representing the recording industry worldwide

SUBMISSION OF IFPI LATIN AMERICA & THE CARIBBEAN

The Regional Office for Latin America and the Caribbean of the International Federation of the Phonographic Industry (IFPI) respectfully submit the following document of contributions to the copyright reform process conducted by the Minister of Culture of the Republic of Brazil.

IFPI LATIN AMERICA & CARIBBEAN is a non for profit nongovernmental organization incorporated under the laws of the State of Florida that represents the interest of more than one thousand phonogram record producers around the world.

For practical reasons, we divided our comments in four parts:

1. **New exceptions and limitations to copyright and neighboring rights**
2. **Compulsory licenses granted by the President**
3. **Definition of "phonogram" (sound recording)**
4. **Collective management of performance rights**
5. **The necessity for a new legal frame protecting copyright in the digital era**

1. New exceptions and limitations to copyright and neighboring rights (Article 46)

IFPI understands that the main purpose of these new provisions is to provide for a more flexible copyright system that effectively contributes to facilitate the legal access to culture and contents protected, such as musical and audiovisual works.

IFPI welcome the effort developed by the Government of Brazil to achieve the purpose above described. Please note that the Brazilian recording industry is actively contributing to increase the amount and quality of the music offered to the Brazilian consumers trough a wide range of Internet based music services (Brazil is one of the most prolific digital music markets in the world with 27 services in operation in comparison with only 19 in the US and 28 in Spain). The Brazilian music industry also promotes Brazilian talent as a priority. During 2009, nine of the top ten artists were Brazilian (only Beyoncé made it to the list as foreign artist).

We understand that all exceptions and limitations to copyright must be interpreted and applied in compliance with the "three-step-test" of the Berne Convention (9 [2])) which states that:

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"Members shall confine limitations and exceptions to exclusive rights to ***certain special cases*** *which* ***do not conflict with a normal exploitation of the work*** *and* ***do not unreasonably prejudice the legitimate interests of the rights holder.***"

The new exceptions contained in **article 46** should meet the criteria required by such rule and therefore we suggest:

a) A general provision including the "three-step-test" rule should be placed at the very beginning of article 46. It is important to clarify that this rule applies to the interpretation of all exceptions and limitations specified in the law.

b) Consequently we suggest that "Paragrafo unico" in article 46 should be deleted because of its broad construction that actually allows for the "creation" of an unlimited exceptions and limitations to copyright potentially leading to unjustified prejudice to author's rights. Limitations and exceptions to copyright are by definition limited to a "certain special cases".

In regards to some particular cases found in the proposed draft, we have the following comments:

46 (VI) The excessively broad exceptions proposed in this section may lead to an unjustified prejudice to right holders. In practice it will be impossible to control or identify the public attending such performances due to the open nature of universities' campuses and other educational institutions. In today's world campuses are often used for commercial purposes (e.g. festivals, paid performances) not necessarily hosted by Universities' authorities and with no educational purposes whatsoever. Additionally, such exception exceeds the purpose of providing adequate access to works for education. We suggest that section VI should be deleted from the text.

46 (XV) this new provisions are constructed in a way that may be interpreted to allow for unlimited and unjustified exploitations of musical and audiovisual works. Letters "a" and "b" are specially overbroad because they are not precise in regards to the beneficiary of the exception. In fact, any person (acting or not as an official entity or cultural association) doing educational activities or "cultural diffusion" may use this provision to -even without profit intent- make massive utilization of protected works potentially causing tremendous damages to right holders' interests' and rights. Let us give you an example: A "virtual community" hosted by a well known website in Brazil, offers for download more than a half million music tracks (full albums from major Brazilian acts) and they are self proclaimed an "educational network". In conclusion, the

whole provision contained in "XV" should be reevaluated. Consequently, we also suggest that letters "a" and "b" should be deleted from the text.

46 (XVII) Probably the most worrying of the new exceptions is the one that creates a de facto statutory license to copy sold-out and out-of-stock works and sound recordings. This provision effectively "confiscates" the reproduction rights simply because a work or a sound recording has been successful enough to sell all available copies in the legitimate market. The fact that a work or a sound recording is not available at one given moment does not constitute sufficient grounds to allow anyone to produce copies. The lack of availability of certain works in the market is often a complex situation that not only depends on the willingness of the right holder to maintain copies for sale. Sometimes a work is not longer available because distribution channels are no longer operating in certain areas of the country even when the right holder is producing copies to satisfy the demand of the public.

In fact, it is in the interest of authors, performers and producers to offer any and all products (recorded music) for which a market exists. No additional incentive is required for this to happen. Availability of music in Brazil is palpable. Only one of the many Internet based music services offers more than 130 digital stations "free of charge" to any Internet user (www.terra.com.br) with a catalogue of more than 6 million tracks.

This provision also calls for a very precise definition of "enough quantity to satisfy the demand of the public" which is something extremely relative, subject to many factors (e.g. geographical areas, channels of distribution and marketing policies).

