

**Public Hearing on
The Governance of Collective Rights Management in
the EU**

**Relationship between Collective Rights Managers
and Commercial Users**

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A. Introductory remark

The EC Commission acknowledges in its October 2009 Reflection Document that traditional practices for rights licensing are not adapted to digital distribution. It deplores amongst others the unavailability of multi-territory licensing and the fragmentation of rights, and in particular the necessity for separate clearance of the reproduction right and the making available right. Add to this list the unresolved problem of the “split copyrights” where a user must obtain separate permissions from multiple owners of the same musical work.

The new Commission has made the achievement of the digital single market a priority (agenda 2020). Legislative action for a modern, pro-competitive, and consumer-friendly European single market has already been announced. The digital single market is not just about digital downloads and digital distribution; it is about digital exploitation in general. Digital broadcasters are exposed to the same problems in music rights licensing as any other digital music service.

Prospective legislation must therefore be future proof for any type of digital exploitation.

Today's public hearing discusses the relationship between collective rights managers and their members (Panel 1), the relationship among collective rights managers (Panel 2) and finally the relationship between collective rights managers and commercial users (Panel 3) in three different panels as if they were three distinct subject matters. However, these relationships cannot be looked at in isolation. To the contrary, all of these relationships have to be looked at in conjunction because they are closely interlinked. Restrictions imposed onto right holders in membership agreements with collecting societies have a direct impact on what right holders and commercial users can do or are rather prevented from doing even though it may be in their joint interest.

The EC Commission therefore is right to focus on the "middleman", the intermediary between right holders and commercial users. The EC Commission needs to examine the market behaviour of collecting societies which are solely fiduciaries to their members and also to all right owners that they represent. Fiduciaries owe beneficiaries the duty to exercise the rights that they represent for the benefit and in the interest of the right holders. Collecting societies also have obligations towards commercial users. Many of the obligations such as the publication of tariffs, the obligation to license, non-discriminatory licensing and independent dispute settlement flow essentially from the application of competition law on dominant undertakings.

Let's be clear: collecting societies are not owners of the rights that they represent but fiduciaries to the right owners – nothing more and nothing less. Collecting societies have the obligation to put in motion what is in the interest of the members and right holders represented. Collecting societies are not a

licensee in the traditional sense and may therefore not confuse their fiduciary remit with their own organizational interests.

Right holders and commercial users need flexibility for market driven solutions; many commercial users and certainly broadcasters need to have access to the worldwide repertoire through a one-stop shop; not only for mono-territory use but increasingly more for multi-territory use and in cases also for pan-European use. One might therefore suggest to also have a panel solely between right holders and commercial users – i.e. with the exclusion of collecting societies - how to best license rights. Individual independent artists and services are closer to the changing market than the collecting societies. I will address this point when talking about direct licensing.

B. Denial of flexibility to right holders and users by imposed exclusivity in membership agreements means unavailability of market driven solutions

The main inhibitor to the development of future-proof music rights licensing in the Single Market is the self-attributed exclusivity by the collecting societies. Future regulation on collecting societies has to create flexibility for right holders and users on how to best license music rights. The self-attributed exclusivity has to be replaced by a concept of non-exclusivity.

The EC Commission has already ordered the collecting societies to give up three forms of exclusivity:

a. Membership restrictions¹ restrict the ability of an author from becoming a member of the collecting society of his choice or to be simultaneously a member of different EEA collecting societies.²

¹ See section 7.4 CISAC decision.

b. Exclusive representation³ in reciprocal representation agreements prevented a collecting society from granting a licence over its *own* repertoire; commercial users had no direct access to a foreign society's *own* repertoire (the KODA/SGAE example⁴).⁵

c. Exclusivity clause. Pursuant to Article 6(II) of the CISAC model contract, the EEA CISAC members agreed to abstain from operating in the territory of the other collecting society.⁶

The EEA collecting societies conceded that aforesaid exclusivity clauses were anti-competitive and therefore decided not to challenge the EC Commission's decision before the General Court of the European Union.

Some of the EEA collecting societies now confirm the availability of own repertoire licenses to commercial users outside their home territory in the ongoing annulment proceedings against the CISAC prohibition decision. However, public information on how and on which conditions own repertoire is licensed is unavailable.

² Membership restrictions (also) affect competition between collecting societies on the market for licensing rights to commercial users; potential competition between collecting societies on the licensing of their own repertoires is reduced (see CISAC decision paragraph 126).

³ See section 7.5 CISAC decision.

