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*Committee on Legal Affairs*

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## **DRAFT REPORT**

on the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)  
(2006/2008(INI))

Committee on Legal Affairs

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### **on the Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI))**

*The European Parliament,*

- having regard to the Commission's Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)<sup>1</sup> (hereinafter "the Recommendation"),
- having regard to the Treaty establishing the European Community, in particular Articles 95 and 151 thereof,
- having regard to Articles II-77 and II-82 of the Charter of Fundamental Rights of the European Union,
- having regard to Article III-181 of the Treaty establishing a Constitution for Europe,
- having regard to the international agreements in force which apply to music rights, namely the Rome Convention of 26 October 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty of 20 December 1996, the WIPO Performances and Phonograms Treaty of 20 December 1996, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994,
- having regard to the body of EC law ("*acquis communautaire*") in the area of copyright and related rights which applies to music rights, namely Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and certain rights related to copyright in the field of intellectual property<sup>2</sup>, Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission<sup>3</sup>, Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights<sup>4</sup> and 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<sup>5</sup>,
- having regard to the Green Paper of the European Commission on copyright and related rights in the Information Society (COM(1995)0382),
- having regard to its resolution of 15 May 2003 on the protection of audio-visual

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<sup>1</sup> OJ L 276, 21.10.2005, p. 54.

<sup>2</sup> OJ L 346, 27.11.1992, p. 61.

<sup>3</sup> OJ L 248, 6.10.1993, p. 15.

<sup>4</sup> OJ L 290, 24.11.1993, p. 9.

<sup>5</sup> OJ L 6, 10.01.2002, p. 70.

performers<sup>1</sup>,

- having regard to its resolution of 15 January 2004 on a Community framework for collective management societies in the field of copyright and neighbouring rights<sup>2</sup>,
  - having regard to the Commission's Communication of 16 April 2004 on the Management of Copyright and Related Rights in the Internal Market (COM(2004)0261),
  - having regard to Rule 45 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Culture and Education (A6-0000/2006),
- A. whereas the Commission failed to consult interested parties sufficiently before adopting the Recommendation; whereas all categories of right-holders must be consulted on any future regulatory activities in this area so as to ensure a fair and balanced representation of interests,
- B. whereas the Commission's omission to involve Parliament formally is unacceptable, particularly in view of Parliament's above-mentioned resolution of 15 January 2004, given that the Recommendation clearly goes further than merely interpreting or supplementing existing rules,
- C. whereas it is unacceptable that a “soft law” approach was chosen without prior consultation and without the formal involvement of Parliament and Council, thereby circumventing the democratic process, especially as the initiative taken has already influenced decisions in the market to the potential detriment of competition and cultural diversity,
- D. whereas it is important to avoid the possible threats and to strike a reasonable balance between the rights and interests of the various stakeholders;
- E. whereas music is not a commodity and collective rights managers (CRMs) are mainly non-profit-making organisations, and whereas introducing a system based on unrestricted competition may not be in the interests of right-holders or of promoting cultural diversity and creativity,
- F. whereas national CRMs should continue to play an important role in providing support for the promotion of new and minority right-holders, cultural diversity, creativity and local repertoire,
- G. whereas greater, but controlled, competition in the collective management of copyright and related rights in the music sector can be beneficial to all parties and underpin cultural diversity, provided that it is fair and transparent and that competition concerns only the provision of the service in question without affecting the value of the rights,
- H. whereas there is concern about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity given the potential risk of favouring a concentration of rights in the bigger CRMs, and whereas the impact of any initiative for the introduction of competition between rights managers in attracting the

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<sup>1</sup> OJ C 67 E, 17.3.2004, p. 293.