Therefore, we suggest that this provision should be removed from the text.

2. Compulsory licenses (Chapter VII- Articles 52-B\52-C)

Special mention deserves the inclusion of a new chapter "VII" dedicated to "non voluntary licenses" granted by the President of the Republic in four special cases. We understand that this new chapter is also intended to allow for a more flexible copyright system and to provide for ways to better access works and sound recordings. However, we firmly believe that such system does not contribute to strengthen the Brazilian culture and to the creation of ways to make culture creations more accessible to the public.

Limitations and exceptions to copyright, as included in the majority of copyright laws around the world, plays the role of allowing consumers in special cases to access and enjoy works and sound recordings without authorization from the right holder or payment. Therefore, a compulsory

license system maybe only justified in exceptional cases and only for educational purposes as prescribed by international conventions.

The provisions proposed by articles 52-B and 52-C are really overbroad because they exceed the translation and reproduction of out of stock works that may be necessary for governmental education programs.

Particular concern generates the power to grant licenses when "it was impossible to obtain the authorization...because of the impossibility to locate its author or right owner". The impossibility to locate a foreign right owner may happen, but, this circumstance alone should not be considered enough to confiscate the exclusive right from the author or from a foreign right holder.

In sum, we suggest that new chapter VII should be carefully reconsidered.

3. Definition of Phonogram (sound recording) (Article 5 [X])

The definition of phonogram contained in article 5 modifies the current definition that expressly excludes from the concept the audiovisual fixations.

When a sound recording is part of an audiovisual production (i.e. music video) the new work is subject to a different legal regimen which may be the one applicable to audiovisual works. It is clear that a sound recording is protected under the umbrella of neighboring rights but the legal regimen is different when the right owner decides to makes its exploitation on a different way such as an audiovisual work.

The recording industry is highly interested in continuing its constant investments on the production of audiovisual works that may satisfy the demand of the public for more audiovisual contents on their TV's, computers and portable devices such as MP3 players and cellular phones.

Also, a strong legal frame is necessary specially to defend music products against Internet piracy.

The change proposed to the definition may lead to a problematic interpretation of the concept of audiovisual works in many cases and certainly to limitations in the scope of rights protecting music videos and audiovisual works in general.

Therefore, we suggest that the definition of phonogram remains the same as it is in the current copyright law excluding the audiovisual fixations. The current definition is compatible with standards seen in the majority of copyright laws around the world and also on international treaties.

4. Collective management of rights (Articles 98-110)

As representatives of many foreign right holders, which performance rights are administrated in Brazil by a collecting society, we welcome the effort developed by the Minister of Culture to create a legal frame that contributes to the transparency and efficiency of the collective management system.

The view of international sound recording right holders is that ECAD is doing a good job in providing for performance rights licenses to music businesses in Brazil and serving as "one-stop-shop" for all rights affected by music consumption.

However, the new system should maintain a careful balance between the interest of the authors, artists, musicians, publishers and producers and the interest of the public and users of the repertoires.

Excessive controls on collecting societies may just weaken the whole system (intended to facilities the legal access to extensive repertoires) and generate conflicts at administrative levels of the activity. Those conflicts are very often promoted by reluctant users that simply don't want to pay for the exploitation of vast repertoires.

We encourage the Government of Brazil to not only identify the current problems and deficiencies in the collective management system lead by ECAD but also to preserve its advantages and great achievements during all these years of hard work.

5. The necessity for a new legal frame protecting the copyright and neighboring rights in the digital era

The opportunity provided by the copyright reform in Brazil should serve also to update the existing legislation in regards to the protection needed by copyright owners when their creations are transmitted trough digital networks, specially the Internet.

The biggest challenge faced by right owners around the world today is to get an effective protection of rights when their works, sound recordings, computer software and other creations are massively used by millions of users of "Peer to Peer" networks without authorization. The amount of illegal downloads done every year in Brazil is estimated at over 2 billion (only for music).

Many countries around the world are taking effective steps to combat the problem not only for the purpose of enforcing copyrights but also to give the opportunity to a new digital economy to flourish.

France, The United Kingdom, South Korea, Taiwan and Chile are among those countries that already passed legislation establishing proceedings to notify repeated infringers involved on serious copyright violations including proportional sanctions.

We strongly believe that any reform to the copyright law should include new ways to guarantee the effectiveness of the enforcement of rights in the new digital environment. A very simple system of graduated response will provide the necessary incentives to Internet Service Providers (ISP's) and consumers.

For these reasons, we respectfully ask for the inclusion of a new chapter with a graduated response system intended to create a deterrent effect on repeated infringers of copyright and establish the appropriate incentives to ISP's.

A graduated response system may include a first notification sent by the ISP to its subscriber, followed by a second notification (in case of not compliance) and finally by a temporary suspension of Internet access, among other possible sanctions.

In conclusion, it is extremely important to achieve an effective protection in the current environment by having legislation that includes mechanisms adapted to the new realities and challenges.

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