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Ministry of Justice  
Department of Intellectual Property Rights and Transport Rights  
103 33 Stockholm

**Joint statement by COPYSWEDE and KLYS on the EU Commission recommendation on collective cross-border management of copyright and related rights for legitimate online music services**

The recommendation's aim is stated to be to ensure that cross-border licences for the entire EU area may be issued in one and the same place, via one and the same agreement, for the use of online music services. The recommendation assumes that this can be achieved by forcing authors, performers and other rightholders to accept a change in the way their rights are collectively managed via collecting societies. The recommendation also includes provisions designed to increase rightholders' freedom of choice and to induce the emergence of an honest, just and transparent system of management of rightholders' rights via collecting societies.

The recommendation also includes an "impact assessment" intended to explain the implications of the recommendation.

However, the recommendation and impact assessment are not the only measures taken by the EU Commission with regard to collective rights management within the EEA. In a statement of objections (case COMP/C2/38.698-CISAC), the Commission maintains that it is incompatible with EU competition rules to uphold the system of reciprocal agreements and territorial rights monitoring country by country that is the basis of the current international collaboration between rightholder organizations throughout the world. This extends the scope of the issues under consideration to cover more than just the areas of music and the licensing of online music services. Radio and TV transmissions and their retransmission by cable TV networks are mentioned specifically.

The material that must be considered in order to be able to gain a clear and distinct picture of the effects of the Commission's actions is extremely extensive and some of the issues are very complex. It has not been possible for COPYSWEDE and KLYS to form a view of the whole issue in just a couple of weeks, or to establish what all the issues are with our 18 member organizations. Nor in its work on these issues, has the Commission provided the artist organizations with any opportunity to obtain information or present viewpoints. In view of the above, we have chosen to focus on a few main principles in this statement. COPYSWEDE and KLYS are both umbrella organizations and our viewpoints are therefore on the general level. They also relate mainly to aspects of artist and culture policy. As far as more detailed issues are concerned, such as terms and conditions applying to rightholders, repertoire management, details of reciprocal agreements etc., we assume that the organizations

most immediately concerned, i.e. those in the area of music, will provide their own statements on these.

The recommendation includes rules intended to safeguard the ability of rightholders to freely choose which collective rights manager to entrust their rights to, plus a long list of different rules on the distribution of payments, on precision in the management of rights, on transparency in accounting etc. We have absolutely no objections in principle to these rules. It is our understanding that Swedish organizations already meet these demands. It also seems to be the case that Swedish legislation, such as legislation on economic associations, the annual accounting act, general regulations on administration, protective provisions within the contract licensing system in Sweden, ensures that collecting societies behave in a reasonable way. Were any further regulations required, we would hardly be likely to oppose the introduction of such rules. However, it cannot be ruled out that measures may be necessary at EU level to establish good relationships between rightholders and their organizations and to ensure fair distribution and non-discrimination. There is therefore no reason for opposition to this within Swedish circles.

At the same time, COPYSWEDE and KLYS wish to stress the importance of Sweden taking an active role in the continuing processes within the EU on collective rights management to ensure that the structures that we in Sweden and the rest of the Nordic region have chosen to use to organize rights management are recognized and respected as perfectly satisfactory in terms of achieving what the recommendation seeks. The structuring of rights management in Sweden is characterized by – for example – close cooperation between the artist organizations and the collective rights management organizations. As Nordic traditions in this area differ from the situation in many other EU countries, it is important that Sweden, in consultation with the other Nordic countries, should ensure that the measures that are adopted to achieve the aims of the recommendation, are not structured in such a way that they come into conflict with or jeopardize the successful models for rights management that have been built up in our country.

In this context, COPYSWEDE and KLYS also wish to comment on the method of dispute settlement advocated in section 15 of the recommendation. In certain cases, the law on mediation applies in Sweden to copyright disputes. In the view of COPYSWEDE and KLYS, this method of dispute settlement fully satisfies the aims of the recommendation.

A closer study of the recommendation and of the Commission's "statement of objections" mentioned above, does not provide a clear picture of how any future regulatory framework and rights management system that may be desired by the Commission would work. However, it appears that – at least where the rights of European rightholders are concerned – the current system of one single licence from one single organization covering an entire world repertoire of works would be replaced by one where a licence holder acquires one or several licences for limited

repertoires from different sources. This would create competition between repertoires represented by different collecting societies and also competition between the societies that represent rightholders. The likely result would be an immediate fragmentation of rights management and possibly a concentration of rights management at one or a few very large rightholder organizations. However, none would be likely to be able to offer a comprehensive licence for a world repertoire.

The Commission's measures are designed as part of efforts to equip European industry with content that will generate success and that may be distributed via electronic networks. We do not believe that the measures now being taken will actually produce this outcome. There are reasonable grounds for anticipating that the opposite will be the case.

