Cable Europe Position Paper on the Commission's Proposal for a Directive on Collective Rights Management

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Introduction

The European cable TV industry currently provides broadband, telephony and digital TV to approximately 72 million customers. Cable Europe represents Europe's leading cable TV operators and their national trade associations. The aim of Cable Europe is to promote the industry's public policy positions and business interests at both European and international level, and to foster co-operation among its members.

Cable Europe welcomes the Commission's Proposal for a Directive on collective management of rights in musical works for online uses in the internal market. It should aim at introducing a European minimum standard for the regulation of collecting societies.

We believe indeed that the copyright clearance problems stem in many member states not solely but largely from inefficiencies in the functioning of collecting societies - rather than the licensing framework - and many countries lack tribunal oversight.

In particular a Directive is necessary to ensure greater transparency of rights management (which rights are held by each collecting society and which rights owners they represent) and of the basis for calculating the fees charged by collecting societies (collecting societies set tariffs unilaterally without giving commercial negotiations a chance and the basis for calculation the rate level is often totally obscure). It should also impose a stricter and more expedited supervision of – and a cap on – remuneration levels. Rights clearance should be carried out on the basis of commercial negotiations in the first instance (either with collecting societies or directly with broadcasters on an "all rights included" basis or with producers when they are independent from broadcasters, ie Hollywood studios) with a mediation or tribunal oversight. Furthermore, the Directive has to find ways to balance the downsides of the proposed right to choose for right holders: The expected fragmentation of rights that will increase the burdens for clearing such rights has to be addressed appropriately.

In this context, Cable Europe considers that the proposal is a good step forward but still needs improvement to achieve the goals set.

I. Unbalance between right holders and right users:

Cable Europe welcomes the goal pursued to ensure better transparency and governance of collecting societies. While doing so, we have the impression that the proposal focuses mainly on imposing obligations on collecting societies towards the

right holders, lacking to address the users' interests and the relationship they also have with collecting societies. With users we mean market parties that use content for distribution to their customers such as cable TV operators. Therefore, we call on to introduce a more balanced approach towards users with the following improvements:

- Introduce minimum European standards of regulation for collecting societies to avoid "forum shopping" by the right holders and allow keeping the reciprocal agreements in place.
- Introduce transparency obligations towards users on methods used to set tariffs and on the repertoire of different collecting societies
- Put in place an ex ante control regarding all the obligations that affect collecting societies (including tariffs)
- Introduce effective and efficient procedures for dispute resolution between users and collecting societies
- Introduce effective and efficient system of preliminary judicial remedies

These points will be developed in the following sections.

II. Definition of Collecting societies:

The proposal defines the collecting societies to which the Directive would apply as "any organization which is authorised by law or by way of assignment, licence or any other contractual arrangement, *by more than one rightholder*, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members". With this definition and the words "by more than one rightholder", it is not entirely clear whether CRMOs like CELAS managing the repertoire of one rightholder is covered by the Directive. Clearly, they should be covered by this Directive as they do the same work of any other collecting society, i.e. managing the rights of a right holder and collecting money a right holder should gain for the exploitation of its right. The definition should therefore be adapted and these words "by more than one rightholder" removed.

III. Governance obligations:

A. **Art. 5.2** allows rightholders to **choose** the collecting society they wish to manage their rights.
Cable Europe supports the strengthening of rightholders' rights towards collecting societies and appreciates the approach of granting right holders the right to choose the collecting society best suitable for their needs as legitimate. Nevertheless, the Commission has to consider the negative effects that a right to choose might have on users: Cable Europe fears it will lead to a **fragmentation of repertoire** that would make it much more difficult and costly for users to clear the rights they need for their services. If the Commission wants to ensure cross-border freedom of choice for right holders, it would have to take measures that are much more far-reaching in order to balance out the detrimental effects entailed by the fragmentation of rights. For example, it would be very opportune to introduce **minimum European standards** for collecting societies as developed below to avoid "forum shopping" by the right holders and for keeping the reciprocal agreements in

place. It has to be prevented that right holders choose the collecting societies which only due to negligence of standards are capable of distributing the highest payments. The level of minimum standards should not be the lowest common denominator that would lower the standard already achieved in certain countries. Such minimum standards should entail the transparency obligations set in this proposed Directive as well as the following:

A. The right to choose a collecting society should be balanced by an obligation for the collecting societies to contract with users. Collecting societies shall have the duty to contract with every interested rightholder in entrusting the society with the rights he / she holds and the duty to contract with every interested user on non-discriminatory grounds.

B. Art. 5.3 gives rightholders the right to terminate the authorization given to a collecting society to manage their rights "upon serving reasonable notice not exceeding six months". We fear that this provision will significantly complicate the conclusion of longer-term contracts between collecting societies and users. Therefore, it should be made clear that licenses already granted by collecting societies will continue before any termination will remain valid in order for "grandchildren rights" granted to sub-licensees to remain unaffected by this termination.

