Copyright Users' Platform - CUP

Possible improvements to the proposal for a Directive on collective rights management

The Copyright Users' Platform (CUP) is a forum for informal dialogue between representative organisations of major copyright users. CUP members meet regularly to discuss EU copyright policy and have actively debated the recent European Commission proposal for a Directive on collective rights management.

Building on the **April 2012 Common CUP principles** **on transparency and governance of collective rights management organisations and dispute resolution mechanisms**, the CUP welcomes the European Commission Proposal for a Directive on collective rights management and appreciates the fact that some key CUP requests have been taken into account by the European Commission.

However the current Proposal for a Directive stops short of fully addressing the possible improvements which could be made to the governance and transparency of collective rights management organisations in the EU. **The following document outlines further improvements which should be made to Title II and provisions on dispute resolution mechanisms in the future Directive.**

1. Scope: a level application of governance and transparency requirements

The text applies mainly to collecting societies (or the preferred term that we will use in the remainder of the text, "collective rights management organizations"), i.e. any "*organisation 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*" (article 3 point a).

This would mean that most of the text does not apply to entities used by collective rights management organisations such as CELAS, PAECOL, PEDL.

This could lead to an intentional circumvention of the societies' obligations under the proposed Directive. Ensuring that subsidiaries of collective rights management organisations or other entities managing authors' and related rights are submitted to the same governance and transparency requirements as collective rights management organisations themselves is a basic minimum to ensure a level playing field.

2. Re-aggregation of the repertoire: avoiding further fragmentation

Rightholders "*have the right to authorise a collecting society of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the Member State of their choice, irrespective of the Member State of residence or of establishment or the nationality of either the collecting society or the rightholder*" (article 5 §2).

The current formulation of Article 5§2 may create a conflict with national law, especially when it comes to collective management of remuneration rights (e.g. with respect to neighbouring rights), as well as with the use of blanket licensing regimes, which are the result of both licensor and licensee's will to facilitate access to the global music repertoire.

It should be clarified that Article 5§2 only applies with regard to the exercise of authors' exclusive rights. Article 5§2 should include the following as an introductory sentence: "For mandating the exercise of exclusive rights".

CUP members warn that this current provision under Article 5§2 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. This is why reciprocal agreements should be kept in place as far as possible, and there should be no interference with existing licensing practices concerning the global repertoire.

Another concern in this regard relates to the fact that some collective rights management organisations wear a "double hat" (e.g. if a traditional membership driven collective rights management organisation operates a subsidiary for a major publisher who has withdrawn its mechanical rights in the Anglo-American online repertoire), which goes against the stated objective of the Proposal for a Directive of facilitating the re-aggregation of repertoire[1] and corrupts the idea of collective rights management.

[1] See Impact Assessment accompanying the Proposal, section 4 « Objectives », page 33

3. Duty to contract: the flip-side to rights' management entities natural monopoly

The "flip-side" of the collective rights management organisations' monopoly is their duty to contract with every interested rightholder in entrusting the entity with the rights he / she holds and the duty to contract with every interested user **on non-discriminatory grounds**.

This is established case law of the European Court of Justice. Similarly, § 11 of the German Copyright Administration Law includes a more user-friendly version than the current article 35 of the proposed Directive, which merely provides for a dispute resolution mechanism if a collective rights management organisation refuses to license. The latter is insufficient.

CUP Proposal:

Article 15 should include the following:

Collective rights management organisations shall be required to grant, on equitable conditions with respect to the rights they administer, rights or authorisations for exploitation to any user so requesting.

Should no agreement be reached with respect to the level of remuneration to be paid for such grant of rights or an authorisation, then recourse under article 35 shall be provided [and the rights or authorisation shall be deemed to have been granted if the remuneration previously paid to the collective rights management organisation has been deposited on an account in favour of that society].

4. Supervisory function: covering all collective rights management organisations

The supervisory function to be established by collective rights management organisations (article 8) does not apply to all types of collective rights management organisations. This is inappropriate, as **supervision remains always necessary, also for smaller societies**.

CUP Proposal:

The exception for "smaller" collective rights management organisations (**article 8 §3**) should be deleted.

