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INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS CONFEDERATION INTERNATIONALE DES EDITEURS DE MUSIQUE ICMP/CIEM

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When looking at the Internet today, there appears to be five main content streams which are working : email, information, sex, violence, music. People are trying to make money out of the last three. But, they are certainly not, yet, with music.

When we were here last, William Booth (Sony Music Publishing) and Michael Karnstedt (Peermusic) underlined the risk of the developing piracy on the net and had called for legislative reform to allow enforceability of copyright on line. This was viewed as a condition for licensing practices to adapt.

Developments over the past two years have confirmed the risk, then identified, of increasing unauthorized use of music on line. A transitional period has indeed opened for law, commercial practices and technology.

I- It is clear that a great deal of the music on-line is unauthorised. Music publishers with songwriters and composers have had to fight to assert their exclusive rights over the musical composition and the lyrics. The press has widely reported the litigation, particularly in the United States, in the course of 2000-2001.

Internet service providers have shown great imagination. For instance, MP3.com offered the possibility to store one's music in virtual lockers which people could use to listen to their recordings from any connected computer. The system did not prevent people from borrowing friends' CDs to stock their account, nor from exchanging passwords. This resulted in massive exchanges of copyright content to the benefit of many, but the creators. In addition, a database was built comprising tens of thousands of commercial CDs, including some 500,000 songs, all of this unlicensed. Music publishers alongside with the recording industry filed separate lawsuits. Settlements have resulted in agreements under defined licensing terms and conditions.

Other services offer the possibility to download free of charge software which permits parties to connect with one another's computers and swap files. The best known, obviously, is Napster with a software program which connects computers and their respective stocks of MP3 music files. Songwriters, music publishers filed suit in United States Federal Court on December 7, 1999 on the grounds of contributory and vicarious copyright infringement seeking permanent injunction and damages for infringement. The judge dismissed defence argumentations. One was based on the claim that the limited service provider liability safe harbour in Section 5.12(a) of the Digital Millenium Copyright Act applied ; another on the alleged application of the United States 1992 Audio Home Recording Act. The judge

concluded that Napster's peer to peer service was infringing copyrighted works on a unprecedented scale and entered preliminary injunction against Napster. After an appeals before the United States Court for the Ninth Circuit, the injunction was modified and confirmed. The music publishers' case is now certified by the District Court as a class action. The hoped evolution is that Napster will develop into a licensed subscription service.

Since the launch of Napster, numerous mutations have emerged of file sharing type software which unlike Napster, do not rely on a centralised directory for connecting users (Gnutella, Freenet). They have not sought licences from music publishers. A suit against the owners and operators of the Aimster on-line service was filed in United States Federal Court and is in its initial stages. Another example of a service which has not sought licenses from music publishers is the Farmclub On-Line. Music publishers and songwriters also filed suit in the United States Federal Court and a ruling is anticipated.

It is a fact that composers, songwriters and music publishers have had to rely on the judiciary to bring on-line music services to the table to discuss licensing terms and conditions. This unfortunately has increased the perception by the public that intellectual property rights are an obstacle against technological development, consumer rights and fairness. It also allows numerous parties to use these arguments against copyright sometimes for other reasons.

It is, therefore, crucial to remind parties that the right to "benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he/she is the author" is a human right (Universal Declaration of Human Rights, art. 27, and International Covenant on Economic, Social and Cultural Rights, art. 15).

II- The law is still in transition and the transition has proven a slow and difficult process in many places. In Europe, the Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, dated May 22, 2001, has taken approximately three years to be finally approved by the European Parliament and Member States. The Directive is intended to foster the development of the information society in Europe through a harmonised legal framework on copyright and related rights. It also serves to implement a number of the new international obligations in the December 1996 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). However, a Directive, although imperative throughout the European Union, must be implemented by each European State.