<sup>2</sup> OJ C 92 E, 16.4.2004, p. 425.

most profitable right-holders should be examined and weighed against the adverse effects of such an approach on smaller right-holders and cultural diversity,

- I. whereas the ability of right-holders and users to choose a CRM regardless of the Member State in which they are located must:
  - be accompanied by appropriate measures to safeguard and promote the diversity of cultural expression, notably by offering users large diversified repertoires, including in particular local and niche repertoires,
  - ensure that all right-holders, irrespective of their nationality or residence, receive a fair share of royalties as directly as possible,
  - not allow the most profitable right-holders to strengthen their dominance to the detriment of lower-earning right-holders,
- J. whereas the existing system of reciprocal collection of royalties should be preserved so that competition is introduced on the basis of the services that CRMs can offer and the commission they charge and users are licensed on the basis of the tariff applicable in the country where the act of copyright exploitation will take place, and whereas Member States should ensure that commercial users apply for the necessary legal consents and duly pay equitable royalties to all categories of right-holder,
- K. whereas CRMs should be free to provide commercial users based anywhere in the EU with pan-European and multi-repertoire licences for cross-border and online uses (including mobile telephony and other digital networks) where they are in a position appropriately to administer the exploitation of the rights licensed, and whereas such multi-territorial licenses should be granted on fair and individually negotiated conditions without discrimination between users or between different technological platforms so that CRM licensing practices do not result in competitive distortions among different users of rights and different technological transmission means,
- L. whereas, in order to maintain a one-stop-shop (where commercial users may obtain a licence for the world repertoire for the territory they need), the existing system of reciprocal collection of royalties should be preserved, in combination with a high degree of protection for right-holders, so as to avoid downward pressure on revenues, whilst also ensuring that undesirable exclusive mandates inimical to fair competition may not be granted,
- M. whereas there is a need for better governance of CRMs through improved solidarity, transparency, non-discrimination and accountability rules combined with appropriate control mechanisms in Member States,
- N. whereas equitable, impartial and effective dispute-settlement mechanisms should be introduced in the Member States for all stakeholders,
- O. whereas the Commission should make a thorough impact assessment of the possible results and risks of multi-territory and multi-repertoire licensing for online services taking full account of the cultural, economic and social dimension,
- P. whereas there is a need for common tools and comparable parameters and the coordination of CRMs' areas of activity so as to improve cooperation between CRMs and take the development of the information society into account,
- Q. whereas any effort made to stimulate competition in the internal market and promote the

international distribution of European musical works, regardless of which CRM manages the copyright, is welcome, bearing in mind that every repertoire, regardless of whether or not it is widely known, should be treated equally,

1. Invites the Commission to present as soon as possible - after consulting closely with interested parties - a proposal for a flexible framework directive to be adopted by Parliament and the Council in codecision with a view to regulating the collective management of copyright and related rights in the music industry, while taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires;
2. Stresses that the proposed directive should not in any way undermine the competitiveness of the underlying creative businesses, the effectiveness of the services provided by CRMs or the competitiveness of user businesses - in particular small right-holders and users - and should:
  - guarantee right-holders a high degree of protection,
  - be based on solidarity and an adequate, equitable balance between right-holders within CRMs,
  - provide for democratic, transparent and accountable governance in CRMs, inter alia by establishing minimum standards for organisational structures, transparency, accounting and legal remedies,
  - promote creativity and cultural diversity,
  - allow only fair and controlled competition, without territorial restrictions, but with the necessary and suitable qualitative criteria for the collective management of copyright,
  - avoid downward pressure on royalty levels and the over-centralisation of market powers and repertoires,
  - preserve CRMs' cultural and social role while ensuring that they administer right-holder funds and provide services to rights users and right-holders in the most efficient manner possible,
  - provide users with a high degree of legal certainty and preserve the availability of the global repertoire through licensing,
  - foster right-holders' ability to develop a new generation of collective licensing models for music across the EU for online uses more adapted to the online environment,
  - adequately satisfy the future needs of a streamlined online market without posing any threat to fair competition and cultural diversity,
  - take account of the different forms of legitimate online music services and lay down specific rules to foster their development;
3. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.

## EXPLANATORY STATEMENT

Before entering into a discussion of the merits, your rapporteur would like to point out that she fully endorses the suggestions made in the Culture Committee's opinion, some of which she has incorporated into her draft report.

### Introduction

About 5-7% of the EU's GDP is earned by goods and services protected by copyright and neighbouring rights. This underlines the huge importance of proper management of those rights, in common with their enforcement, particularly in this digital age.