⁴ See paragraph 140 CISAC decision

⁵ The EC Commission states in the CISAC prohibition decision: "It is noted that 12 years after the CISAC recommendation of May 1996 to its EEA members to avoid usage of any exclusivity clause in their reciprocal agreements, and 19 years after the Tournier and Lucazeau rulings, the majority of the EEA CISAC members have not yet modified their reciprocal representation agreements in compliance with these judgments, even though they all recognised that the exclusivity clause is contrary to EC Competition rules." (paragraph 144)

⁶ The meaning of this clause was unclear. The EC Commission ultimately refrained "from intervening in relation to this provision insofar as CISAC and its EEA members understand it simply to mean that a collecting society will not interfere with the other society's ability to grant licences and that the clause is not interpreted as in any way limiting the possibility for the former to grant direct licences over its own repertoire" (see paragraph 152 CISAC decision).

d. Unresolved problem: exclusivity in respect of rights administered

If you thought that the three examples exhaust the debate on exclusivity provisions in membership agreements, you are mistaken. Recent discussions with stakeholders have confirmed that a majority of collecting societies take the view that the exclusivity provisions are caught by competition rules only in respect of *territorial* restrictions. Accordingly, collecting societies claim to be entirely free to impose exclusivity in respect of rights administered onto their members. In other words: a member is forced to decide whether or not to have a “whole” category of rights administered exclusively by that collecting society – either in or out, all or nothing – but he/she does not have the choice to have this right be administered non-exclusively, i.e. to have the option to have the right licensed by the society *or alternatively* to license the right to certain individual commercial users by himself without having to withdraw everything from the society.⁷

The unavailability of non-exclusive administration of rights explains why the major music publishers had no choice but to withdraw their reproduction right for the Anglo-American repertoire for “*all*” online and mobile usage from the collecting societies.

C. Necessity to remove artificial and anti-competitive restrictions through legislation: availability of direct non-exclusive licenses to members

⁷ Reference to the “Daft Punk” case; Daft Punk wanted to transfer only certain categories of its copyright to SACEM and only for its domestic territory (France). SACEM considered that request to be incompatible with its statutes and therefore rejected it. Following a complaint lodged by the band, the Commission considered that SACEM’s refusal could constitute an abuse of its dominant position. Accordingly, SACEM modified its statutes and established the option for its right holders to individually manage certain categories of their rights or to transfer them to another collecting society – see paragraph 135 CISAC decision. A non-exclusive grant is therefore not yet available.

A framework directive for collecting societies should eliminate exclusivity in member grants of rights. In other words, the grant of rights to a collecting society must be made non-exclusive so that right holders can license directly to users - i.e., around the collecting society, if and when it makes business sense for them to do so. This one change by itself, will give right holders and users more flexibility to enter into licensing agreements, when it is good business to do so, and will go farther in promoting transparency and good governance from collecting societies than a top down approach from regulators who cannot possibly be expected to effectively regulate the nuances of an evolving marketplace and the daily operations of many collecting societies.

We therefore call on the European Commission to ensure through appropriate legislation that collecting societies are bound by the concept of non-exclusivity.

The proposed wording for such legislation is as follows:

Collecting societies are enjoined and restrained from limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a collecting society, non-exclusive licenses to music users for rights of public performance and reproduction.

This wording is a modification of article IV. (B) of the ASCAP consent decree.

The benefits of non-exclusivity in collective administration are manifold.

First. The fragmentation of the worldwide repertoire into multiple licensing platforms is the result of exclusivity provisions in membership agreements. Absent this exclusivity, platforms such as CELAS, PAECOL, DEAL and others would become obsolete. Major music publishers would no longer be forced to

withdraw the reproduction right for the Anglo-American repertoire from the collecting societies and commercial users could offer right holders alternative options for direct licensing within the framework of collective administration.

Second. *Local* collecting societies continue to be a source for the global repertoire. The position of minority repertoires and cultural diversity would no longer be at risk: The concerns in the June 2007 Joint Position of 21 European collecting societies on the 2005 Music Online Recommendation would be without object.

Third. Commercial users would again be able to rely on the availability of the global repertoire (at least for mono-territory use).

Fourth. The review and update of the 30 year old GEMA categories would become obsolete. GEMA-categories are not needed if parallel direct licensing is made possible through non-exclusive grants of member rights.

Fifth. Parallel direct licensing will have much stronger impact on the efficiency, transparency, good governance of societies than any regulation in a framework directive. Parallel licensing will create the incentive for the collecting societies to improve their efficiencies and their services to members, to cooperate for back-office functions etc. It flows automatically that the members will have little incentive to withdraw rights.

Sixth. The reproduction right and the making available right would again be available from the same licensing source.

Seventh. The EC Commission and European and national courts would be "discharged" from adjudicating on issues of exclusivity and the internal

functioning (e.g., administration fees and the transparency of distribution rules) of collecting societies; important calls by the European Parliament (Levai report) on appropriate legislation would be served.

Eighth: Mandatory non-exclusive licensing is a proven concept in the US for more than fifty years.

I am personally convinced that many music publishers and many commercial users subscribe to the concept of mandatory non-exclusive licensing in collective administration of rights. Direct licensing between right holders and users provides opportunities (not an obligation) for new and untested business models.