5. Negotiations with users: ensuring reasonable tariffs and transparent criteria for remuneration

The provision on negotiation of licences with rights users (article 15) is incomplete compared to the wording of the case law of the European Court of Justice (ECJ).

ECJ Kanal 5 and TV4 vs. STIM (C-52/07) refers to the fact that **remuneration to rightholders should be "reasonable in relation to the economic value of the service provided" by the collective rights management organisation**.

Article 15 only partly reflects this case law of the ECJ but fails to mention the "**reasonable**" and "appropriate" character of the tariffs. This reference should be included in this article**. Collective rights management organisations should furthermore motivate with clearly defined criteria their fees' calculation. Criteria to determine the tariffs should also be "non discriminatory" and "proportionate".**

Moreover, the present wording of article 15 §2, 2nd sentence, should be improved in order to **take account of the fact that remuneration may be for a licence or merely a remuneration right** (thus not only for exclusive rights), **and that the collective rights management organisations' management services are not paid separately by users;** the management fee is deducted by the societies from the agreed remuneration to the rightholder. A similar modification would be necessary for the 3rd sentence of article 15 § 2.

CUP Proposal:

Modification of **article 15 §2**: Objective criteria for calculating tariffs

Tariffs for rights [i.e. licences or mere remuneration rights] shall be reasonable and appropriately reflect the economic value of the exploitation [concerned] and of the service provided by the collective rights management organisation. Criteria to determine the tariffs should also be non-discriminatory and proportionate.

The following points are also essential:

- Collective rights management organisations should act in a customer-focused, service-oriented way, avoid long delays in settling all the rights and **keep administrative fees borne by rights users (and by rightholders) as low as possible.**

- Collective rights management organisations should have the power and the obligation to **guarantee rights users that the latter are held harmless from claims for the same use/repertoire from other collective rights management organisations**. Whenever a given licensing agreement involves right holders represented at national level by a plurality of collective rights management organisations, a one-stop-shop should be ensured to lower transaction costs and save time in procedures to obtain authorisations for rights uses.

CUP Proposal:

Suggested **paragraph to be included under article 15**:

Upon request from the user concerned, in cases where one and the same use is subject to authorisations from, or remuneration to, two or more collective rights management organisations managing rights of the same category of rightholders for such use, the licences required for the exercise of that activity shall be granted via a single contractual arrangement. Therefore, on request of a user, the relevant collective rights management organisations should be obliged to act together.

Information should be delivered to the users regarding all necessary criteria for calculating tariffs (including split costs of both, rights usage and administration fees), the licensing conditions, and administrative requirements. This does not preclude the possibility to negotiate lump sum agreements.

If the renewal of the contract is subject to a fee increase, this should also be clearly motivated on the basis of justified factors, such as increased usage or other demonstrable cost increases. Tariffs, if any, should be construed as a reference offer whereby all different costs are clearly identified and motivated on economic grounds. This offers the possibility to start a fair negotiation process.

CUP Proposal:

Collective rights management organisations should **limit their administration / transaction costs to a certain reasonable amount** when managing the revenue.

6. Transparency and reporting: better information for users

Chapter 5 deals with "transparency and reporting". **There is much less information provided to users.**

The most significant pieces of information - which are only transmitted to rightholders - are "the deductions made for management fees in the period concerned" (article 16 point e) and "the deductions made for any purpose other than management fees, including those that may be required by national law for the provision of any social, cultural or educational services in the period concerned" (article 16 point f).

These last requirements should also be communicated to users.

Information to be provided to rightholders, collective rights management organisations and users as provided in article 18 should not be based on a "pull" basis but rather on a "push" basis, a reliable information center such as a database. The words "on request" should therefore be deleted.

7. Public information on collective rights management organisations

Article 19 listing the elements to be made public on the website of the collective rights management organisation is incomplete. **Rights users need to be able to benchmark how rights management entities redistribute royalties to rightholders**.

CUP Proposal:

The requirements under article 19 should include the income received by collective rights management organisations from tariffs, per tariff, and the number of licences issued by collective rights management organisation per sector.