On 18.10.2005 the European Commission adopted a Recommendation on the cross-border management of copyrights for legitimate online music services on the basis of Art. 211 EC. Commissioner McCreevy described the Recommendation as "a *'soft-law instrument'* designed to give the market a chance to move in the right direction"<sup>1</sup>.

The Recommendation has far-reaching consequences for the copyrights market and major players in the market are already acting on the basis of it. It clearly goes further than merely interpreting and supplementing existing rules and its impact has all the characteristics of a full regulatory initiative.

The Recommendation's primary aim is to adapt the collective management of copyrights for online music services to the development of new technologies that have led to the emergence of a new generation of cross-border commercial users of copyrights (*i.e.* online music providers).

It must be stressed, however, that the same principles that apply to the management of copyrights for online music services, can, and in due course very likely will, apply to the offline environment as well, such as broadcasting. The precedents set in relation to the online environment are thus a touchstone for the future evolution of the broader market for authors' rights. Again, this highlights the importance of any initiative in this area.

To provide a balanced picture, it must be noted that there is a concern on the part of minor CRMs and rightholders that, in practice, the Recommendation has been taken as a clear signal for the major publishers to withdraw the so-called "international" repertoire they control from the network of national collective rights management societies (CRMs) and place it in the hands of one or a very few large CRMs with an exclusive mandate to represent those rights across the EU.

Contrary to the avowed objective of the Recommendation of promoting fair competition, such action is potentially anti-competitive, as it is likely to lead to a *de facto* oligopoly, with market power concentrated in the hands of a few major rightholders and a similar number of big CRMs. It also constitutes a severe threat to the health and vibrancy of cultural diversity in Europe because the removal of international repertoire from the network of national CRMs is likely to cause many national CRMs to cease to operate, to the detriment of local and minority repertoires.

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<sup>1</sup> SPEECH/05/588.

The Commission's adoption of the Recommendation has deprived the European Parliament and the Member States of the chance to make considered input to a process of change which will have major consequences for future competition in this field and for cultural diversity in Europe. This issue is too important for the European Parliament not to be formally involved.

Parliament must be able to play its role in the democratic process. The Commission must, therefore, be invited to present as soon as possible a proposal for a suitable binding legal instrument in this field, to be adopted by Parliament and Council in codecision.

### **Functioning of the market**

Collecting societies are associations of authors and other rightsholders, such as publishers. They are set up to collect and distribute royalties for rightsholders on a collective basis. In practice, CRMs enjoy a (natural) monopoly position at national level. Rightsholders are represented in that territory directly by the CRM and in third countries via reciprocal arrangements concluded bilaterally between their chosen CRM and all the other CRMs in Europe and around the world.

For decades the European and international music copyrights market has functioned on the basis of this network of such bilateral agreements. This “System of Reciprocal Agreements” provides a one-stop-shop for users of copyrights (*i.e.* from one CRM, users can get a licence for the worldwide repertoire for exploitation in the national territory where the CRM is located), ensures proper monitoring of the global market so that rightsholders are appropriately remunerated and provides an effective rights-enforcement mechanism for all the national and international rightsholders involved.

This system ensures that not only the big rightsholders, but also small and local authors, are well represented on the market and receive their fair share of the royalties collected.

### **Market change and the introduction of competition**

As part of the further development of the European music market, the introduction of controlled competition is needed to reflect the changes in the European single market, developments in technology, the emergence of new business models and the consequent changes in consumer preferences and behaviour.

The Recommendation intends that rightsholders should have greater freedom to choose the CRM that best serves their needs. In other words, competition between CRMs should be based on individual CRMs competing to attract rightsholders. Superficially, this appears to benefit rightsholders.

In practice, however, individual authors may already place their rights with the CRM of their choice. Indeed, there are a number of instances of more successful authors exercising this right and opting, *e.g.*, to work with a CRM outside their home country. This is generally not that feasible in practice for small rightsholders.

