

## PUBLIC HEARING ON THE GOVERNANCE OF COLLECTIVE RIGHTS MANAGEMENT IN THE EU

---

### RELATIONSHIP BETWEEN COLLECTIVE RIGHTS MANAGERS AND THEIR MEMBERS - COMPULSORY AND VOLUNTARY COLLECTIVE MANAGEMENT OF RIGHTS

*José María Montes  
AISGE. Spain*

- A proper analysis of the relationship between collective rights managers and their members must take into consideration the differences between the *compulsory* and the *voluntary* collective management.
- Indeed, the types of mandates that right-holders may grant to collective rights managers, as well as their substantive scope, territorial reach and date range, depend on the nature of the rights involved and the faculties that these rights grant to their holders.
- The holder of an *exclusive right* is entitled to authorize every exploitation act, in the terms that he may agree with the user. Therefore, the aim of an exclusive right is its direct and individual effectiveness by its holder, even though he may decide, *on a voluntary basis*, to entrust its management to a collective management organization.
- On the other hand, the holder of a *remuneration right* cannot authorize, nor prohibit, the exploitation act (i.e. he cannot negotiate any terms and/or conditions with the user), being just entitled to receive an equitable remuneration for each exploitation act.
- From this perspective, it must be up to the holder of an *exclusive right* to determine the scope of the mandate granted to the corresponding collective management organization. The legitimisation, faculties and obligations for those organizations will depend on the terms agreed with the right-holders.

- Therefore, regarding the *voluntary collective management* of rights, the substantive scope of the mandates and their territorial reach must be based on the terms mutually agreed between both parties – manager and right-holder –, granting the freedom of choice of the right-holder as to which rights should be included in the mandate, for which territories, for how long, etc.
- As to the *compulsory collective management* of rights, since the holder of a *remuneration right* cannot individually exercise it, it must be the Law itself which determines, not just the collective exercise of those rights, but also the obligations of the collective managers (regarding both the right-holders and the users), and their extraordinary faculties for the collection of such rights.
- The *compulsory collective management* must be seen as a tool legally provided to the right-holders for the effectiveness of those rights which in any other way would be impossible to exercise the individual. For instance, regarding the massive use of audiovisual performances (not just through the traditional channels, such as TV broadcasts, but also through the Internet), the only possible way for granting the participation of the performer in the exploitation of his performances is by means, not of an exclusive right (which, furthermore, will always end up transferred to the producer – specially if we consider his negotiation power *vis-à-vis*), but of a *remuneration right* and its collective management.
- In sum, the freedom of choice of the right-holder as to the substantive scope of the mandate granted to the collective manager, including its territorial reach and date range, must be fully observed in the voluntary collective management of the exclusive rights. But such freedom of choice is more restricted in the compulsory collective management of the remuneration rights – the scope of the right-holders’ will in their relation with their collective managers will be limited to those aspects not regulated in the Law.
- Lastly, the distinction between voluntary and compulsory collective management cannot yield different levels of participation of the right-holders in the decision-making bodies of the corresponding collective management organizations, which must, in any case, observe and grant a certain standard of transparency in their activities (i.e. public and predetermined rules for the distribution of rights; information on the administration costs and on the application of possible funds for cultural, promotional and/or welfare purposes; availability of the organizations’ figures; disputes settlement mechanisms; etc.).

Brussels, April 23<sup>rd</sup>, 2010