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Position Paper

GSMA Europe Response to the Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing

29 June 2009

GSMA Europe welcomes the opportunity to respond to the conclusions of the report. It is unfortunate that mobile network operators did not participate in the roundtable discussions but we look forward to contributing more fully to the debate going forward.

1. The debate must focus on growing the legitimate content market

GSMA Europe members are keen to play their part in growing the market for online content, including music. However, it is important to focus EU-level discussions on how to grow the legitimate content market. Whilst piracy remains an important issue, it is not directly relevant to the debate on collective rights management.

2. Multi-territorial licensing, correctly implemented, would boost the legitimate content market

GSMA Europe agrees that the current music licensing arrangements are a barrier to the market, and multi-territorial licences offer part of the solution. Nevertheless, these new licences must be attractive for commercial users, offering clear benefits for rights owners and commercial users in terms of ease of use, transparency and value for money. The ideal licensing model should combine the elements of a global repertoire and multi-territorial licenses.

3. Competition in collective rights management would bring benefits to all

Competition should be introduced into the music licensing regime, balanced with the need to have an efficient and clear system. A centralised database is an idea worth further exploration, but should not restrict competition unnecessarily.

4. Appropriate dispute resolution mechanisms are a necessary part of the licensing regime.

A key point missing from the report concerns adequate dispute resolution mechanisms applying to the licensing regime. These mechanisms should exist in all Member States and apply to pan-European licensing by collecting societies. More effective dispute resolution for all rights clearance would increase confidence in the market.



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5. Creating a true internal market for the provision of online goods and services will further support the growth of online retailing

GSMA Europe supports DG SANCO's proposal for a Directive on Consumer Rights and its objective to fully harmonise consumer protection rules across the EU so as to achieve a high level of consumer protection and reduce compliance costs for cross-border sales. Once adopted, the Directive will stimulate online retailing, including the consumption of online music offers, provided digital goods and services are handled appropriately in the scope.

These points are developed further in the pages that follow.

About GSMA Europe

GSMA Europe is the European interest group of the GSM Association (GSMA), representing 167 members in 50 European countries/areas serving 600 million customers. The GSMA is the global trade association representing more than 700 GSM mobile phone operators across 218 countries and territories of the world. In addition, more than 200 manufacturers and suppliers support the Association's initiatives as key partners. For more information, visit www.gsmeurope.org.



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1. The debate must focus on growing the legitimate content market.

The market for online mobile content is growing, and is expected to reach over €120 billion in service revenue by 2013 globally¹. However, this is predicated on the right approach by mobile network operators and content providers. It is important to focus EU-level discussions on how to grow the legitimate content market. Whilst piracy remains an important issue, it is not directly relevant to the debate on collective rights management. Just as the rules on private copy levies are not aimed at compensating rights owners for the loss of revenue to piracy (they are designed to remunerate rights owners for legitimate private copying), nor should the rules on collective management licensing be aimed at compensating right owners for the use of their works without licenses. We believe the best way to fight illegal file sharing is to make available legitimate attractive offers both in terms of pricing and choice.

2. Multi-territorial licensing, correctly implemented, would boost the legitimate content market.

Access to creative content is the cornerstone to achieving the full potential of content online and contributing to European competitiveness. Commercial users are currently limited to negotiating a license with their own local collecting society. Introducing competition into the system and allowing the possibility of multi-territorial licenses would be of benefit both to rights owners and to commercial users, and would boost the content market. As commercial users we need a mechanism by which, through new licensing regimes, we will be able to obtain pan-European clearance of rights from various collecting societies in Europe. This would establish true competition between collecting societies. However, it is essential that new licences are attractive to commercial users, and provide clear benefits in terms of reporting requirements and economies of scale.

Although we appreciate the European Commission's objective to liberalise the system of collecting societies, the approach taken in the Commission Recommendation (2005/737/EC) has led to developments which increasingly endanger access to a global repertoire and the one-stop-shop "blanket license" model. In our view, many of the initiatives that collecting societies have taken to date in an effort to further the Commission Recommendation have not achieved its aims, and far from improving the licensing situation, have introduced further complexity. The creation of entities such as CELAS is not a realistic solution to the issue because it has led to a fragmentation of rights and more uncertainty. Commercial users are unable to identify or verify individual publishers' rights. They are faced with more stringent and less realistic commercial terms, as well as reduced negotiating power. A commercial user is not in a position to run its music service without particular publishing rights given the rights identification issues mentioned above and the "mismatch" of publishing rights with recording rights.