Member States have until 22 December 2002 to adapt national legislation to the Directive. In this process, Member States should be cautious not to add new exceptions which remain optional pursuant to the Directive. Commercial practices must be able to adapt to the market place without the law freezing situations ; especially in a market where practices are changing so rapidly. The "three-step test" which provides that exceptions shall only be applied in "certain special cases which do not conflict with the normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder" is crucial. Legislations in Europe should apply the test to all exceptions whether pursuant to the right of reproduction, the right of communication to the public, the right of distribution. In any event, exceptions must not apply if the source or the access to the copyrighted work is not legal.

Technological measures and rights' management information will be protected in Europe. However, the level of such legal protection remains to be defined. The remedies against

circumvention of technological measures and injunctive relief against Internet service providers in the event of third party infringement have yet to be determined by the Member States. Notices and take-down procedures are being discussed. Fortunately, parties appear to understand the requirement for rapid and effective enforcement against unauthorised users.

On August 28, 2001, the United States Copyright Office released a Report mandated by Congress pursuant to Section 104 of the DMCA. In enacting the DMCA in 1998, Congress has asked the Copyright Office to study "the effects of the amendments made by the anti-circumvention and rights management provisions of the DMCA, and the development of electronic commerce and associated technology on the operation of Sections 109 and 117 of the United States Copyright Act". Section 109 contains the "first sale doctrine"; Section 117 establishes an archival copying exemption for computer programs. The Office, in response to arguments advanced by certain commercial users of works, also examined proposal calling for an exemption in the law for certain temporary or "incidental" copies. In so doing, it raised important issues which impact directly on music and the development of electronic commerce.

On the effects of the amendments made by the anti-circumvention provisions of the DMCA, Title I, it is noteworthy that the United States Copyright Office writes that the "arguments raised concerning the adverse effects of the C.S.S. technological protection measure on the operation of Section 109 are flawed". The Office further notes that the current impact of the use of technological measures on an exception, such as the archiving exception in Section 117, appears minimal, since the licenses generally define the scope of what is permissible, in this instance of what is permissible for archiving purposes. Furthermore, the use of CD-ROMs reduces the need to make back-up copies. Thus, the Office concluded that no amendment in the law was necessary in this regard. One extremely important point, recently confirmed in the European Copyright Directive, is that anti-circumvention acts are strictly prohibited. This is crucial. The validity of anti-circumvention provisions must be upheld.

Another point in the United States Copyright Office Report is that the United States Copyright Act should not be amended to extend the "first sale doctrine" in Section 109 to the digital transmission of the copy of a work. The first sale doctrine in Section 109 limits the copyright owners' exclusive right of distribution only to physical copies of a work. Digital communications will enable authors and publishers to develop new business models with a more flexible variety of products that can be tailored and priced to meet the needs of different consumers. It is quite clear that a digital first sale doctrine would prevent distribution models to adapt. This solution is also correctly confirmed in Europe. The Copyright Directive, Recital 29, specifically indicates that the question of exhaustion does not arise in the case of services, and on-line services in particular. Furthermore, the communication to the public right is not subject to community exhaustion either.

Temporary copies is the third, and perhaps the most controversial, issue addressed by the United States Copyright Office Report. The Office declined to recommend that temporary copies incidental to the operation of a device in the course of any lawful use of a work should be subject to a blanket exception. Temporary copies in integrated circuits known as RAM, are specifically subject to the copyright owners' exclusive right of reproduction pursuant to Section 117 of the United States Copyright Act. Indeed, temporary copies remain in memory until they are over-written or deleted. The legal status of RAM reproductions becomes crucial in the context of streaming, audio-delivery, webcasting.

The Copyright Office, however, in the Report opens the debate on whether the United States Copyright Act should not preclude liability arising from the assertion of a copyright owners' reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a performance of a sound recording and underlying musical work. The *rationale* put forward is that these buffer copies[1] are temporary, have no independent economic significance, and are within a licensed authorisation. This suggestion, for those that were involved in the discussions concerning the Article 5.1 exception for transient reproductions in the European Copyright Directive, will ring a strong bell.

