



Brussels, 31 October 2012

Daniel Calleja Crespo, Director General, DG for Enterprise and Industry
Jean-Luc Demarty, Director General, DG for Trade

RE: EU and US call for input on regulatory issues for possible future trade agreement

Sirs,

I am writing to you on behalf of ICMP, the International Confederation of Music Publishers and on behalf our member organisation, the National Music Publishers Association in the US (NMPA US), in relation to the matter - EU and US call for input on regulatory issues for a possible future trade agreement.

ICMP is the world trade association representing the interests of the music publishing community internationally. We speak out on behalf of music publishers across the world to safeguard their creative and economic interests and to help them meet new and emerging challenges in the music business. Collectively, our members represent hundreds of thousands of songwriters, composers and lyricists from every corner of the globe. Constituent members of ICMP are music publishers' associations from Europe, Middle East, North and South America, Africa and Asia-Pacific. Included are the leading independent multinational and international companies and regional and national music publishers, mainly SMEs, throughout the world.

NMPA US is a music publishing trade association with over 2500 members whose mission is to protect, promote, and advance the interests of music's creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation's capital and in every area where publishers do business. The goal of NMPA is to protect its members' property rights on the legislative, litigation, and regulatory fronts.

ICMP members represent publishers who are engaged in numerous commercial transactions between the EU and the US, and as such our particular interest in EU and US trade discussions is Intellectual Property Laws and the approaches to their enforcement. We welcome the willingness of the European Commission and the US Government to promote greater regulatory compatibility generally. ICMP believes, however, that in order to promote this compatibility, it is essential to first achieve a greater degree of harmonisation in the EU and this submission therefore will look primarily at areas of difficulty within the Union.

Within the EU, the main problem faced by rightsholders is legal uncertainty. European and non-European stakeholders are for example faced with different **regulatory offices**. There is no single

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point of reference when rightsholders encounter a problem. Each Member State has its own office dealing with Intellectual Property Rights (IPR) issues, and they apply EU IPR laws as implemented by the Member State. While it is welcomed that EU law allows Member States flexibility, nevertheless when it comes to the specifics of implementing EU IPR legislation, a level playing field and a consistent approach to implementing and enforcing the laws, and providing remedies in cases of infringement, is very much needed. This is not only the case for EU companies and individuals but also for non-EU parties as they face many different laws and regimes when operating within the EU.

In this regard, ICMP commends the fact that the OHIM (European Office for Harmonisation of the Internal Market) has now been given responsibility for a wide range of tasks relating to research, training, communication, and the development of advanced IT support tools and the enforcement of all types of IPRs. We also welcome the work of the European Observatory IPRs on Infringements of Intellectual Property Rights. Both bodies will greatly contribute to the development of a more coordinated approach to tackling IPR infringements and to the introduction of more efficient enforcement measures.

As an organisation representing rightsholders, the **relevant regulatory and/or statutory provisions** for ICMP in the EU are: EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society; EU Directive 2004/48/EC on the enforcement of IPRs; EU Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce); and the Proposal for EU Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.

We are pleased with the current EU regulatory framework on IPRs; we believe there are comprehensive pieces of legislation that provide rightsholders with a satisfactory level of protection. Yet, we see that these laws also include a number of shortcomings as a result of the flexibility that EU Member States have to implement the laws in whatever way they deem most efficient (some Member States adopt more stringent rules than others), and there are a number of **regulatory differences** that should be addressed.

One example of this lack of harmonisation is Article 5 of the EU Directive 2001/29/EC on exceptions and limitations to copyright. First of all, there is no *numerus clausus* of the different cases, and Member States can add to the list as they see fit. Secondly, the Directive only outlines the principle and leaves the implementation to the Member States in accordance with the principle of subsidiarity. One of the consequences of this practice is the situation we now have with regard to private copying levies and the related disparities in the different Member States.

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Another example is the EU Directive 2004/48/EC, in relation to which Member States interpret enforcement measures differently. ICMP's main concerns relate to the different interpretations of the provisions on damages, injunctions and the right of information.

We would also like to mention our concern about the "Bars and Grills exception" that is still a part of US legislation, and according to which over 70% of the bars and restaurants in the US are exempted from paying royalties for broadcasting musical and audiovisual works on their premises. Despite the WTO ruling in 2000 which found that this US law is contrary to TRIPS, the law has remained unchanged. It is true that European authors and composers received compensation of sorts at the time of the settlement, but since 2004 European rightsholders have not received any further remuneration.

Possible solutions for bridging these differences are the following:

In relation to EU Directive 2001/29/EC, ICMP welcomes the discussions with the High Level Mediator Antonio Vitorino. A possible solution to the problem of disparities in the methodology for setting tariffs is that, for example, rates should be balanced and open to regular revision reflecting technological and economic developments as well as changes in consumer behaviour in the Member States. Rates should therefore be set according to the average estimated level of use and storage capacity of recordable equipment and media.

In relation to the EU Directive 2004/48/EC, the Commission should seek to remedy identified problems concerning the different interpretations of the Directive's provisions by proposing specific improvements/clarifications and launching infringement proceedings against Member States whose national laws are inconsistent with the terms of the Directive.

In relation to the EU Directive 2000/31/EC, the EU should recognise the models for fighting against internet theft that are emerging and working in some Member States such as Sweden and France, and in the US, and should require the introduction of equally effective systems elsewhere across the EU. This could be done via legislative initiatives mandating ISP cooperation, requiring warning and/or educational messages to be sent to infringing subscribers' accounts and obligating Member States to enact effective deterrent mechanisms against recidivists. In our view, the EU should adopt clear provisions that encourage and require ISPs to cooperate to reduce online infringement so that all parties – rights owners, digital service providers and consumers – can benefit from the growth of a licensed digital market. Furthermore, the process of notifying ISPs of illegal content could be facilitated and harmonised through a standardised procedure that is easily accessible, simple to complete electronically and not conditional on fulfilling other conditions.

Concerning the US Bars and Grills exception, we call upon the US Government to make US legislation in this regard compliant with the TRIPS Agreement.

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Finally, ICMP calls upon the European Commission to propose effective IPR enforcement measures in whatever instrument is to be discussed with the US. The flow of creative content between the EU and the US, beneficial to both parties, is based on the existing copyright framework including the WIPO Internet Treaties. This economic relationship needs a proper enforcement framework that protects artists on both sides of the Atlantic, as otherwise there is a high risk that the creative and innovative sectors cease to develop, leading to job losses and reduced trade in products and services that are dependent on intellectual property laws.

We are open to more in depth and continuous dialogue between stakeholders and policy makers. Both ICMP and our member in the US, the NMPA, are happy to meet with the relevant officials for further discussion, as we believe that enhanced regulatory compatibility would contribute to continued and healthy trade relations between the EU and the US.

Yours sincerely,

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Director General

Jay Rosenthal
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cc: Ambassador Miriam Sapiro, Deputy US Trade Representative, Office of the US
 Trade Representative
 Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs
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