Common CUP principles on the upcoming Collective Rights Management Directive

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The following document is strictly limited to principles on transparency and governance of collective rights management organisations and dispute resolution mechanisms.

In today's state of play, European collective rights management is essential for enabling that creative content is lawfully circulated, accessed and used. Rights users have dealt with collective rights management organisations for many years, despite recurrent criticisms of their lack of efficiency and transparency and repeated requests for improvements. This situation, coupled with the fast uptake of digital technology that has considerably eased ways to spread and access creative content, calls for an overhaul of collective rights management practices, both for online and offline uses of works. Based on their experience, the undersigned members of this rights users' platform (CUP) welcome the European Commission's initiative to address the issue of collective rights management practices in Europe and deems it to be their duty to make the following suggestions to achieve a long overdue improvement in the collective management of rights.

The following should be seen as basic principles which are suggested to be included in the European Commission proposal for a Collective Rights Management Directive. These principles should apply to all collective rights management bodies, at national, regional or EU level.

Collective rights management organisations[1] being often *de jure* or *de facto* national monopolies, should be prevented from abusing this position and be subject to external control and regulation.

[1] Collective management is the exercise of copyright and related rights by organisations acting in the interests and on behalf of the owners of rights. A collective rights management organisation is therefore any body thus exercising collective management. Please refer to WIPO FAQs: http://www.wipo.int/about-

Experience from regulating other markets has shown that improvements in the functioning of the market could result from creating appropriate accountability. Such an *ex ante* model for collective rights management would open up the market for effective collective rights management.

Improving rights management is a difficult balancing act. CUP Members are strongly committed to ensuring that governance principles and dispute resolution mechanisms allow for efficient systems to the benefit of rights users, while rightholders receive fair reward for their work.

I. Governance of collective rights management organisations

I.1 Efficiency

This includes:

- ***Efficiency of service***

Collective rights management organisations should effectively seek solutions for rightholders and rights users. Collective rights management organisations should also 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. Transparent information about calculations for the payments and in particular on administrative fees would ensure fair remuneration for rightholders and fair prices for rights users.

- ***Guarantee of coverage and avoidance of overlapping mandates***

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. This should take the form of either mandating one of the collective rights management organisations to act on behalf of all, or of concluding a joint licensing agreement, at the request of the rights user.

I.2 Contracting duty

Collective rights management organisations 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[2].

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ip/en/about_collective_mngt.html#P67_8306 . Such a definition should be clearly stated in the European relevant legal framework.

[2] See, for example, German law

I.3 Transparency

This mainly includes two blocks of requirements:

- ***Accountability rules***

Collective rights management organisations should be fully transparent on both the repertoires they represent and the rights they are mandated to manage for those repertoires, so as to avoid that users are faced with double claims for payment from different collective rights management organisations for the same acts of use with respect to the same repertoire. Collective rights management organisations should publish the repertoire, the various rights, the rightholders and the territories they represent in a publicly accessible worldwide database.

Collective rights management organisations must be subject to a clear and strict accounting framework that provides full transparency in their bookkeeping – including their cost structure (the costs should be clearly identified including those for social and cultural funds; cross-subsidy of activities should also be indicated) – and on financial transfers between collective rights management organisations with regard to the redistribution of fees among themselves. Collective rights management organisations – similar to banks – act *de facto* as economic intermediaries managing funds of others and requiring appropriate external reporting[3].

This type of common accounting framework should also allow for benchmarking between collective rights management organisations. Additional obligations in this context could relate to non-discrimination and accounting separation[4].

- ***Necessary ex-ante information between collective rights management organisations and right users in the context of negotiations***

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[5] whereby all different costs are clearly identified and motivated on economic grounds. This offers the possibility to start a fair negotiation process.

I.4 External and independent authorisation and control

This includes a two-step approach:

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[3] In this respect, collective rights management organisations shall also inform their members regularly and frequently and be accountable to them with regard to how they enforce applicable rules

[4] Please see, for example, Art. 11 & 13 of the Directive on access to, and interconnection of, electronic communications networks and associated facilities 2002/19/EC

[5] Please see, for example, Art. 9 of the Directive on access to, and interconnection of, electronic communications networks and associated facilities 2002/19/EC

- ***Independent authorisations***

Collective rights management organisations should be submitted to an independent authorisation regime[6].

- ***Independent control***

Independent control of the good governance of collective rights management organisations must apply, especially regarding the accounts published by collective rights management organisations, the respect of their aims and tasks. This also includes the right to require an audit on the activities of collective rights management organisations (regarding the territorial scope of the mandates rightholders have granted them, the reciprocal agreements they have entered, and the destination of the monies received – including those monies that are not distributable; e.g. when a rightholder cannot be found).

Control and authorisation should be performed by an independent body or bodies, sufficiently resourced and competent.

Any supervising body should be a one-stop addressee for rights users and rightholders in all matters concerning the exercise of activities by collective rights management organisations.

II. Dispute resolution mechanisms

Each EU Member State should be encouraged to set up fair dispute resolution mechanisms in order to avoid excessively lengthy and costly dispute resolution procedures, to solve rights clearance problems without necessarily going to court, while ensuring that all parties involved are equally represented.

In particular:

- ***Applicable law and jurisdiction***

A rule should stipulate that the law and the jurisdiction applicable to the dispute resolution should be that of the disputing rights users' country of establishment, unless both parties agree otherwise.

- ***Special arbitration or specialised body of decision makers*** (e.g. a tribunal or, if deemed appropriate, an ombudsman tasked with the arbitration of the conflict)

A special arbitration or specialised body of decision-makers ensuring that all parties involved are equally represented should handle disputes over licences quickly and efficiently[7].

[6] Authorisation regimes already apply in several Member States such as Germany, Malta or Poland. However, these authorisations should be delivered by independent bodies. Please see, for example, art. 3 & 4 of the Directive on the authorisation of electronic communications networks and services 2002/20/EC

Competence:
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.

Staff and 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 professionals with backgrounds in antitrust law, economics, and intellectual property law.

- ***Possibility of deposit and continued use of licences***

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 society 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.

- ***Failed negotiations***

In cases where negotiations between a rights user and a 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 and 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.

- ***Appeals***

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.

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[7] Examples of equal representation of all parties can be found in Poland or in Switzerland, where there are arbitral commissions composed of an equal number of representatives of rightholders and of representatives of rights users, and an impartial arbitration person delegated to the case

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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: AER, Cable Europe, DIGITALEUROPE, EBU, GSMA, 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 for such reform.*

BEUC, ECTA and ETNO are also signatories of these principles.