

## ECSA

### Comment on EC proposal for a directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for the online uses in the internal market

#### *Introduction*

ECSA considers the efforts of the European Commission to harmonize and regulate certain aspects of the collective management of copyrights and related rights as positive. As the representative body of Europe's composers and songwriters, we believe that it is vital that the EC appreciates the economic interest of authors in the collective management of their Rights; even when those Rights have been assigned or licensed to a music publisher, which in many instances is not the case.

In consequence of reciprocal agreements and international networks, Collective Rights Management Societies (hereafter CRMS) are depending on good collaboration among themselves in order to best comply with their tasks. Certainly a level playing field is needed, also because CRMS are subject to EU internal market rules. However, ECSA understands that the proposal over-regulates in certain areas, as for instance when outlining in too detailed manner the mandate and role of some of CRMS internal bodies, which are already regulated on national level through corporation law.

Further, within this detail of the draft there is much that is potentially ambiguous or which could be misconstrued. It is important to remember the fate of the 2005 Recommendation, which, whilst leading to fragmentation of repertoire, was intended to do the opposite. This paper therefore highlights issues in the draft, which from an ECSA point of view must be urgently clarified and fine-tuned.

#### *Detailed comments on the draft*

##### Title I, Article 3

- a)

The draft defines a "collecting society" as "*any organization which is authorized by law or by way of assignment, ..., by more than one rightholder, ..., and which is owned or controlled by its members*". This definition appears to exclude publisher owned licensing vehicles such as CELAS (managing mechanical and performing rights of EMI repertoire for online use in Europe and being a joint venture of GEMA and PRS for Music). This is appealing as CELAS issues licenses for EMI repertoire, which have consequences of numerous authors.

The definitions shall be amended in order to ensure that such societies are also covered by governance and transparency provisions.

##### Title II,

##### Article 5, para 2

Is this going beyond the "Gema categories"? Important to seek clarification from DG Markt and make sure that the exclusive assignment in one particular category of rights (especially the performing right) is not put in question. See appendix on why the exclusive assignment of the performing right is pivotal for composers and songwriters.

### **Article 7, para 8**

*“Every member of collecting society shall have the right to appoint any other natural or legal person as proxy holder to attend and vote at the general meeting in his name”*

It appears that the draft fails to consider the heterogeneity of CRMS. In trying to harmonize horizontally all CRMS (whether of music authors, record producers, film directors etc) it clearly overlooks important distinctions. For instance, continental European CRMS of music authors provide that decisions are taken separately in each curie (songwriters, composers, publishers). ECSA pleads that the appointment of proxy holders takes such distinctions into consideration.

### **Article 8, para 1**

*“...there should be fair and balanced representation of the members of the collecting society in the body exercising this function (supervisory) in order to ensure their effective participation”*

How shall this be applied in practice? Again, continental European CRMS of music authors provide that decisions are taken separately in each curie (songwriters, composers, publishers). The different categories of members in the decision making process, as noted in Recital 11 of the draft directive, shall also be reflected in Article 8. ECSA therefore pleads that the body exercising the supervisory function contains a balanced and fair representation of all three categories of members, i.e. songwriters, composers and publishers.

### **Article 11, para 2**

*“Member States shall ensure that, where a collecting society provides social, cultural or educational services funded through deductions,..., rightholders are entitled the following.”*

It seems fair to say that the term “rightholder” is too broad in scope. It includes publishers and non-members of a collecting society. Rightholders shall be replaced by “members”.

### **Article 14**

Does this also apply to non-EU societies? Clarification needed

### **Article 15, para 2**

According to this provision, licensing terms shall be based on *“objective criteria, in particular in relation to tariffs”*. The draft further states that *“tariffs for exclusive rights shall reflect the economic value of the rights in trade and of the service provided by the collecting society”*.

See on how this is translated in your language: The German version translates “economic value” into “Marktwert, i.e. market value”, which needs to be corrected.

But ECSA also doubts that applying the term “economic value of rights” as objective criteria is useful. How to determine the exact economic value of rights in musical works? There is no explanation of what the phrase “economic value of rights in trade” means exactly. In a world where we are moving from country based licensing to repertoire based licensing does this mean that some repertoires have lower economic value in trade?

There is reference to the “**service**” provided by the CS. This seems to indicate a dangerous misunderstanding of the roles of CS – they provide services to their members not to

licensees. The level of service they provide to licensees should not be relevant in determining the price paid to license rights.

#### **Article 16**

*“Member states shall ensure that a collecting society makes available..., by electronic means, the following information...”*

It seems odd that the EC assumes that all members of collecting societies all over Europe have access to the internet. Especially older members of collecting societies (and they are numerous!) would be excluded from receiving information. ECSA therefore suggest that by electronic means shall be complemented by “postal”.

#### **Article 28**

*“Any representation agreement between collecting societies whereby a collecting society mandates another collecting society to grant multi-territorial licences for the online rights in musical works in its own music repertoire shall be of a non-exclusive nature. The mandated collecting society shall manage those online rights on non-discriminatory terms.”*

#### **Conclusion**

In a broader context it appears that the Commission may have missed an opportunity genuinely to harmonise this specific area of authors rights and neighbouring rights. The rules governing societies and qualifications for the pan-European licensing “passport” are, to a degree, self-certifying on a national basis and there appears to be a lack of objective criteria which could be monitored and ensured by *central supervision*, which would ensure standards and harmony. Similarly, there is no EU/EEA copyright tribunal established – so it appears that arguments over tariff rates even for a pan-European licence will have to be re-played in the tribunals of each relevant country.