

Brussels, 20 December 2016

Statement of the ECSA board of directors

Decision of German Regional Court 24 U 96/14 – *Kramm*

Bruno Kramm and Stefan Ackermann v. GEMA Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte

On 14 November 2016, the Higher Regional Court of Justice in Berlin decided that GEMA may no longer automatically distribute to GEMA publishers on the basis of the existing distribution rules because the distribution rules do not sufficiently take into account the flow of rights or the provisions of the individual publishing contract. Two GEMA members claimed that GEMA violates its fiduciary relationship with its author members when distributing 40% of the mechanical right and 33,33% of the performing right to publishers, as well as compensations due to exceptions to exclusive rights. The Higher Regional Court took into consideration previous case law, notably the German Federal Court decision in the Vogel case (I ZR 198/13) and concluded, in essence, that as publishers do not bring any rights to the collecting society GEMA cannot distribute the publishers' share.

The ECSA board of directors takes note of the *Kramm* decision and wishes to transmit the following views: As a high-level principle ECSA supports the collective management of rights of music writers and publishers. ECSA believes that publishers have an important role in promoting composers and songwriters, in marketing their music and amplifying the exploitation of the works created by composers and songwriters. In the context of this exercise, publishers are and should continue to be entitled to a share of the distributions of CMOs.

However, in many instances music writers are forced to sign a publishing contract in order to get a commission to compose music (i.e. music writers must sign a contract in which the writer agrees that the publisher gets a share of the CMO distributions). This practice, also known in the business as coercive publishing, is a practice especially widespread in the audio-visual sector. ECSA believes that the *Kramm* ruling should help composers, who were coerced into publishing, to claw back the publishers' share which were wrongfully and with no justification assigned in the first place. Furthermore, in many instances publishers stop fulfilling their duties to promote their writers, whilst continuing receiving their share (in most instances for the entire duration of copyright which is 70 years after the death of the author). The *Kramm* ruling should also help to retract these shares, when no active publishing is taking place.

Therefore, the *Kramm* ruling should be considered as a wake-up call for those publishers, who use coercive practices and do not fulfil their promotional obligations. Publishers must value the trust and assignment of rights from composers and songwriters. Consequently, it must be a publisher's moral and legal obligation to ambitiously engage in publishing activities for the entire duration of the rights assignment. Otherwise music writers should be entitled to claw back the publishers' share.

About ECSA

ECSA is the representative body of composers, songwriters and lyricists of all music genres in Europe, regrouping over 50 national associations of music creators in 25 European countries. The main objective of the alliance is to defend and promote the rights of music writers at the national, European and international levels by any legal means. ECSA advocates for equitable commercial conditions for composers and songwriters and strives to improve the social and economic development of music creation in Europe.

ECSA is one of the five members of the Authors' Group¹, Europe's widest alliance of creators, including composers, songwriters, journalists, film/TV directors, screenwriters, writers and translators.

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¹ Members of the Authors' Group are: ECSA, EFJ (European Federation of Journalists), EWC (European Writers' Council), FERA (Federation of Film Directors in Europe), FSE (Federation of Screenwriters Europe)