Apart from minimum standards for collecting societies, other reciprocal measures should be taken: In some member states [at least in Germany] cable retransmission rights have been legally structured as a right to issue prohibitions. This and other existing rights to issue prohibitions should be revised in a way that they become mere claims to compensation. Otherwise each individual collecting society may block cable retransmission or other forms of use – even if it only disposes over a very small portfolio of rights, unless the user deposits the full compensation demanded under the tariff.

IV. Transparency obligations

A. **Art. 18** mentions **information to be provided** to rightholders, collecting societies or users *on request*. We consider these transparency obligations to be interesting but not going far enough.
   1. The wording "on request" should be deleted and any information should be provided by collecting societies on a "push" basis and not a "pull" one. What should be required for the rights to be cleared up in a functional and comprehensive way is a reliable information center, like a database.

B. **Art.15** stipulates that collecting societies and users shall conduct negotiations for the **licensing** of rights in good faith, including the provision of all necessary information on their respective services. Furthermore, licensing terms shall be based on objective criteria, in particular in relation to **tariffs**. Tariffs would reflect the **economic value of the rights in trade** and of the service provided by the collecting society. We welcome this introduction but consider that this provision remains very vague. From the users' perspective,

collecting societies have a dominant position on the national markets for copyrights licenses. Collecting societies should therefore – similar to operators of electronic communications networks with significant market power (SMP) – face a number of *ex ante* obligations which, *inter alia*, relate to clear, transparent and predictable grounds for pricing as well as to non-discrimination.

1. Firstly, ECJ Canal 5 vs. STIM case (C-52/07) refers to the fact that prices should not be "*excessive in relation to the value of the service provided*" and that they should be "*reasonable in relation to the economic value of the service provided*". Article 15 reflects this case law of the ECJ but fails to mention the **"reasonable"** character of the tariffs. This reference should be included in this article.

2. Secondly, a major step forward would be for collecting societies to publish **clearly defined criteria** for their fees' calculation in order to allow for benchmarking. This would lead to convergence of the way fees are calculated all over Europe. Tariffs, if any, should be construed as a fully unbundled reference offer (See art. 9 of the Directive on access to, and interconnection of, electronic communications networks and associated facilities 2002/19/EC) whereby all different costs are clearly identified and motivated on economic grounds. This kind of motivation is particularly important for distribution platforms as they are the ones in the value chain who know the least about the value of the distributed content.

   In Spain, the Competition Authority (CNC) has defined criteria to calculate tariffs. Based on the European Court of Justice's ruling (Case C-245/00), the CNC considers that collecting societies' applicable fees for the exploitation of the rights that they manage should reasonably relate to the *economic value of the use of their respective repertoire.*

   For that purpose, the CNC has considered as a suitable criteria for the calculation of those fees the following: **the use of repertoire + the value of that use** (which could be calculated using several indicators, such as the content's broadcasting times, the audience of the content, advertising placed, if any, etc). Those use and value may be calculated on a case by case basis or as an average (percentages to be initially provided by the collecting society). In both cases, collecting societies shall make sure that they obtain the relevant data from neutral and accurate sources.

   In this context, the CNC has also mentioned that collecting societies should be obliged to **clearly inform content users** about the whole repertoire that each of them represents, in order for the applicable remunerations to be proportionate to each relevant repertoire.

   Notwithstanding the above, the suitability of these criteria shall not preclude the use of other methods of calculation, such as a percentage of the contents' exploitation revenue obtained by content users. However, the CNC considers that this method might not be as

proportionate in respect to the market value as the one based on use of repertoire, and it may even constitute an obstacle in terms of competition among collecting societies.

In any case, the CNC has declared that collecting societies should not apply different fees to similar categories of content users without a **justified motivation**, as it would be considered discriminatory. In order to avoid any possible discrimination, the CNC has declared that collecting societies should be obliged to inform a content user about the agreements reached with similar users.

Another suitable and indeed basic basis for the calculation of tariffs would be the **amount of rights** and – probably more importantly – potential changes in the amount of rights **covered by a certain license**. There are several examples of collecting societies arbitrarily raising prices of licenses without giving any account of changes in the amount or the value of the rights covered by the license.

3. It is not uncommon for collecting societies to raise their fees once a contract has to be renewed. Such increase should also be clearly motivated on the basis of **justified cost increases**.

4. Additional obligations in this context could relate to **non-discrimination and accounting separation** (See art. 11 & 13 of the Directive on access to, and interconnection of, electronic communications networks and associated facilities 2002/19/EC).

5. **Collecting societies should be obliged to contract** with any interested user.

