

Position Paper
on
Collective Societies of Authors' Rights – Norms and Standards

Introduction

The European Composer and Songwriter Alliance (ECSA) is the voice of composers and songwriters of all music genres at the European level.

ECSA represents associations of composers and songwriters in 28 European countries and speaks for over 13.000 professional composers and songwriters of the three main music genres (popular music, classic and concert music, and film and audio-visual music).

ECSA fully supports the principles of collective rights management and appreciates their overall role as an aggregator of rights. However, technological developments, increasing international activities of composers and songwriters and a fragmented European market are challenging the current models. It is therefore vital to establish a European legal framework and a playing level field under which collective societies operate.

The issue of **governance and transparency standards** of collective societies is of crucial importance to ECSA since its initiation.

Among others, the 2010 Bilbao Declaration called

- “upon the European Union to set minimum standards for the constitution and governance of, and the representation of authors within, Authors' Rights Management Societies, as well as minimum standards to qualify as such”,
and
- “to harmonize and simplify rules relating to the oversight of Authors' Rights Management Societies, including rate-setting tribunals, adopting best practices from member countries to ensure that the rate-setting process is speedy, certain, financially viable and guarantees adequate remuneration”

This paper sets out therefore minimum governance and transparency standards of collective societies, which should be considered in the upcoming EU legislative proposals.

Relationship with members

1. The key principle is that the author, as the creator of the works, has free choice of which society to entrust his or her rights and should be free to move repertoire between societies.
2. ECSA considers that where societies have put up barriers to free movement, such as unreasonable or excessive notice periods, or delays in the reported use of repertoire, these barriers must be removed.
3. In order to decide which society to mandate with their rights, authors should have access to information on how rights are licensed and distributed (money in-money out).
4. Any unreasonable restriction which hinders the movement of authors between CS acts against this principle and ECSA strongly opposed to it.
5. Distribution Rules should be transparent and members should expect to be sent detailed distribution statements by the CS explaining what specific payments are made to the member and from what sources those payments arise.
6. CS should commit to publish service standards (which should be at a granular level according to distribution type) and the adoption of a “Code” which sets out clearly the rights and obligations of the member and the society.
7. As with Licensees, members’ complaints should be dealt with according to a published procedure (which sets out time periods for responses and clear steps to escalate a complaint – culminating in some form of independent adjudication or arbitration)
8. Whereas CS play an important role in providing support for the promotion of new local and minority right holder, CS should retain the right to charge deduction¹;
9. ECSA believes that full information should be provided at annual general assembly’s on how deductions are applied, including
- the specific use / destination of royalties deducted

¹ “Levai Report“, EP 2007

- the costs of administering said funds

10. Proceeding of how such deductions are used should be left entirely to individual societies and their members

11. CS should be managed on a not for profit basis.

12. CS shall be owned and governed by their members – composers / authors / rights holders. It is understood however, that appointed and qualified managers shall be in charge of management and administration.

13. When publishers belong to a society, the rules of the society must ensure that authors sit with a qualified majority on the boards of those societies.

14. ECSA appreciates that threshold levels for becoming full member are often too high and a great majority of members have no voting rights.² It is important however to distinct between professional authors and authors who occasionally compose; voting rules must reflect this distinction

15. ECSA encourages further deliberations on finding new representation systems (for instance elected representatives) of non voting members at annual general assemblies.

16. New technologies can encourage a better information flow and a higher degree of participation. For instance, in countries with long distances and high thresholds CS should set up live streaming of their general assembly's (accessible only for members) and offer interaction possibilities such as through social media

Intra society relationships

17. Inter-society transparency should be fostered and encouraged

18. CS who have representation agreement with other CS abroad, should make available information regarding the administration of the rights of their repertoire.

19. Equal treatment of repertoire must be ensured

20. Annual audit reports must be published and made available to sister societies

² Report on a community framework for collecting societies of authors' rights (EP Committee of Legal Affairs and Internal Market, Rapporteur: Mercedes Echerer)

Relationship with licensees

21. ECSA supports the setting of published tariffs by CS, which provide standard licenses and clear tariff structures

22. CSs have a duty of non-discrimination as between users. This can be met by providing, where practicable, standard licenses and clear tariff structures. However, important differences in the services, business models of licensees (especially online) and EU member states militate against a “one size fits all model”.

23. Non-disclosure agreements severely compromise fairness and transparency and should be avoided

24. Appropriate complaints procedure models (especially for public performance sales) Complaint should be dealt according to a published procedure (which highlight concrete timeframes for responses and transparent dispute settlement procedures)

Conclusion

Whilst ECSA calls for an elaboration of minimum standards regarding governance and transparency, any legislative proposals must cautiously assess CS’s role in a highly competitive environment and consider their needs to adequately react to market developments.

Appendix: the exclusive assignment to CS - a necessity for composers and songwriters

APPENDIX

EXCLUSIVE ASSIGNMENT OF PERFORMING RIGHT *A necessity for Composers and Songwriters* Briefing Paper

1. Introduction

The major music publishers have recently made it clear that they wish to end the exclusive assignment by writers of their performing right to Authors' Societies. This call has been echoed by some major users of music (most notably RTL) in submissions to the European Commission.