If they were to result in legislation, the Office's conclusions could have negative implications for music publishers and songwriters, but potentially for other rightholders as well. Among the questions raised is : what type of liability are we talking about, *vis-à-vis* third parties that are operating transmissions, or *vis-à-vis* users of the content ? In Europe, the liability of third parties has been addressed in the E-Commerce Directive distinct from the Copyright Directive. Therefore, music publishers have seen the Article 5.1 exception introduced in the Copyright Directive as a limitation of the reproduction right *vis-à-vis* users of the content. They have always opposed the introduction of this Article 5.1 exception for so-called technical copies. In any event, the Article 5.1 exception remains in our view subject to the three-step test of Article 5.5 of the Copyright Directive. Indeed, there are different views as to the economic value of temporary copies. As streaming becomes more common, temporary copies will increase in value because of the adverse effect of the offered services on the market for purchases of copies of works. It also seems questionable to consider that streaming should solely require a performance license, or that the nature of the technology used to access or deliver the work should, of itself, dictate the rights implicated. The flaw here is for legislation to impose licensing choices.

A fourth and last noteworthy point which the Report addresses is raised in the context of digital music downloads. The United States Copyright Office defines a use of digital music in the form of downloads where digital performances are incidental to digital music downloads. Here again, the relationship between rightowners and users of music seems at stake. According to the Report, performances incidental to an authorised download could be considered as technical. They would, then, since they are technical, generate no liability. If any legislation were to go as far as to qualify what rights are involved in what uses on line, it seems that the legislator will be making a potentially prejudicial pre-determination of how licenses should evolve on line. This could create a revolution rather than an evolution of commercial practices. The danger being that at a stage where nobody knows where or how the value will be generated – from the perspective of the creator and rightholder or from that of the consumer, the legislator will pre-determine the rights involved.

The legislative agenda in the United States is unclear at this time owing to developments surrounding that nation's recent tragedy. It is likely, however, that this year or early next, Committees of the United States Congress will consider the Copyright Office's Report in oversight hearings. What is less clear is whether Congress will choose to act upon the Office's recommendation or not.

III- Commercial considerations and commercial practices are also in transition and time must be given for that transition to be made. It is an area of the most intense frustration and difficulty. Adapting the licenses and the underlying technology in a global networking

[1] To stream audio information smoothly, packets of information are saved in a portion of RAM called a buffer.

environment generates very complicated questions. Music publishers, in coordination with different partners in the music, have certainly been pushing for progress and working for it.

Music publishing is a software industry. It is a rights business and many of these rights held by music publishers, songwriters and composers, are in fact the essence of the Internet music. The elements for a successful software or rights business are (i) good content, (ii) an adapted legal framework to license and enforce rights, (iii) a global and fluid system where licensors are easily identifiable and licences fairly negotiated, and (iv) an adequate technology which allows the implementation of the licenses within the legal framework.

Many have complained that the adaptation is slow. It is true that music publishers rely on complicated licensing systems in the world. All of this has to adapt to a totally new market on-line. Quite ; the traditional market is national, the new market is global, the old model recognises specific rights for specific uses, the performing right, the mechanical right, the synchronisation right, the graphic right in relation to public performances and broadcasting, CDs and all forms of physical carriers, film and audiovisual uses, print and visual uses. The old model involved sales to dealers, the new model is direct to customers ; the standard broadcasting and cable retransmission is territorial, the new model is regional or worldwide. On-line music comprises a mix all of these rights and that mix applies to the different models of delivery on-line, including downloading, subscription, streaming.

Another constraint is that the traditional market remains operational and must not be hurt. Pricing on-line must be revisited because the basis is different. It must, nevertheless, remain at a reasonable level by comparison with current practices. The new market may need some help as it is nascent ; but this should then be a global and reciprocal effort.

