

**31<sup>st</sup> January 2006 Public Hearing  
In the JURI Committee of the European Parliament  
Speech of Nick Ashton-Hart, for FIA, IMPALA, and the IMMF**

Thank you Mr. Chairman

May I begin by thanking the Committee for the opportunity to speak in this most important debate.

My comments today are representative of the views of:

FIA, The International Federation of Actors, represents more than a hundred associations of performers around the world, working in film, television, radio, commercials, new media, live performance, variety and circus;

IMPALA, the international representative of 2500 independent record companies in Europe, who are collectively responsible for 20 percent of all sales of phonograms;

The International Music Managers Forum, who represent the professional associations of managers in countries worldwide; managers are the legal representatives their featured artist clients for all aspects of their professional lives.

In other words, I speak today on behalf of people who create and disseminate a key part of the culture that surrounds us all and defines how we view ourselves, how we know who we are; the creators of the culture of our nations and how we protect those who create it and those who make it available is the question of the day. This is about creative people's ability to continue doing something that has driven them to enter a career knowing they face almost impossible odds against ever making a decent living, yet their creative impulse drives them to do it anyway. We all have a stake in helping as many of them as *we* can be as successful as *they* can.

We completely agree that when intellectual property is exploited commercially without proper remuneration of its creators and right holders there should be a penalty.

We note that legal and natural persons are liable for infringement in the current proposals. Since a legal person cannot be imprisoned, to explicitly require higher economic penalties for legal persons than a natural person would face seems sensible, as is preventing those convicted of egregious violations from forming new corporate entities.

Since many Member States already provide for longer prison terms than the current proposals require, wouldn't establishing the 4-year term as a *de minimis* obligation be sensible?

Both Directive 2004/48/EC and the current proposals seem to have been drafted with the main thought that pirates are those who engage in the commercial exploitation of rights to which they have no legal attachment. The assumption appears to be that those with licences are assumed to be operating in good faith.

These are flawed assumptions.

We would define piracy as: any natural or legal person who exploits intellectual property for commercial gain without proper recompense to creators and rights-holders. A separate and explicit definition of what constitutes 'commercial gain' is

needed – we wouldn't support grandmothers and children being dragged into court because they downloaded some files, as some stakeholders seem to favour. Further, it is essential that those who receive the protection of the law are obligated to act reasonably in relation to others – the current proposals do not address this fundamental point.

Some examples of what we mean may be helpful.

There are instances where rights-holders pay a royalty which any reasonable analysis would see as grossly unfair. For example, the major phonogram producers are currently paying even the largest UK artists 4-5 pence per iTunes download sale – a royalty of 5% of retail sale price – and there are all kinds of ways in their standard contracts to withhold payment of all or part of even of that.

Is that piracy?

No – but it isn't legitimate either – and the law should not be blind to it.

When a rights-holder refuses commercial exploitation of a creators work on any terms whatever, or requires commercially impossible terms, even when the creator themselves asks for the right to exploit that work personally, is that acceptable?

Is that piracy?

No – but it isn't legitimate either – and the law should not be blind to it.

Why is this important? Because at present approximately 90% of all the sound recordings owned by the major phonogram producers are locked in vaults and not available commercially on any terms anywhere, to anyone. The creators of these recordings are powerless to do anything about it.

Think about that for a second – that's a staggering amount of cultural diversity! Imagine all the music you've ever heard – that you've ever seen in a shop – and realise – that's the tip of the iceberg!

Which brings us to a really big question:

If it is illegal in the EU to *exploit* IP without remuneration to creators and rights-holders, shouldn't it also be illegal to *refuse to exploit* it *and to refuse to allow anyone else to do so*, even the creators themselves?

We say – yes – that should be illegal.

In such cases the IP should revert to the creator so they can arrange for it to be exploited. Otherwise, you're preventing people from making a living, and depriving the public of access to vast amounts of culture.

You may be thinking that all this can be sorted out on a case-by-case basis in the courts.

We are individual creators and small companies. Legal action is frequently too complicated and expensive (especially when you are in a David and Goliath battle

with a large corporation) for most artists and many small record companies to undertake.

