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WORKING DOCUMENT
from: Spanish delegation
to: Working Party on Intellectual Property
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No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
Subject: Proposal for a Directive of the European Parliament and of the Council on the measures and procedures to ensure the enforcement of intellectual property rights – first subparagraph of Article 5(2)

ALTERNATIVE WORDING FOR AND COMMENTS ON THE FIRST SUBPARAGRAPH OF ARTICLE 5(2) OF THE COMPROMISE PROPOSAL PRESENTED BY THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION IN 14862/03 PI 116 CODEC 1618, DATED 14 NOVEMBER 2003

Article 5(2) - Alternative text proposed

Member States shall confer upon intellectual property rights collecting societies or professional defence bodies that represent intellectual property right holders, or other persons authorised to use these rights according to the applicable law, the capacity to seek application of the measures and procedures referred to in this Chapter, including the capacity to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.
RATIONALE

1. Inadmissibility of the requirement that collecting societies should have a mandate from the holders of copyright and related rights in order to be entitled to seek application of the measures and procedures referred to in the Directive.

Holders of copyright and related rights face the problem of controlling the widespread use of their works and performances, which it is generally impossible to do personally.

The works and performances of the rightholders can be enjoyed by many people simultaneously, as a result of spectacular technological progress both in the media used for their reproduction and in those by which they are conveyed to the public, which makes it impossible for the rightholders themselves to exploit them and makes it necessary for management of the rights concerned to be handled by collecting societies in order to be really effective.

Both the World Intellectual Property Organisation (WIPO) and the European Union acknowledge the desirability of having copyright and related rights managed by collecting societies when such rights cannot in practice be exercised because of the number of uses or where personal management would be very burdensome for the holders because of widespread use.

The need for collecting societies to enforce copyright and related rights is in turn closely connected with the objective fact that those bodies in many cases represent thousands of rightholders.

Both circumstances mean that it would be extremely burdensome for the copyright and related rights collecting societies if they had to bring before the courts thousands of mandates or contracts agreed with the rightholders they represent in order to confirm the capacity granted by those rightholders.
The collecting societies, inasmuch as they are entrusted with the defence of collective interests and the exploitation of works and performances for widespread use, should therefore be provided with the necessary capacity to defend and protect the rights which they represent and should therefore be exempt from the obligation to prove that they represent each and every one of the rightholders whose rights they manage.

2. Moreover, it must be stressed that Community legislation itself provides that in certain circumstances copyright and related rights can only be exercised through a collecting society.

Thus, for example, Article 9(1) of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission provides that:

"Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society."

It is contradictory and in our view inadmissible that, on the one hand, rights should exist which Community law itself requires to be collectively managed through collecting societies, and which those societies are therefore empowered to exercise as a direct consequence of that law, and that, on the other hand, those same societies should be required to produce a mandate from the rightholders in order to be able to call on the resources and procedures set out in the proposed Directive to defend those rights.