates with users which are mostly cultural institutions and establishments. Thus, they provide the service to facilitate the access to works and legal certainty for users, the dissemination of works and insurance that authors are rewarded. It comes as no surprise that these societies are founded and to large parts governed by artists themselves. As authors of fine art usually do not have such permanent business relation to industries such as publishers and record labels the collecting society usually is the only professional service provider who concludes copyright contracts, monitors the market and distributes revenues.

By providing for authors an environment where their rights are acknowledged and protected and where it is insured that they receive equitable shares of profit made by others artists may feel appreciated and be encouraged to create works.

Collecting societies for visual arts administer remuneration rights, such as private copying, reprography, public lending etc. They are also managing primary rights which are the reproduction right and the broadcasting right. The main user groups are museums and educational institutions, public collections, public broadcasters, publishers specialised in works of art and to some extent producers of packaging of products and advertisers.

The users on the other side appreciate to have most artists represented under one roof, legal certainty and predictable price structures. Most of the users have to choose particular works of particular authors for their publication because the works are no simple decoration but are in close connection to the contents of a product. A museum for instance would be interested to obtain rights on works which are exhibited or part of their permanent collection and which can not be exchanged by a subsequent product. Competition in this respect therefore is of low interest. If a museum for instance plans a communication activity with several products it would most likely not be appreciated if the right for print products were to be obtained at the local society while the rights for the website publication are not. It would rather be an unappreciated challenge to “hunt” the rights all over the EU.

The social and cultural funds of the collecting societies only exist in some countries. These are mostly the same countries which offer a rather high standard of rights for

authors and are not afraid to put the burden on the domestic industries. The collecting societies are obliged by laws to deduct amounts of income for social and cultural support of authors who are active in the same creative field. These laws are constructed in different ways and are more or less detailed.

The Commission believes that funding needs to be accessible EU wide because collecting societies would have an international range.

In reality the creation of funds for domestic artists is a para-fiscal measure with the aim to create funds which use income received from domestic industries for domestic culture purposes. It is comparable with other para-fiscal measures where industries are obliged to pay into a fund for expenditures on research or environmental project which are close to the industries. It is rather an out-sourcing of the public task to nurture and promote artists in order to protect cultural diversity and it is fully covered by Article 151 of The Treaty.

The Commission expects that artists would obtain new international plat-forms. We believe that the international promotion of artists is also an important field but something different from protection of cultural diversity which can only be ensured if domestic artists are the target group.

### Reciprocal agreements

The EVA societies only sign A-contracts with full exchange of revenues across borders. We always advocate that remuneration and revenues flow to the visual arts societies in order to ensure that the authors and estates – which our members only represent – receive their equitable share.

At first sight it might appear confusing that all societies sign bilateral - mostly reciprocal - agreements. However, once signed, a solid network is created on which the international co-operation is based.

Reciprocal contracts have been created in order to overcome the territorial restrictions which are characteristic for IPR. They are the first system to offer cross-border rights and to facilitate cross border flow of revenues.

As member states have failed to agree on a high level of harmonisation in the directive 29/2001, namely since in article 5.2. a long list of optional exceptions

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ensures that differences in the countries maybe continued also in the online environment territoriality has a further reason justification to be continued also in the new environment.

The traditional reciprocal agreements are limited to multi-repertoire licenses which are still the major field of activities of all collecting societies. Since the market requests multi-reperitory and multi-territory licences collecting societies are considering solutions which serve the users without endangering the interests of the authors.

For the limited market of visual works of fine art the collecting societies have found and created a solution which is working successfully. In 2002 eight societies created OnLineArt a one-stop-shop for world-wide licenses for works of art on web-sites. OnLineArt has today 12 associates in the EEA, Switzerland and the U.S.

It is a one-stop-shop for world-wide licenses without territorial restrictions within the EEA and Switzerland based on a common server which facilitates communication between the collecting societies included in the circle and facilitates also the monitoring of uses. In other words: any user situated in the EEA or Switzerland may choose a collecting society.

The common server is of particular importance because efficient DRMs are still not available for our sector and we are creating with the common server a tool to overcome the lack of monitoring on-line uses.

OnlineArt offers world-wide licenses under the same conditions for all users but includes also options for artists who desire individual licenses in cases where this is appropriate. The system is in place and working since the beginning of this year.

### Landscape of societies for visual arts, overlapping, gaps and competitors

Because of the territorial character of IPR it is preferable to have one collecting society for the visual arts repertory in each country. In the absence of a level playing field for collective management in the EU it would be extremely complicated for one

or two EU wide societies to maintain low administration costs when dispute settlement cases in several member countries under entirely different legal regimes would need to be pursued. Further it is most difficult to keep the necessary contacts and knowledge of the users' landscape which also is entirely different structure in the member countries. Museums, broadcasters, auctioneers and galleries are only some of the most important users. The particularities of the repertory, the market, the direct representation of authors and estates towards cultural institutions request a highly individual service and specialised knowledge. In countries where such societies do not exist the rights of visual artists are not protected and artists do not participate on revenue flows. Further the contact to the domestic authors can only be provided by a domestic society which is usually even created by artists associations.

For all these reasons the collecting societies for visual arts have never seriously considered to their services in countries without collecting societies which is the case for instance in Malta, Cyprus, Slovenia, Luxembourg – in Ireland a society was only launched in June. It would be a venture of too high financial risk.

The collecting societies do not represent all authors mostly because a certain number of mainly living artists is not interested in general on copyrights. Some estates prefer to represent rights by a single foundation and others choose a mixed representation. The Picasso estate for instance is only in France represented by their foundation and has signed contracts with all international collecting societies. In some countries, like in Belgium several societies offer representation for visual arts. The UK –based Bridgman Art Library is competing with collective management.

In other words the landscape is diverse, competition is existing already but it can be stated that the users in most cases appreciate that the collecting societies unite the great majority of authors under one roof and offer services to find further authors and estates, which is only possible because of the solidarity character between most players and the common interest to promote the arts.

The rights administered by the societies cover all copyrights of this professional group including primary rights, the resale right and remuneration. It would be most difficult to separate one right from this group and introduce a system under Option 3 because friendly co-operation - which is in the end helpful for the users and consumers to receive licensed products - would end.

Authors may choose their collecting society

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There is no restriction in practise which imposes the obligations to authors and estates to become member of one particular society. To our knowledge this problem has been cleared 20 years ago by an EC judgement (GVL v. Commission [1983] ECR 483). In our sector the free choice of collecting society never was questioned and has only been raised in very few cases which were solved in best interest of the artist.

Following the study it should be possible for the author to become member of one society for the right of communication and in another one for other rights. There is no evidence shown that this would result in benefit for authors or users and as explained above, this would more likely result in higher cost-rates and be against the interest of the users.

#### The options

From the option the Commission outlines we cannot give our support to any. We do not oppose in general EU initiatives which aim to improve the situation for cross border uses. However, we believe that option 2 is too unclear to comment and option 3 unfortunately has a high potential to create much more damage than benefits.

We would also like to underline that we are actively working on our solution for the online cross-border uses by creating OnLineArt.

We would welcome an opportunity to explain in more detail the work and positions of our members.

Brussels, 21 July 2005