You must understand – more than 95% of all musicians never – let me repeat – never – make a living from their craft. Of those who do, most only make a basic living – even those who have had quite successful records generally live modestly. How are people living modestly supposed to take people in faraway lands to court?

Some EU member states have creatively dealt with these problems. In Germany, a law, entitled “Law to improve the contractual position of authors and artists“, with a stated purpose of securing “adequate payment for the use of the artists‘ work” provides the possibility of renegotiation of contracts if they appear to be unbalanced. Were this to be harmonised upwards to the EU level, with an accompanying obligation for the various stakeholders (performers unions, phonogram producer trade lobbies, etc) to negotiate standard contractual terms, which could be used to assess reasonableness of contracts when there is a dispute, a great deal more transparency, healthy economic activity, and ‘systemic integrity’ would result. It would also recognise what the law and public policy have long recognised – legal protection is necessary whenever a greatly unequal bargaining position exists.

One cannot speak of enforcement of IP rights without addressing digital rights management (DRM’s) and technical protection measures (TPMs).

Is it legitimate for a rights-holder to employ these technologies without the consent of creators – or even against their wishes?

We say that the answer *should* be ‘no’.

The vast majority of musicians and a large number of independent record labels hate copy protection. They are horrified by the idea of someone buying a CD and being unable to play it or use it anywhere they wish, in any non-commercial way they wish. Do you know that the major producers charge a hefty deduction to artists royalties for ‘new formats’ of sound recordings, like digital distribution – so effectively major label artists are financing technology both they and the public dislike.

This is why we submit that private copying levies remain the fairest system on balance for everyone – after all, whether or not levies exist, private copying of music will still occur which would not qualify as ‘fair use’ – but without the levies, a large number of performers will lose a big chunk of their income from this activity. How big? In France it *averages* 25% of musicians’ IPR income.

It is a very unfortunate fact that currently DRM and TPM technologies are used mostly to prevent access – or to reduce access to a level that is below what is available when the same products are delivered in physical formats. This is a perversion of what these technologies could provide – fairer, more flexible and accountable access as well as the foundation of new, innovative revenue streams for creators and rights-holders.

DRMs as a technology are something like a hammer – you can use a hammer to build a house, or you can use a hammer to hit someone over the head. Unfortunately we see DRM being used far more as a weapon than as a tool. We are not against DRM per se – we are against the use of DRMs as a TPM, or with one. DRM which tracks

usage so that creators and rights-holders get paid and the consumer has the access they want, when they want, to whatever they want – that we're all for.

Clearly, the use and development of DRM and TPM technologies cannot be left completely to the market – there must be some oversight to remedy and prevent current and future abuses. Lack of interoperability between systems continues to make life difficult for everyone, and hardware and software vendors, as well as sectoral forces such as the major entertainment producers and telecom companies are simply not managing the development and deployment of these technologies properly. Current EU law in this area is clearly insufficient. Remedying this is inextricably linked with the enforcement development efforts we're discussing today. After all, if the current legal situation is being abused, and you apply more enforcement to that regime, the logical outcome is further (and greater) abuse.

Our final points on the proposals concerns sustainable development – believe it or not! First, wherever infringing goods are destroyed, they should also be recycled if possible. Second, confiscated office equipment such as computer terminals could be given to registered charities.

In closing, and in brief since my time is up, these harmonisation proposals need quite a lot of work.

Fundamentally, the principle behind them should change to incorporate a simple concept: anyone who commercially exploits – or indeed fails to exploit – intellectual property without fairly remunerating creators and rightsholders is acting illegally – whether they have a licence to do so or not.

They must address the abuses of the regimes that are the object of the enforcement provisions. Preventing access on any reasonable terms shouldn't be any more acceptable than providing unauthorised access is.

They should take into account the creative solutions to market problems member states have developed regarding relations between stakeholders – and obligate stakeholders to take a more central role in the healthy development of their sectors.

They should encourage technological development that is constructive, interoperable, and healthy, and discourage regimes that provide a product digitally which has more restrictive access provisions than a physical copy of the same product, as we cannot build the economy of the future on such a basis.

We look forward to any questions you might have; there are representatives of the associations above-referenced available to speak with you.

Thank you for your kind attention.

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