6. Member states should be obliged to amend process regulations that impede **fair negotiation conditions** between collecting societies and right users. Fair commercial terms in licensing should recall the principle of **technology neutrality** (cfr Recital 18). Fair conditions would also mean to require a **deposit** when the user and the collecting societies do not reach an agreement on the amount of licence payments and the user pays a deposit to avert criminal liability. Due to the collecting societies unrestricted frequently exorbitant tariffs the users are drained of liquidity and lack these assets for investments until there is a final judgment without further appeal. This risk seriously affects the users` bargaining power. A solution could be to limit the deposit to the amount of remunerations paid heretofore or to empower the arbitration boards or the courts to suspend or curtail excessive tariffs.

7. Lastly, a relevant **ex ante control** (such as an independent controlling body) has not been foreseen while we consider essential to introduce it as we explain below.

V. Enforcement measures:

A. As said supra, an **ex ante control** of compliance of all these rules by collecting societies should be put in place, otherwise the obligations listed for collecting societies will have no object. This could be based on the model provided by the regulatory framework for electronic communications leading to appropriate accountability to authors and users in Europe. It is essential to define a legal instrument at EU level including ex ante regulation which would open up the market for rights management (see Directive on a common regulatory framework for electronic networks and services 2002/221/EC). Who is the competent authority as defined in article 39? It should be an **independent, impartial and competent** body, such as the **national competition authority**

B. The distinctions between the role of the competent authority, the courts and the alternative dispute resolution body should be clarified.

C. Also the **applicable measures and sanctions** to collecting societies should not be left entirely to Member States as stated in article 38 in order to avoid fragmentation and potential forum shopping. **Minimum standards** of applicable sanctions and measures should be defined at EU level.

VI. Dispute resolution procedure:

A. The dispute resolution procedure proposed in article 35 is too vague and risks having very limited effect. The provision does not contain any regulation on **the practical implementation of the procedure**, in particular as regards how reasonable remuneration levels are supposed to be determined or how conflicts are supposed to be settled in an effective and swift way. Thus, a user that challenges the terms and conditions proposed by a collecting society risks ending up in lengthy and unpredictable legal processes.

B. This Directive should impose to Member States to implement dispute resolution systems. It cannot be an option for Member States. The words "if appropriate" should be deleted. Disputes should be first brought **either to a mediator that is independent, impartial and competent** – as it is foreseen by article 12 in the Satellite and Cable Directive (93/83/EEC) **either to the competent court.** The use of these procedures shall not preclude direct access to the courts.

C. A system of effective **preliminary judicial remedies** should be introduced in case of excessive remuneration claims, such as that which exists in the UK where the Copyright Tribunal adjudicates commercial licensing disputes between collecting societies and users of copyright material. The existence of the Copyright Tribunal in the UK helps rights holders and entertainment business to reach agreement on licensing matters, which in turn facilitates the introduction of innovative new services. As an alternative, cases of dispute should trigger a temporary grant of rights within a certain period – if need be, subject to the deposit of security specified by the competent court with which temporary relief is being sought.

VII. Multi-territory Licensing:

Recognizing the need for multi-territory licensing in the digital era, Cable Europe wonders why such a chapter has been introduced within this Directive dealing essentially with transparency and governance of all collecting societies. This approach will most probably complicate and delay the adoption of such an important Directive.

Cable operators and broadcasters operating on a single territory should not be required to buy pan-European or multi-territorial licenses. However cable companies active in several territories should be given the option to choose between pan-European/multi-territory licensing and national/bilateral licensing.

The clearing of rights by cable operators is in many cases characterized by a high degree of inefficiencies. In the current system, some cable operators are subject to important transaction efforts and opportunity costs as a result of uncertainties caused by copyright regulations.

It should be noted that in addition to clearing the audiovisual rights, other elements *incorporated* in the audiovisual work, eg music, often require a separate rights clearance which has significant administrative and transaction costs.

Pursuing the policy goal of a European single digital market for cross border distribution of musical and audiovisual works should not result in a two speed market in practice, where a company operating on a European single market basis would have a better regulatory/operational environment than those - who by nature - operate on a national/regional basis. The national remuneration tariffs must not be proportionately higher than international ones. Moreover it should not lead to the undermining of existing national regimes where those regimes are delivering positive benefits to end-users.

For communication of content to the public, broadcasters clear the rights on a territorial basis or, if so desired, on a multi-territorial basis. We have difficulties in understanding exception enshrined in proposed article 33 and would require a clarification of this article.

Operators of distribution platforms clear the rights, if need be on a country by country basis, for their service areas where their subscribers have their residence. This is current practice.

However, once the rights have been cleared in this way and the target audiences of the broadcasters or the subscribers of the distribution platforms are known, these national consumers should be granted a portability right (to other territories and to other devices of their choice).

For making content available to the public (eg s-VOD), the same principle should apply. Once rights have been cleared by the service provider, the subscribers should be in a position to enjoy his subscription anywhere and on any device of their choice.

This can only be true if realities of technology neutrality in the DIGITAL world (not just ONLINE) and of both musical and audiovisual worlds are taken into account. This complex issue should perhaps better be discussed in the stakeholders' dialogues on the "Licences for Europe" initiative of the Commission rather than in such a proposed Directive.

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