8. Annual transparency report

Article 20 foreseeing points on an annual transparency report should be applicable to most collective rights management organisations. **Small collective rights management organisations should not be exempted from the requirements for their annual financial report**. However, CUP recognises that it might be difficult to obtain the same details from a society with less than 10 employees as from one with several hundred people.

CUP Proposal:

CUP recommends deletion of the exemptions **under Article 20** of points 1 (a) and (g) **of Annex 1**. Ideally, financial information as described under Annex I point 2 should also be provided by smaller collective rights management organisations.

9. Dispute resolution mechanisms need to be more detailed and complete

Article 35, 36, 37 and 38 on dispute resolution mechanisms, especially between collective rights management organisations and rights users are too vague and incomplete. Article 35 is very basic and only fulfils already mandatory requirements of the European Convention on Human Rights.

- Independent dispute resolution systems should not be an option for Member States, but should be mandatorily implemented by the Member States (deletion of "if appropriate" is necessary).
- Rights users and rightholders should be equally represented by any non-court body.
- The distinctions between courts, the independent and impartial alternative dispute resolution bodies and competent authorities should be clarified.

CUP Proposals:

The following points should be reflected in the Directive, including their details:

- Shorter time periods for dispute resolution: Disputes over licences should be dealt with quickly and efficiently (less than a year).

- **Referral to a special arbitration body**: In cases where negotiations between a rights user and an collective rights management organisation fail owing to lack of agreement on the level and / or structure of a fee for rights intended for new business models, or new technological solutions, the rights user shall have the right to refer the case to a special arbitration body. The special arbitration body shall be granted timely access to all relevant information from the collective rights management organisation, including financial information, in order to be able to promptly make a well informed interim decision

regarding a fair level of remuneration for clearing the rights, so that the rights user is able to use the rights before a final decision has been made.

- **Competence of specialised arbitration bodies**: The specialised arbitration bodies should be competent for all kinds of disputes concerning licensing, in particular remuneration aspects dealing with the level of administrative fees and the level of any social and cultural contributions that are part of the licence fee, or for cases where the granting of a licence is declined, e.g. whether or not the refusal is reasonable (discriminatory practices or imposition of restrictive conditions), and to adjudicate other matters relating to the transparency of the collective rights management organisation such as its repertoire.

- **Qualified staff and adequate resources**: The specialised arbitration body should be granted sufficient resources to ensure that the dispute resolution system will be efficient and affordable. In particular, it should be staffed by well qualified and independent professionals with backgrounds in antitrust law, economics, and intellectual property law.

- **Possibility to appeal:** Appeal of the decision of any non-court body should always be made available. If recourse of the arbitrary decision to the ordinary courts for a first instance decision is made possible under national arbitration law, then the competent courts should be those equipped with specialised chambers for the issues in question.

- **Deposit for remuneration:** In cases where the collective rights management organisation may sue for infringement even when the rights user has made an adequate offer for remuneration (which the entity has not accepted), the rights user should be given the opportunity to make a deposit for the remuneration offered and then be granted, to a reasonable extent, with the necessary right of use. When there is a dispute on the increase of tariffs, the rights user may be in a situation of low liquidity until there is a final decision. Here again, the rights user should be able to make the deposit corresponding to the amount of remuneration paid heretofore or to empower the special arbitration body to suspend or curtail excessive increases.

- **Independent competent authority:** The competent authority referred to in article 37 should be able to act independently and shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to it under national law implementing the Directive. This shall not prevent supervision in accordance with national constitutional law. Only judicial appeal bodies should have the power to suspend or overturn decision taken by the authority referred to in article 37.

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Note to editors: The Copyright Users Platform (CUP) is an informal group of a number of organisations representing copyright users at EU level. It is a forum to exchange information and views, set up in April 2004 following the publication of the Commission Communication on the Management of Copyright and Related Rights in the Internal Market (COM(2004) 261 final). Members of CUP include: ACT, AER, Cable Europe, GSMA Europe, HOTREC and Pearle. This right users' platform advocates a reform of the collective management system at national and EU level and wants to raise policy makers' awareness of the need of copyrights and related rights users in such reform.*

ECTA and ETNO are also signatories of this document.