

**COMMENTS ON THE NOTIFICATION PUBLISHED 17 AUGUST 2001**

Dear Sir,

On behalf of the FIM, I should kindly like to submit certain comments relating to the abovementioned case.

*Your department will find information on our Federation at [www.fim-musicians.com](http://www.fim-musicians.com), including its Rules, a membership list and a document outlining its major activities.*

*In the light of information made available to us at the moment, the agreement notified by IFPI leads us to express significant reservations for the following reasons.*

***1. The facts***

*1.1 The notified agreement seems to refer to a new way of exercising the sole rights of the record producers, concerning the “simulcasting” of radio and television programmes. The notification published by the Commission on August 17, 2001, contains no element which indicate that the aim of the agreement might also cover the exercise of performers’ rights and authors’ rights. However, in its press release of September 11, 2001, reported by the daily press, IFPI mentions that this “new system” means that “collecting societies representing record producers and other rightholders... may now grant simulcasting licences in over 20 countries in the world”.*

*1.2 The rights respectively provided to the performers, the authors and the producers are independent from each other, and have similar value. These rights are individual exclusive rights, except where the law decide that their exercise must be collective (as for instance in the field of remuneration for private copying). It is to be noted that most laws which create for instance a mechanism of remuneration for private copying allocates an equal share for performers and producers from such remuneration. The same generally goes for the “equitable remuneration” which applies to the broadcasting and the communication to the public of commercial phonograms (to which WPPT now assimilates phonograms made available on the Internet).*

*1.3 The goal of FIM, its member unions and the one of the collecting societies representing performers, is to ensure that performers’ rights are fulfilled, particularly with regards to so-called “mass” uses for which performers cannot really exercise their rights individually. The FIM, together with organisations representing performers at national levels, have as part of their objectives to ensure that uses via Internet be controlled and should result in fair remuneration for performers. The “one stop shop” system might prove opportune if it is set up with the agreement of all the related rightholders. This system should not, however, lead to getting round current compulsory licensing schemes at national levels. Neither should it lead to*

the disappearance of each category of rightholders' freedom of bargaining carried out to protect its own interests.

1.4 The notion of "record producers" is in itself ambiguous since the word "record" does not correspond to a rigorous legal concept with regards to current European and international norms (in particular the Rome Convention of 1961, the Directive 92/100 and the 1996 WPPT). We assume that the purpose of the IFPI agreement is to protect both phonograms and videograms. However, these recordings are not always exploited on the same market, even via Internet, and can be subject to different legal systems. For instance, videogram producers have rarely been recognized when it comes to receiving specific related rights at a national level and do not benefit from any of such specific protection at a European or international level. The IFPI agreement can therefore only concern essentially the rights of phonogram producers, when it comes to "simulcasting" of phonograms included in radio or television programs.

1.5 Analysing IFPI practices, via some collecting societies for producers' rights, should, in our view, take into account several markets, particularly when such practices relate to dematerialized uses (i.e. commercial uses without copies). We have identified a multitude of markets to be taken into consideration, such as: the distribution of phonograms incorporated in radio and television programmes transmitted on the Internet, the distribution of videograms incorporated in television programmes transmitted on the Internet, the exercising of phonogram producers' rights, the exercising of possible rights of videogram producers, the exercising of performers' rights whose performance has been fixed on a phonogram, the exercising of performers' rights whose performance has been fixed on an audiovisual fixation, the exercising of authors' right for exclusively sound works, and the exercising of authors' rights for audiovisual works. This means that the consequences of the IFPI agreement should be analysed in respect of each of these markets, including because such agreement binds only organisations from 20 countries, which means that the system works in competition with the exercise of rights relating to repertoires that are not represented in these 20 countries; including in the European Union.

1.6 No contractual licence is required, nor even have any legal basis when legislation requires (as it does in numerous countries) a "statutory" or "compulsory" or "non-voluntary" licensing systems, via which the act of communication to the public of phonograms (and, in some countries, videograms) is authorised by law subject to the payment of a remuneration. It is the mechanism of "equitable remuneration" referred to in 1.2 above which correspond to a very specific legal system, particularly insofar as it generally imposes an equal sharing of remuneration between performers and producers. This means that producers cannot contractually acquire the remuneration given by law to the performers. The Commission should know that significant legal proceedings presently oppose IFPI members with organisations representing performers, particularly in France, Spain and Switzerland, with regards to the question of the field of application of this system of compulsory licensing. IFPI members have, in fact, developed contractual practices which are, in our opinion, unlawful and which aim at getting round a compulsory system where remuneration shall be equally shared. Legal proceedings of the same type are currently being prepared in other European countries.