The ideal licensing model should combine the elements of a global repertoire and multi-territorial licenses. This would lead to an easy to manage one-stop-shop system as one prerequisite to enhancing legal offers. The current uncertainties over the future of collecting

¹ Juniper Research: *"Mobile Content Strategies & Business Models: Scenarios & Forecasts 2008-2013"*



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societies and the reciprocal agreements between them are holding up the development of new offers. Collecting societies should implement the recommendations of the DG Competition Decision of 2008, and cooperate with commercial users as soon as possible in order to move forward on the issue under the second option described in the 2005 Commission Recommendation.

3. Competition in collective rights management, balanced with the need to have an efficient and clear system, would bring benefits to all. A centralised database is an idea worth further exploration, but should not restrict competition unnecessarily.

Competition can deliver benefits in this field as in many other areas: improved choice of collecting society should help to reduce the inefficiencies in the market, and allow innovation in terms of offers made to users. US authors have seen benefits in being able to manage their rights between the various collecting societies, not the confusion and drop in revenues for rights owners which some collecting societies are predicting. In its response to the Amended Final Judgement 2 (AFJ2), the United States Department of Justice clearly states that “*competition will be more effective than regulation in securing member rights*”².

There is nevertheless a need to make the reporting requirements on commercial users easier to implement. Fragmentation of the repertoire could multiply the amount and variety of reporting, and potentially negate the positive effects of competition. A centralised database is one idea that could help alleviate this possible obstacle. An information platform or a meta data agency is urgently needed to provide transparent and complete information about the ownership of musical works. This platform should allow all users, in an automated and pragmatic way, to ensure that claims from collecting societies/rights managers regarding sold music are correct.

Another way forward would be a system of alliances between collecting societies, as proposed in the GSMA Europe response to the Commission’s call for comments on the 2005 Commission Recommendation³. In the response, we recommended an alternative solution whereby national collecting societies are encouraged to form alliances. It is then these alliances, linked through reciprocal representation agreements devoid of any territorial exclusivity clauses, which will offer licenses to commercial users.

In addition, rights owners should be encouraged to proactively allow for competition between collecting societies, as Warner Chappell Publishing appear to have done. Warner Chappell is the only major publisher that we are aware of that has decided to ensure maximum flexibility for both itself and the music provider in not withdrawing its rights from national collecting societies (thereby allowing national licences to continue where necessary) but instead to allow several “major” collecting societies who we understand are able to offer a good service to the publisher member to represent them on a pan-European basis. This

² “Memorandum of the United States in response to Public Comments on the Joint Motion to Enter Second Amended Final Judgment”, p.39 [<http://www.usdoj.gov/atr/cases/f8200/8224.pdf>]

³ GSME Response to the EC Call for Comments dated 17 January 2007, 29 June 2007, [http://www.gsmeurope.org/documents/positions/2007/gsme_response_ec_collective_%20rights.pdf]



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has allowed for competition between those societies in licensing music providers but also provides an incentive to collecting societies to generally ensure that their standards of administration for the rights owner are attractive. This approach is preferable to the monopolistic approach of one entity per major publisher with complete dominance over licensing terms.

4. Appropriate dispute resolution mechanisms are a necessary part of the licensing regime.

A key point missing from the report concerns adequate dispute resolution mechanisms applying to the licensing regime. These mechanisms should exist in all Member States and apply to pan-European licensing by collecting societies. More effective dispute resolution for all rights clearance would increase confidence in the market.

Even with increased competition, collecting societies remain powerful institutions which are, at present, de facto monopolies. It was for this reason that some EU countries, most notably the UK and Germany, have specialist dispute resolution procedures to assist in achieving the right balance between collecting societies and commercial users. Where such mechanisms do exist, it is not clear that they have any remit over pan-European licensing. It is absolutely crucial to ensure that a fair balance is retained between collecting societies and commercial users in this regard. This will ensure that commercial users are not forced to accept terms which are commercially unreasonable and which would stifle the development of legitimate music services.

In considering such mechanisms, the ability of the commercial user to refer to a scheme on certain grounds, for example rate or specific licensing terms, should be possible. In order to be successful, the mechanism also needs to encourage speedy hearings with minimal costs for both parties. Finally, it is imperative that the panel deciding the outcome of the case is specialist in this area, and, where possible, should include industry experts who understand both the role of collecting societies and the business of the particular music provider concerned.

5. Creating a true internal market for the provision of online goods and services will further support the growth of online retailing.

Linked to the availability of online content is also the question of diverging consumer protection rules in the EU²⁷. GSMA Europe supports DG SANCO's proposal for a Directive on Consumer Rights and its objective to fully harmonise consumer protection rules across the EU so as to achieve a high level of consumer protection and simultaneously reduce compliance costs for cross border sales. Once adopted, the Directive will stimulate online retailing, including the consumption of online music offers. However, specific issues remain over the interpretation of consumer protection rules in relation to digital content and we are therefore ready to participate in further discussions on this topic.