Collecting societies have proven to be far too slow in devising appropriate licensing schemes in a fast evolving digital environment with new and innovative business models. They are not to be blamed for this market failure since their role is that of intermediaries. However, collecting societies should not be allowed to prevent right holders who are actors in the market themselves to design new licensing schemes with innovative commercial users.

Collecting societies are not entitled to make themselves the unavoidable trading partner for right holders and commercial users; such market behaviour is a violation of their fiduciary duties and it also does not stand the "competition test". This is exactly the reason why the ASCAP and BMI consent decrees provide for the possibility of parallel direct licensing and do not permit the societies to force right holders to withdraw rights.

The obligation to remove exclusivity imposed on members is even more justified if you recall that a number of collecting societies - including GEMA,

SACEM and PRS - confirmed to the EC Commission that they offer multi-territory/pan-European licenses of their *own* repertoire to commercial users. If the collecting societies themselves offer direct licenses for their own repertoire, collecting societies have no reason to deny right holders the right to also grant direct licenses to commercial users without having to withdraw rights from the collecting societies. Collecting societies have no compelling argument to deny right holders what they claim for themselves.

D. Safeguards and accompanying measures

Mandatory non-exclusive administration of rights and parallel licensing of rights needs to be escorted by a set of accompanying measures.

Punishment of members who enter into direct licensing schemes with commercial users and retaliation between societies in respect of direct licences of societies *own* repertoire in the territory of another society are issues of great concern and may deter right holders and societies from entering into direct licenses. Therefore, adequate protection mechanisms are needed, in particular full transparency on applicable administration fees on the basis of activity based cost⁸, distribution and governance.

In addition, commercial users must be protected from the risk of “double payment” for the same rights, i.e. payments to right holders that issue direct licenses and payments to collecting societies. It should be emphasized that broadcasters are able to supply detailed and direct reporting of the music used in their services.

E. Final remarks

⁸ See recommendations of the UK Monopolies and Mergers Commission of February 1996.

Direct licensing provides for market place solutions around the collecting societies. It offers competition law compliant solutions in music rights licensing and preserves at the same time cultural diversity in the Single Market.⁹

We call on the EC Commission to reject attempts for the establishment of a single European super collecting society. It is the “traditionalist” fraction in some of the EEA collecting societies that promote and favour the resurrection of a European monopoly for multi-territory or pan-European licensing of music rights. The EC Commission should not forego the opportunity to propose a legislative framework for collecting societies that favours market driven solutions for the benefit of right holders and commercial users and that is at the same time competition law compliant and protective of cultural diversity. We have shown above that both objectives can be reached and that they are not mutually exclusive. Stop exclusivity in membership agreements.

⁹ Note: direct licensing as imposed under the ASCAP and BMI consent decree does not solve the issue of multi-territory licensing but puts significant pressure on collective societies.

**PUBLIC HEARING ON COLLECTIVE RIGHTS
MANAGEMENT IN THE EU**

**RELATIONSHIP BETWEEN COLLECTIVE RIGHTS
MANAGERS AND COMMERCIAL USERS**

**Brussels, April 23, 2010
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**SELF-ATTRIBUTED EXCLUSIVITY IN
MEMBERSHIP AGREEMENTS
HAS TO BE REPLACED BY A
CONCEPT OF NON-EXCLUSIVITY**

Self-attributed exclusivity

- **Membership restrictions** - **anti-competitive**
- **Exclusive representation** - **anti-competitive**
- **Exclusivity clause** - **anti-competitive**

Exclusivity in respect of rights administered



Unresolved problem

Proposed legislation for framework directive

Collecting societies are enjoined and restrained from limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a collecting society, non-exclusive licenses to music users for rights of public performance and reproduction.

Modification of article IV. (B) of the **ASCAP consent decree.**

Benefits of non-exclusivity in collective administration

- Platforms such as CELAS, PAECOL, DEAL and others would become obsolete.
- *Local* collecting societies continue to be a source for the global repertoire.
- Commercial users would again be able to rely on the availability of the global repertoire (at least for mono-territory use).
- GEMA-categories are not needed.

Benefits of non-exclusivity in collective administration (continued)

- **Parallel direct licensing will have much stronger impact on the efficiency, transparency, good governance of societies than any regulation in a framework directive.**
- **The reproduction right and the making available right would again be available from the same licensing source.**
- **The EC Commission and European and national courts would be "discharged" from adjudicating on issues of exclusivity.**
- **Mandatory non-exclusive licensing is a proven concept in the US for more than fifty years.**

Protection mechanism needed

- **No punishment of members**
- **No retaliation between societies**

Tools

- **Full transparency on applicable administrative fee on the basis on activity based cost.**
- **Full transparency on distribution.**
- **Governance**

Thank you!

Questions?