1.7 In some recent legislations, for example in Belgium and Poland, rights are recognized for producers of phonograms provided that performers' rights and authors' rights are fulfilled. This means that such producers can only exercise their rights if those of the creative part (authors and performers) are fulfilled. In certain countries, this principle has seemingly stemmed from general civil law principles.

1.8 Phonograms are increasingly produced by performers themselves, since they have started to use digital technologies. Today, musicians make massive uses of computers and sound mixing equipments as working and creative instruments. This means that they are themselves increasingly owners of the so called "phonogram producers'" rights, recognized at national and international levels, over and above their performers rights. Thanks to Internet, these artists can establish a direct relation with the public. With regards to distribution of CDs and other copies of their phonograms, many of such artists often sign, as a "producer", licensing or distribution contracts for a limited duration, through which they entrust societies with a type of exploitation, without necessarily transferring their intellectual property rights for other modes of exploitation. They only proceed to the transfer other rights if they are obliged to do so during negotiations which are often unbalanced.

1.9 Finally, given that the public will start, in a mid-term, to have television screens that have a direct Internet access, it is likely that webcasting of concerts and other entertainment products will undergo a significant development. Knowing whether this type of diffusion on Internet is broadcasted simultaneously is of secondary importance, since such broadcasting may be of a technical order or organized artificially for legal reasons. Transmitting a concert, by broadcasting and/or webcasting, necessarily implies, for technical and commercial reasons, the previous fixation or reproduction on a medium. It is therefore always from a medium that the act of "simulcasting" takes place. This means that the agreement drawn up by IFPI could cover the exploitation of a significant number of artists' performances, even performances that are not commercially "distributed" as phonograms but are qualified by the WPPT as "phonograms" .

## **2. Our comments**

*2.1 Producers cannot claim globally, via their collecting societies, to be the beneficiaries of performers' rights and authors' rights, in order to draw up licensing agreements on behalf of all rightholders. It is of interest to notice that IFPI has never contacted FIM and its members about the initiative for creating a "new system" of exercising rights through a "one stop shop". IFPI mainly represents VIVENDI-UNIVERSAL, AOL-WARNER, SONY ENTERTAINMENT, BERTELSMAN GROUP and EMI-VIRGIN, i.e. 5 multinationals which control 80 to 90% of the market for distribution of phonogram copies and over 90% of the market for the exercise of phonogram producers' rights. The fact highlighted in 1.1 here above reinforces our impression that the intention of these 5 multinational companies is to impose a mechanism via which IFPI members would exercise all intellectual property rights relating to "simulcasting" and could therefore divide up the market for the exercise of performers' rights and authors' rights in the future. Such a practice could provoke a serious distortion on the related markets. Things would be different if IFPI had decided to enter into a prior agreement with organisations representing performers, which we feel should be the first condition to achieve a favourable decision from the Commission.*

*2.2 No licensing agreement can be justified if simulcasting is covered by a compulsory licence mechanism, with by law the equal sharing of the "equitable remuneration". A question is the identification of the repertoires for which "equitable remuneration" should be collected and paid in each country, but the answer to such question varies from country to country. In France for example, the obligation of payment of the equitable remuneration covers uses of any phonogram, regardless of where they were fixed or published and the nationality of the rightholders. In addition, remuneration is generally calculated on the basis of a percentage of the user's incomes, which can include revenues from trans-frontier uses. Consequently, the Commission should clarify this crucial legal aspect before coming to a decision. We feel that the Commission should do so after a consultation with all the related parties, taking into account ongoing legal proceedings in the area of "equitable remuneration".*

*2.3 Finally, we feel that the Commission should take into account the important increase of phonograms produced by performers themselves. These performers are represented by trade unions and collecting societies. They should remain free to exercise their rights as they wish, especially in a context where the main companies represented by IFPI are now under the control of the major suppliers for Internet access (AOL, VIVENDI, etc.). The gap between the interests of the artists and those of such companies will increase, in particular with regards to the issue of the price to be paid by the public to AOL, VIVENDI and other groups making phonograms and videograms available to the public via subscriptions covering all their services.*

***3. For these reasons, we would kindly ask the Commission to postpone its decision and wait for additional information in the light of our comments. We would also ask the Commission to convene the major organisations representing performers in order for such organisations to present their opinion on this important topic.***