The reciprocal agreement system that music organizations around the world have built up is the result of investments over decades. It has created a highly effective system of rights monitoring that has made it easy for music users to gain access to the music they want, without the need to shop around among a number of different organizations. It is also the case that rights monitoring by the music organizations has served as a model for other groups in the area of rights management and in other areas, too, it has helped bring about similar reciprocal agreement systems.

There is no doubt that the systems used will have to be adapted if the goal of EU wide – and worldwide – licences for the use of music and other works online is to be achieved. However, what has been presented by the Commission to date appears to be hastily conceived and contains no clearly drawn or distinct line that can clarify the rules of play for operators in the market. Uncertainty in the market is not normally conducive to the rapid technical and commercial development that is sought. The Infosoc Directive was part of this endeavour. What the Commission is now proposing will, in the opinion of COPYSWEDE and KLYS weaken the position of European artists and open up, as far as we can see, at least three undesirable scenarios for European and Swedish culture.

The first thing that could happen is an undermining of the position of people in the culture sector. For the individuals concerned, collective rights management has been their only defence against the exploitation of rights that over-powerful producers often practise. By managing their rights collectively, artists have fashioned an instrument for, and a guarantee of, access by the market to their works and performances via effective licensing “under their management”. This has also made it possible to guarantee a financial return to artists when their work gains success in the market. Any weakening of such collective rights management would pave the way for a buying spree by producers of various kinds. For example in the film and TV area, these producers have generally not been domiciled in the EEA but rather on the other side of the Atlantic. In the case of Swedish companies, this often involves the subsidiaries of foreign producers. Through other arrangements, wholly Swedish-owned companies can also be highly dependent on non-European producers. Such an

outcome would not favour European artists. Nor would it benefit cultural diversity. It would be difficult for narrowly-based cultural offerings to reach an audience.

The second possible consequence of the Commission's measures is that, as mentioned above, collecting societies in different fields would become less representative than before. The Commission has expressed the view that different repertoires should be able to compete with each other. There seems to be a notion that the various rights management organizations would each put together a repertoire and then compete with each other on the market. The logic behind this seems to be that Per Gessle would be exchangeable with Benny Andersson, that Henning Mankell could substitute Lisa Marklund and so on. This argument fails on account of its inherent lack of credibility. Of course, it is in the interests of society that collective rights management – whether for musical or other works – should be organized such that everything is available to the general public.

The third effect of the Commission's proposals would be that the fragmentation of rights management would make it expensive and difficult for producers and distributors to acquire blanket licences for what they want to do. This is particularly true of companies such as Sveriges Television and Sveriges Radio and other organizations that aim to offer the public a broad, all-round range of programmes. In certain areas, however, utilization could still come about if it concerns what is deemed to be in the public interest to an extent that justifies an extended collective licence. After all, the extended collective licence format is designed to enable the acquisition of blanket rights, even if the organization entering into the contract does not represent 100% of the rights that will be utilized. At this stage it is not possible to say which new extended collective license clauses in the law may in the long term be needed.

The recommendation of the Commission, which is what we have been requested to comment on here, addresses the issue of collective cross-border management of copyright and related rights for legitimate online legal music services, and nothing else. It is conceivable that measures are needed to ensure flexible rights management in such cases. As we have already stated, COPYSWEDE and KLYS have no objections in principle to the recommendation now on the table. However, if the recommendation is linked to the other initiatives taken by the Commission, it would appear that the medicine prescribed by the Commission is so powerful that we risk losing the patient, if not as a result of the medicine itself then through its side effects. In the opinion of COPYSWEDE and KLYS, seeking in this way to bring about a change in how rights management is structured would not be well advised.

We are not convinced that the Commission has itself appreciated all the combined consequences of the various measures now being adopted. Neither is it true that the member countries and other interest groups in the area have had sufficient opportunity to influence the process. It is clear that the Commission has had its eye primarily on the interests of industry policy. However, Article 151 of the Treaty of

Amsterdam states that the EU must always take cultural aspects into account when acting in accordance with other directives in the treaty, especially in order to promote and respect cultural diversity. Sweden, like other EU countries, is also in the process of ratifying the new UNESCO convention on cultural diversity. In this context, there is genuine reason to recall that the culture policy commitments that follow from these documents will have a clear impact on this process as it unfolds.

We believe it is imperative for the issue to be placed on the political agenda. We cannot judge what opportunities Sweden, along with the other Nordic countries, for example, will have to influence the issue. However, COPYSWEDE and KLYS propose that an initiative is taken to commence the customary procedure associated with formulating a directive in the area. This would create an opportunity to take culture policy issues into account as well, not just industry policy issues. It is certainly not impermissible for the Commission to use recommendations, but it is not a democratic way of working. It means that issues that are fundamentally political and for which it should be possible to demand political accountability, will be decided by a few individuals. There is a clear risk that the issues will not have light shed on them from all angles and that at the end of the day, the outcome will be determined more by the most powerful lobby groups than by the best arguments.

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