The Viewpoint of the Phonographic Industry

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Let me start by thanking the organizers for the invitation to this ALAI Congress and by congratulating the Hungarian ALAI group for the excellent organization of the event.

I have been asked to address the three different modes of dissemination of works and other protected subject matter indicated in the program of the Congress – free dissemination, controlled dissemination and uncontrolled or uncontrollable dissemination, and to do so from the point of view of the recording industry.

I am going to try to give you, first, a brief overview of the present situation as regards the forms of dissemination of recording music in digital networks and, then, I will go on to address some of the key legal issues which I believe are most likely to influence which form or forms of dissemination become predominant in the end. My intention is to concentrate more on the latter than on the former aspect.

Before getting into it, let me stress a couple of points that might seem obvious but which I think we need to keep in mind throughout the discussions in these three days:

First, the three forms of dissemination identified in the program do not exclude each other. They are not *per se* good or bad, beneficial or prejudicial, provided that they are undertaken with the consent of the owners of the rights in the disseminated content – assuming, of course, that there are rights over the disseminated content. Thus, provided that right holders have a choice, none of these models are *per se* – as I have said – bad, but that choice can only exist if we have the right legal framework in place, the right technology in place and the right licensing mechanism in place.

Second, we need to be aware of the fact that the dominance of one form over the others during a sustained period of time might influence future developments in the system of copyright and related rights and the principles that have underlined it so far. Equally, the way in which some of today's key legal issues (TPMs protection, exclusive nature of rights, levies, etc.) will be addressed (in legislation, in case law and by the doctrine) cannot but in the end determine to a great extent which of these forms of dissemination is going to be predominant in the future.

Now, as I have said, I am going to give a brief overview of the various forms of dissemination of recording music in digital networks, mostly the Internet today.

It certainly will not come as a surprise if I say that for the recording industry, the present level of uncontrolled dissemination versus controlled dissemination is a major problem. What has been described as uncontrolled dissemination systems here amounts mostly – not always – to what we call piracy. We could indeed think of cases where the record companies choose to disseminate some of their content for free, it might be the case that other right-holders decide to do the same. But the vast majority of uncontrolled uses that you see out there are not for free because the decision was taken by the right-holder, they have simply not been subject to any decision. They cannot be characterized in any way other than by saying that they represent fully fledged piracy.

I am not going to drown you with figures, but I can tell you that the number of unauthorized music files on the Internet has nearly doubled from 600 millions in 2002 to 1.1 billion in 2003. Of those files, the greatest majority resides in peer-to-peer systems. We have gone from 500 million files last year to 1 billion files this year. IFPI estimates that at any moment today there are at least 5 million users of peer-to-peer systems who are offering unauthorized files containing music. We have gone from 3 million concurrent users of such systems in 2002 to 5 million at the moment.

If we move to the "controlled dissemination systems": legitimate services are getting momentum, but I need to stress that they are getting momentum in a very difficult environment. It is not the same to enter a new market as to enter a market that is dominated by piracy. However, you have probably all heard about recent successes like iTunes which has today over 10 million legitimate downloads since it was launched in April this year, and there are more and more of this type of legitimate download services being offered. There are about 20 of those already in Europe. We also can see the development of services offering legitimate on-demand streams; one of the most recent successes that you may have read of in the press is Rhapsody, a subscription-based service that lets its members listen to streams of music on demand and which recently announced that it had streamed over 16 million on-demand songs during the month of August only – which amounts to 500 000 songs a day roughly. There are many other positive developments: Microsoft teamed-up with Peter Gabriel's OD2 service to deliver music downloads to Windows users in Europe, Tiscali and Virgin have also joined up with OD2 to offer the same. Roxio is preparing to re-launch its recently acquired Napster brand; RealNetworks plans to upgrade its Rhapsody service, Sony has launched its own… and we could go on.

So these are some good news. There is another piece in the jigsaw that should also be seen as good news, although it has got extremely bad press but it is a basic and important element: the development and deployment of copy-protection for CDs. This is an important step forward to ensure that we can get to a legitimate

on-line environment. We cannot keep putting on the market what amounts to be unprotected master copies because after that we cannot control what happens to them and how they are distributed through the Net.

I am afraid I cannot offer you a more or less precise prediction about the future chances and the foreseeable market share of legitimate on-line services, and I do not believe that anyone can provide such a forecast in particular in these hard times. I know that recently the well-known research firm Forrester has published a report about such downloads where it estimated that, within five years, 33% of music sales in the United States will be coming from the Net in the form of downloads through inscription-services. I still think it is very hard to predict how things are going to evolve in the rest of the world. It is hard for many reasons, but, among other things, it is also hard because there are a number of legal issues under discussion the answers to which are going to shape our future to a great extent.

So, let me go on now to discuss which of the legal issues are most likely to influence the form or forms of dissemination of recorded music in digital networks. I will examine four of such issues. They are not all tough; there are others like applicable law, ISP liability or data protection, which I will not have the time to touch upon.

What I can see as the four fundamental issues are the following:

1. the nature of rights, in particular, exclusive rights versus compulsory licenses;
2. the legal protection of technological measures;
3. the private copying issue; and
4. the licensing of rights.

Depending on how we address these four issues, we might see a very different landscape, in one way or in another. The first three ones – exclusive or non-exclusive rights, technological measures and private copying – are completely interrelated, and I am sure you are going to examine them in depth during these three days. Let us discuss them very briefly.