Furthermore, the rapporteur has noted that minor CRM's and rightholders are concerned that the Recommendation has been interpreted by the major publishers as an opportunity to withdraw the rights they control from all the national CRMs and place them with a small

number of larger CRMs. The latter will then be able to by-pass the network of reciprocal agreements and grant licenses in and for the whole European market, thereby diminishing the turnover of the national CRMs commensurately.

The loss to the national CRMs of the turnover associated with royalties collected in respect of international repertoire would make it increasingly difficult for national CRMs to function effectively because the cost of their operations would fall on a smaller number of local rightsholders. Once a national CRM is forced to cease operations, it is unlikely that a small rightsholder will obtain an equivalent level of service support from an alternative CRM in another country where, for example, another language is in use.

This approach to rights management clearly favours large and successful commercial rightsholders at the expense of authors of local and/or minority repertoire. In practice, this sort of competition would actually undermine the position of the majority of rightsholders, which would not appear to be the Commission's intention.

And yet, since the Internet operates beyond national borders, online music providers must be in a position to acquire pan-European licences that cover two or more national territories on the European continent. And they must have the choice of where to go for those licences on the basis of where they receive the most competitive services. This scenario is one where CRMs compete for users.

However, the danger with such a system is that the national CRMs would compete for new business by exerting pressure on the level of royalties paid to rightsholders. It is possible, even likely, that this would result in authors' revenues spiralling downwards. Again, this is not in the interest of rightsholders and would undoubtedly have an adverse impact on cultural diversity in Europe, as smaller rightsholders would see their earnings depressed to such an extent that they would no longer be able to survive.

### **Cultural diversity v. competition**

A "big bang"-style introduction of competition in the field of collective management of author's rights should not be pursued because of the risk of irreversible damage to cultural diversity in Europe. Rather, competition should be introduced in a way which ensures a level playing field at the outset so that all CRMs have the opportunity to compete on an equal footing.

The solution is to find an alternative compromise solution to what is a peculiarly European problem. Fair and controlled competition must be introduced in such a way that downward pressure on authors' income is avoided whilst enabling music users to obtain pan-European licences which are in line with the new business models that represent the future.

For this purpose, the best guarantee is the introduction of a system in which authors' revenues are determined by the rates of the country in which the consumer buys (downloads) a particular piece of music. The application of the tariff of the "country of destination" leads to competition based on efficiency of the services offered by the CRMs (notably, by reducing the administrative costs) rather than competition based on squeezing the royalties paid to rightsholders.

In addition, some consider it essential to prevent major rightsholders from reaching exclusive

agreements with one or a small number of CRMs, thereby removing the international repertoire from the overall system.

In its report of 20.7.2006, the Committee on Culture and Education expressed its concerns about the potential adverse effects of the Recommendation on cultural diversity in Europe on the ground that it would affect the functioning of the reciprocal system and that this will lead to a concentration of rights in the bigger CRMs. This will undermine the functioning of the smaller CRMs and therefore endanger small and local authors' position throughout Europe. It is therefore of key importance that the network of bilateral agreements should remain in place without leaving room for the withdrawal of repertoire from this network. The conclusion of exclusive mandates between rightsholders and CRMs should therefore not be allowed.

### **Follow-up**

In order for the European copyrights market to develop properly, it is crucial that adequate follow-up is undertaken by the authorities. In this context, the Commission should conduct, as soon as possible, an assessment of the impact of multi-territory and multi-repertoire licensing on online music services and its effects on cultural diversity and rightsholders' economic and social situation.

In addition, the Commission should carry out a critical analysis of the horizontal concentration in certain sectors of rights management and the effects such concentration will have on rights users and rightsholders. Where necessary, appropriate measures must be taken in order to ensure that the European market for online music services remains in a position to develop in a healthy way without adverse effects on cultural diversity in Europe.

### **Legal framework**

In the preparation of this Draft Report for a European Parliament Resolution, full account has been taken of the existing European legal framework and related policy-making initiatives, the *acquis communautaire* in the area of copyright and related rights which applies to music rights, and relevant international agreements. For a complete list, see the preamble to the motion for a resolution.

Account has also been taken of the study "The Collective Management of Rights in Europe – The Quest for Efficiency", undertaken for the Committee for Legal Affairs and presented to the committee on 11.09.2006.