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Developing a Copyright Agenda for the 21st Century – a response from the Mobile Broadband Group to the Intellectual Property Office's report

1. The Mobile Broadband Group (MBG, whose members are O2. Orange, T-Mobile Virgin Mobile, Vodafone and 3) is pleased to respond to the Intellectual Property Office's report "Copyright the Future: developing a copyright agenda for the 21st Century" (the Report). Mobile communications networks are increasingly used by consumers as a means to access digital content and in our view it is crucial that the regulatory framework is such that it fosters the development of this market.

   In particular the management of copyright and related rights must be such that it is both straightforward and efficient to obtain rights to use copyright works on fair, reasonable and transparent terms.

   Accordingly our response to the Report will focus on the questions raised under two of the broad headings identified, namely access to works and incentivising investment and creativity and, in particular, our experiences in obtaining music licences for our services. While most of our comments relate to the acquisition of music rights, the same principles apply to other forms of content such as TV, film and games content.

2. We agree with the Report's assessment that for the copyright system to be effective, accessible and inspire confidence in users, it should endeavour to maximize the availability of creative works to the public on terms which are fair and reasonable. At the same time there must an acknowledgement of the conditions under which commercial content providers compete, i.e. against a backdrop where content is available to consumers for free via unlawful means. Business models for distribution must evolve and the copyright system must be sufficiently flexible to support this evolution not hinder it.

3. It is our experience that negotiating with collecting societies under the current system is an arduous process, presenting such difficulties (particularly regarding discussions on an appropriate royalty price point and payment terms) that ultimately the growth of legitimate music services is hampered. We would welcome an arrangement that would allow for greater flexibility and facilitate these commercial negotiations to the benefit of consumers and industry alike.

4. The copyright licensing and clearance system, as it stands, is extremely complex and opaque since there is at present no single entity in the UK from which you can obtain

a licence for all necessary music publishing rights. Currently it is not clear which collecting society holds which rights and whether certain rights need clearances in all or part of the territories. Operators are therefore required to individually negotiate and deal with numerous bodies if they require the rights to exploit the full range of music available. This is clearly unsatisfactory and overly onerous. In addition as mobile operators operate over a number of EU jurisdictions the problem is exacerbated by the numerous national collecting societies from which rights have to be obtained and rates negotiated. We are seeing moves to transactional licensing of rights, whereby major publishers are mandating collecting societies and other pan-European bodies such as CELAS, to license their rights across Europe. Therefore in order to obtain the complete set of publishing and mechanical rights to currently available music, companies must negotiate with at least 6 entities in respect of major publishers' rights on a pan European basis and all other national collecting societies for any local repertoire. This results in the need to negotiate potentially 31 licences for a service provider present in all European territories, perhaps more if the licences with the 6 "European entities" have to be negotiated by each operating company in each member state. This makes the introduction of any new proposition a complex minefield with differing approaches taken by each of these bodies and increases the burden on those legitimate users who need to identify repertoire. This can make it very difficult to bring new and innovative distribution models to market, which is clearly not desirable from the point of view of competition.

5. The market would be in a far stronger position if there was a "one stop shop" for purchasing the rights on an international basis or at least within the EU. This body could then react quickly to new legitimate models which will ultimately assist the music industry which is seeing ever decreasing revenues in relation to traditional music sales. We would however, highlight that to be effective such a body would need to be subject to strict controls. Please refer to our points on dispute mechanisms below.

6. The models proposed by the current collecting societies are tailored to the traditional forms of music sales and therefore fail to reflect the fast moving and increasingly innovative forms of mobile and online music distribution models. These again have to be individually negotiated with the various collecting societies and music publishers. This often leads to the delay and the blocking of innovative music propositions which would be beneficial to consumers and so has the effect of reducing competition and frustrating innovation to the detriment of the consumer.

7. Whilst we support the introduction of pan-European licences, there appears to be a lack of choice (such as the option of obtaining a national licence) and clarity as to the exact repertoire offered under each licence. This makes it impossible for a licensee to have certainty as to the licences it requires unless it obtains licences from all collecting societies. It is not possible for a licensee to choose which repertoire to use in its music services because the resources a licensee would need in order to identify and match underlying musical works with the recorded rights that it obtains from record companies make such assessment prohibitive. This is further hampered by the fact that there is no flexibility in terms of the entity that is able to obtain the licence. At present collecting societies assert that the only entity able to obtain the licence is the entity which has the contract with the end consumer. A company has to utilise third parties in order to identify musical works and also has to have contracts with record companies to ensure it has the recording rights for such works. In any other commercial transaction an entity such as a mobile operator would be able to arrange its contracts such that a third party was able to source the publishing rights thereby reducing the burden on the operator and reducing transactional costs.

8. Finally, we would like to make a point regarding dispute mechanisms. We agree with the observations in the Report that the mechanisms for mediation, adjudication and other forms of civil redress must be accessible and appropriate to the copyright system. The mobile operators have been party to a Copyright Tribunal case and agrees that such a specialist tribunal is needed in this area. In our view, however, this mechanism could be improved since current proceedings tend to be lengthy and expensive.

9. Our experience of the Copyright Tribunal was comparable to large scale High Court proceeding rather than an arbitration. This may have been due to the complexity of the issues, the number of parties or the individuals involved, but the proceedings were akin to High Court proceedings in terms of formal procedure, cross examination of witnesses, tactics, time spent (including at the oral hearing) and, crucially, costs involved. The prospect of engaging in such a daunting exercise might serve as a very substantial deterrent on smaller licensees wishing to challenge the terms of a licence. We recommend that the Copyright Tribunal "de-formalise" its procedures in the following ways:

   Number of Parties - It is appropriate to consider whether the number of parties could be limited (on a case by case basis) and encouraging intervening parties to give evidence in support of one party instead.

   Length of hearing/number of witness –In order to improve the efficiency of the Tribunal it is reasonable to question whether there should be a limit on the length of the final hearing and the number of witnesses (including expert witnesses) called to give oral evidence and to be cross-examined.

   Procedure– greater transparency of procedure would benefit parties to the Tribunal. The rules are of course set out in The Copyright Tribunal Rules 1989 (as amended) and a short practice direction accompanies them. However for parties engaging in the Tribunal for the first time, a more "hands-on" practice direction drawing those two sources together and adding any new appropriate procedural rules would be very useful.

10. In addition, we believe that the means of redress must reflect how licences are awarded. As noted above there is an emergence of pan European licences and in time perhaps there will be world-wide licences. There is, however, inconsistency across Europe (and indeed beyond) in relation to such specialist tribunals; our understanding is that they exist in some countries but not in others and there is certainly no standard procedure for complaint or redress. It is unclear whether these new entities who are issuing pan European licences will be subject to such specialist tribunals where they exist and indeed what the appropriate jurisdiction in which to bring a claim would be. The copyright tribunal in the UK was established in order to combat the obvious de facto monopoly position of collecting societies. In a framework where collecting societies are mandated to exclusively license the rights of a major publisher, throughout Europe this de facto monopoly is even greater and therefore the need for an accessible pan European dispute mechanism to ensure the appropriate checks and balances are in place is accordingly great.

We look forward to discussing the issues raised in the Consultation going forward.