

EDiMA response to the call for comments on the *Online Commerce Roundtable Report on Opportunities and barriers to online retailing*¹

Recent developments in the market for securing licences for online audio and audiovisual use are changing the landscape and posing both new challenges and opportunities for online media providers. Intended to benefit both licensors and licensees, some of these changes have resulted in increased complexity, cost and legal uncertainty for licensees. The evolution of the system from the traditional collection society system of facilitating rights clearance is creating short term problems of legal clarity and certainty for online media providers that require the collaboration of all parties so they may be solved in the new licensing environment. EDiMA believes that the market needs to deliver pan-European solutions that enable the licensing of the full catalogue of repertoire, respecting individual business models and their own rights requirements.

For the purposes of this policy statement, we reserve our comments strictly to the system of commercial rights clearance for online, interactive digital audio and audiovisual services such as webcasting, streaming, and downloads.

Respect of copyright and support for fair remuneration

EDiMA members fully support rights holders' desire to achieve fair remuneration for use of their creative works. EDiMA members are leaders in online distribution of music and audiovisual services and license rights for distribution across Europe; and, as such should have a leadership role at the forefront of the development of licensing and business models which seek to provide new revenue streams for rights holders, and provide consumers with compelling and innovative ways to legally consume content online.

Background

Licensing of digital services has undergone considerable change over the past five years and such developments continue. EDiMA does recognise that, in theory, the one-stop shop licensing principle has significant advantages for certain licensees or types of uses. However, we note, that as things currently stand there is no one-stop shop available. The number of rights agents has been reduced (from 27 to 4-5) for a majority of the Anglo-American repertoire. However, in order to provide a comprehensive music service the remaining rights have to be secured (due to the additional rights held by each society), the result is that licensees also need to secure rights from all 27 national societies for national local repertoires, and repertoires from outside the European Union, thereby only increasing the number of licences that are required. Furthermore, without transparency in repertoire from each rights agent, it can make it difficult for the commercial user to determine the need or value of the license on offer.

This complexity has led to uncertainty in the securing of rights. It is no longer clear by whom certain rights are held, leading to possible double payments by licensees for the same right. This cannot be rectified because the technical means to identify the rights holder or manager of given works may not yet exist and greater cooperation between licensing parties is needed. Licensees wish to increase their legal protections (such as via indemnities in licence terms and conditions) in order to alleviate the potential burden of such risks.

¹ Response addressing those issues raised in Sections III.1 and IV.A) of the Report concerning the online distribution of music.

Recommendations for Improvement in rights clearance

It is important to ensure that the licensing process enables, facilitates and accelerates bringing new business models to consumers and rewards and encourages business investment and innovation. In this respect, we also believe there is scope for more innovation in the licensing models to reflect the diversity of distribution and revenue models for digital content and to ease the difficulties arising from the fragmentation of management of repertoire.

Key desired changes in collective rights management and commercial licensing include:

- 1) **Commercial licensing** - licenses must reflect the needs of the given business model and licensing terms must be commercial and market driven. Today's digital distribution markets require innovative and flexible licences for different business models, which reflect the differing approaches and services of different commercial users. For example, some service providers place priority on securing a blanket license to maximize certainty that the whole repertoire is appropriately licensed, whereas other services may consider there to be benefits in acquiring repertoire piece by piece. If collecting societies are to unlock new sources of revenue from digital media, they must adapt licensing frameworks accordingly in order to meet these varied needs.
- 2) **Pan-European licensing** – licenses must be available which cover the whole of the European Union and European Economic Area, or one country or a specific group of countries, in order to facilitate rollout and service availability and to ensure the realisation of a true Digital Single Market.²
- 3) **Service licensing and coverage** - to the extent required, all repertoire should be offered in a license but with license terms and conditions that reflect the commercial user's requirements. Where multiple rights in a work co-exist in a single exploitation (in particular the reproduction/mechanical and performing right in online downloads), the rights should be licensed as a bundle to the commercial user from the same source.
- 4) **Transparency and Clarity** – it is important to understand and be able to verify which rights in which works an online digital media provider is receiving as part of any given licence. Online digital media providers should not have the responsibility for such verification. Now that licences are moving from a territory based system towards a repertoire/source based system, it is important that societies prioritise improving the transparency of ownership of rights so that licensees are not put in the position of remunerating rights to a society with respect to rights which it does not own or manage, nor of managing disputes between potential rights holders. This is particularly critical where more than one society or rights agent is either authorised to offer a license for the right or is claiming the right in question. To this end, societies should have to provide access to the works and rights they are entitled to license, to an extent that enables commercial users to identify what repertoire is being made available by each society or agent. Similarly, it is important for the purpose of legal clarity that the entities granting licenses to digital service providers affirm and ensure that their licenses authorise all uses permitted by the digital services they license.
- 5) **Legal disputes** – EDiMA believes that commercial users should have access to legal fora for recourse in the event of disputes with rights holders or collecting societies including with respect to disputes over rights and/or licence terms. These fora should attract the right expertise and be capable of delivering timely and balanced adjudications which meet the needs of a fast-moving digital market.
- 6) **Efficiency** – EDiMA supports current efforts by societies to move to a consistent reporting regime and urges greater harmonisation on pure administrative (back-end) matters in order to

² However, in this context it should also be recognized that the lack of harmonised consumer law, potential localisation requirements, commercial considerations, issues of scale and issues relating to the multiplicity of languages of the European Union present additional hurdles to the provision of such broad services.

- establish greater efficiencies and ultimately lower costs for societies, commercial users and rights holders. Such harmonisation should of course allow for change by flexibility for individual licencees, and particularly with respect to their particular differing business models.
- 7) **Copyright Levies** – EDiMA believes the issue of private copy levies is a relevant problem in need of review. Copyright levy systems are a legacy from the analogue world, whereas the digital era - characterised by digital content formats, proliferation of digital devices and ubiquitous connectivity – has fundamentally changed the way digital services enable consumers to acquire, consume and enjoy digital files of content such as music and video. The economic impact of the issues at stake is greater than ever and raises important questions about compatibility with a climate conducive to the development of innovative new distribution and licensing models. For this reason a review of the system is required.

Consumer Driven Licensing

It is important to understand that the driving force in the supply of digital media rights licensing is based on meeting consumer demand. Meeting this demand gives rise to innovation and new business models and the inability of licensing terms and conditions to readily reflect these new models creates a drag on the provision of digital media services.

EDiMA has constantly advocated for the licensing system to become more responsive to the need of the consumer. Consumer demand does not stipulate any type of structure for licensing, but one that can address the needs of digital service providers for securing digital licences.

To conclude, EDiMA believes that cultural diversity and a dynamic digital market are best secured by ensuring there is a licensing system that is responsive to the needs of licencees. This will allow all business models to develop, ease the barriers to entry and ensure reward for rights holders and their agents. A well-functioning, market-based licensing regime is **critical to the development of a dynamic and successful digital market in Europe.**