On the positive side, collective licensing has been offered for many years by music publishers, with songwriters and composers, for the performance right and the mechanical right. Thus, in each territory, the people that can either grant the licenses or immediately communicate with those that have the authority to grant the licenses, are limited and well identified. This is true in most countries where the collecting society(ies) operating on behalf of music publishers, songwriters and composers, is (are) well established and operate(s) effectively.

A global response is provided through cross-boarder reciprocal agreements between societies. This allows societies to grant in a given territory where it has authority, worldwide licenses to those requesting licenses in the given territory. Recently, the reciprocal agreements of several societies have been amended to include the ability to grant non-exclusive worldwide licenses for on-line performances (Santiago Agreement, September 2000).

Licensing models will vary slightly from one society to another. In general terms though, the principles are analogous. The license will include a specific rate, tariff or rates/tariffs schedules. The rate/tariff will correspond to a specific use which will be licensed. The base for the rate/tariff is also identified and may change depending on the type of use. For example, it is obvious that an on-line subscription license model must be on a basis which is different than that in the traditional market ; particularly, there should be no room for deductions applied against the value of the musical composition in relation to events relating to the physical world.

The point is that the value of the musical composition has steadily gone down over the last 20 to 30 years by comparison with the value of the product reaching the market and that the new legal framework as it is put into place must take this into consideration.

It should be reminded that in November 2000, the RIAA petitioned the United States Copyright Office to begin a rulemaking proceeding aimed at "clarifying" the Digital Phonorecord Delivery (DPD) provisions contained in the compulsory mechanical license in Section 115 of the United States Copyright Act. Music publishers are of the opinion that all parties are best served by negotiations aimed at setting appropriate rates and alternatively by convening an arbitration (Copyright Arbitration Royalty Panel – CARP) rather than by delaying matters with a rulemaking on the establishment of appropriate general and incidental Digital Phonorecord Delivery royalty rates. Hence, it is encouraging news if publishers in the United States do reach an agreement regarding the operations of two new subscription services (Pressplay and MusicNet).

Agreements will also have to be reached with music publishers, composers and songwriters in Europe and worldwide.

IV- Technology, finally, should not be the reason to slow matters down. Indeed, over past years, the technologies of user consumption have appeared to advance faster than the technologies for the protection of rights (through techniques, such as encryption and encoding) or for the licensing of rights (which have to rely on identifiers and tracers of the content and of the licenses).

Everybody is aware of the numerous digital rights' management technologies. Paradoxically, however, technology does not have to be the best. It has to be the accepted technology with its qualities and its flaws. Because of the nature of the on-line market, it has to be accepted and interoperable worldwide. Its purpose, of course, is to implement the commercial agreements.

There have been attempts to reach global systems within the music industry. There is now in progress a specific project which may provide some answers, the Music Industry Integrated Identification Project. This is an attempt to create a global identification for the whole industry. The two components of this identification project are the number identifying the content and the descriptive data which that identifier is associated to.

With the proliferation of digital music providers and the increasing range of global distribution methods, the industry requires interoperable systems to enable global automated management of rights. The challenges are that there currently exists diverse proprietary identification systems and databases organised differently and there is a lack of standards. There appears to be a need of categorising and of classifying the works, the other protected subject matters, and the transactions.

Currently, the record industry identifies the sound recording through an International Standard Recording Code (ISRC). The release of the recordings or the licensing of the rights therein, i.e. the transactions, do not appear to have a traceable identification. On the musical works side, composers and songwriters, music publishers and collecting societies, are identified through a specific database hosted and managed by SUISA in Switzerland. Musical works are identified by an International Standard Work Code (ISWC). Publications of musical works are identified by the International Standard Music Number (ISMN). For these identifiers to be

effective, interoperability of common standards of description will need to be used. This Project is intended to also focus on this aspect.

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Music publishing as a software business, a rights business, is pushing for the music to get on line upon terms which fairly recognise the value of the musical composition and of the lyrics, i.e. the kind of value that it should be paid. The legal framework should allow the business solutions to be reached and the administrative and technical systems to be established through the market place dynamics.

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