As regards the nature of rights – exclusive rights versus compulsory licenses – we can read in the press ever more frequent claims that the use of works and other protected subject matters is uncontrollable in the digital environment, in particular in the Internet, and that, thus, there is no way creators and producers can have any power of control over their content in the Net. Then these "wise" articles jump happily to the conclusion that we should do away with exclusive rights; exclusive rights do not function anymore, let us go towards the system of compulsory licensing or some sort of taxation model or whatever you want to call it.

Let us be clear about this. Apart from those who consider that the fight against piracy cannot be won, many of those asking for that type of development to happen do so because they want, as users, to benefit from a compulsory license environment. The question should be asked, however, as to the consequences of abandoning the principle of exclusive right and therefore denying creators and produ-

cers the ability to decide about the dissemination of protected works and other subject matters and to negotiate a real market price for their exploitation.

I do not believe there is any reason for abandoning the principle of exclusive rights as an indispensable, core element of any copyright system. I hope we all agree about this. It is also very important, however, that, when we talk about the issue of exclusive rights versus compulsory licenses, we do not get it mixed up with other on-going debates between the various groups of copyright stakeholders; namely debates on adequate remuneration and on the role and future of collecting societies. Adequate remuneration can be achieved on the basis of exclusive rights; compulsory licenses are simply not the shortcut for adequate remuneration, and it would be extremely dangerous for all those who are interested in an adequate copyright system, including collecting societies, to endanger exclusive rights for the sake of pursuing some not quite correctly perceived short-term interests. Equally, collecting societies must see that the fact that we are talking about exclusive rights, and the fact that we are talking about DRM or technical protection measures does not mean that we have any intention whatsoever of undermining, and doing away with, collecting licensing of copyright. Collecting societies have a role to play also in the administration of exclusive rights.

In any case, it is unacceptable to use the current difficulties of controlling protected material on the Internet as an excuse for transforming the copyright system into a taxation/subsidy system; there is no need for elaborating the consequences that this would have for creativity and investment in new works and in new recordings.

Let me pass to the second issue I have mentioned, which is the legal protection of technological measures. It is remarkable that, so many years after the adoption of the WIPO treaties, we still need to keep talking about the right interpretation and application of the norms concerning the protection of technological measures. This might sound a settled issue in some jurisdictions – maybe a settled issue about to be unsettled, I don't know – but it is not, unfortunately, a settled issue in many jurisdictions, including the European Union, despite the adoption of the latest European Copyright Directive; the so-called Information Society Directive.

There is, for example, an on-going debate about the differentiation between copy-control technology and access-control technology. We can see attempts to implement the WIPO treaties in national legislation in a way that only one or the other technology is protected. I believe this distinction is not practicable and, most importantly I believe that denying protection to technologies controlling the access to content would equate to denying protection precisely to the technological measures right holders need most to fight against piracy and develop new services. Let me be clear: all the models that the music industry and any other industry can introduce in the market with any chance for successful legitimate dissemination of content are based on technical protection measures, which are to a large extent con-

trolling access. However, they control access not just for the sake of controlling access but to provide for a secure environment in which no subsequent unauthorized mass reproduction or dissemination may take place. If we keep playing with interpretations that reduce the legal protection we can have for those technological measures, we are back to square one in our efforts to develop a legitimate on-line market.

I do not have much time left; therefore, I can deal with the next issue, which is private copying, only very briefly. I am sure, however, that you are going to discuss this issue at length. It is a very tricky one. We have seen some sort of dangerous mutation in this context: what used to be, and rightly enough, a limitation to the exclusive right of reproduction is now often presented as some kind of consumer right to free use. This assertion would have always been wrong from the point of view of copyright but it is even more so now. There is a need to engage in a serious and rigorous debate as to which are the limits of the concept of private copying in the digital context and which criteria can help materializing the general guidance that on this matter the three-step test provide us with.

Let me pass now to the fourth issue I mentioned at the beginning of my presentation; namely to the issue of territorial and multi-territorial licenses and exploitation. Eric Baptiste spoke before me about the efforts of CISAC and BIEM to facilitate multi-territorial licensing. IFPI, with the collecting societies representing phonograms producers is undertaking similar efforts. We are aware that we need to facilitate multi-territorial licensing, and we are equally aware of the fact that the more cumbersome it is to obtain freely negotiated licenses, the more arguments we give to those who want to push for compulsory licenses to replace them. Therefore, IFPI, in the same manner of CISAC, tries to facilitate licensing for the Internet. I do not have time to go into details; thus, I will only mention that the agreements we have in place are not – as in the case of the Barcelona and Santiago Agreements – based on specific rights but on specific forms of exploitation, namely simulcasting and certain forms of webcasting. We have already in place what we call the Simulcasting Agreement, to which by now 33 collecting societies are party and which provides for multi-territorial licenses for simulcasting, that is simultaneous retransmission through the Net of a broadcast. We are working to put together a similar arrangement for certain forms of webcasting.

As I said at the beginning of my presentation, the four elements that I have discussed here briefly are interrelated. Depending on how we solve one, we will get answers to the others and, depending on how we address the four of them, we might be here in a few years talking about a system that is still familiar to us, or one that is completely alien.

Thank you very much.