This paper tries to set out as logically as possible what the effect would be of the ending of the exclusive assignment. This paper is not intended to be a paean to any particular Authors' Society, but rather to highlight a greater danger that confronts writers of music.

2. What is the Current Situation?

When a writer joins an Authors' Society they assign exclusively to that Society the performing right in all of their compositions (whether already written or written during the period of membership). By virtue of this assignment the Authors' Society becomes the owner of the performing right of its members. (In most European jurisdictions, excluding the UK and Eire, the mechanical right is also assigned, in the UK and Eire it is either retained by the writer or assigned or licensed to a publisher).

3. What are the Advantages of the Exclusive Assignment?

Insofar as the performing right is concerned the status quo of exclusive assignment by the writer to the Authors' Society of their choice has the following advantages:

a) Certainty of Repertoire:

The exclusive assignment gives Authors' Societies certainty of repertoire; they know that they have the performing right for the entire catalogue of their members' works. This also helps users who will know exactly for what they are licensed.

b) Blanket Licences:

The certainty and completeness of repertoire provided by the exclusive assignment facilitates the negotiation and granting of blanket licences to broadcasters and online music operations. It has been stated publically by more than one broadcaster that they are prepared to pay a premium for a complete blanket which makes licensing process far simpler and recently the European Broadcasting Union has made their views on the benefit of the blanket licence clear.³ If the performance right of national and international repertoire was fragmented that premium would be lost.

Were publishers able to take control of the performing right for their entire catalogues the prevalence of split-copyrights (where rights in co-written works are controlled by more than one publisher) would make any replication of the blanket almost impossible. Whilst this may be ameliorated by the adoption the US approach to the licensing of split-copyrights, where the first to licence licences the entire work, this raises the prospect of a race between publishers to licence works and is something from which it can only be imagined that the major publishers would shy away.

c) Transparency:

Whilst it is right to say that Authors' Societies vary in the quality of their services to members and in the quality of their accounting they are, at their best, far more transparent than the almost any music publisher. This is because in most cases they licence at published rates and do not discriminate between users in the licensing process.

d) Equal Treatment of all Repertoire:

When PRS enters into a licensing agreement with a user (whether offline or online) all works are paid at the same rate for similar types of usage regardless of whether they are published by major publishers, independent publishers or are self-published by the writer. The same is true for works which are not part of the domestic repertoire. Authors' Societies do not take shares in ventures as part of the licence fee nor do they take non-attributable advances which go straight to their bottom line.

This equality of treatment means that no works are used as loss leaders or make-weights and that the entire repertoire is given equal access to market, providing users and the public with the greatest possible choice and aids cultural diversity.

e) Protection of Authors' Rights:

In the absence of an exclusive assignment of rights:

³ "Modern Copyright for Digital Media" EBU March 2010

- i) Authors' Societies would not be able to assert with certainty that they controlled the rights at issue (the mere possibility of non-exclusive licensing, even if not exercised by owners, leaves substantial room for users to dispute rights).
- ii) There will be increased difficulty in producing relevant chain of title documents, particularly when such title is complex.
- iii) It would be necessary to prove not only that the relevant society had the relevant rights, but also that no other licence had been granted upon which the infringer could rely. This would leave them effectively having to prove a negative.
- iv) For uses of authors' rights for the purposes of public performance (as opposed to communication to the public), it would be prohibitive to conduct legal proceedings because of the high costs inherent in the problems set out in i-iii above.

f) Promotion of Investment in Database & Administration Systems:

Authors' Societies invest significant sums in building authors' rights administration systems to deal with the registration and licensing of their repertoire and the distribution of the income generated thereby. They are able to make such investment decisions because, they have relatively stable repertoire and because of blanket licences which are negotiated for a number of years at a time they know what their turnover is likely to be. If their rights in the performing right were non-exclusive, and thus their repertoire subject to significant fluctuations, there would be no incentive to invest. If the cost of investment could not, reliably, be amortised across the full repertoire either the investment would not happen or, it would increase the cost of licensing for users and writers and publishers who remained within the collective.

The natural home of any comprehensive database of authors'rights works, which would be available for users to search for information on the ownership of rights are the Authors' Societies. They can fulfil this need without generating the controversy caused by allowing commercial profit-making organisations such as Google to fill the perceived gap. However in order to commit to the considerable investment required they have certainty of repertoire and therefore turnover.

4. What Will Follow if the Exclusive Assignment is Lost?

a) Rights Grab:

In addition to seeking additional rights from writers already signed to them, the major publishers will, inevitably, make the assignment of the performing right a requirement for any new signing, justifying it by reference to any advance paid. It is also inevitable that, if one major publisher requires the performing right the others will follow suit and this will become a standard term in all such publishing agreements.

Once the major publishers have control of the performing right they will be able to withdraw from Authors' Societies (almost invariably the national collection society of the writer) without reference to those writers and place them with another society or even manage them themselves (which will almost certainly happen in the case of online licensing where publishers will be able to unite the two parts of the making available right, the mechanical and the performing right).

The worst outcome for writers would be if the major publishers combined their rights with those of their associated record companies to offer "one-stop-shop licensing (probably from the United States). It is likely in such a scenario that the sums paid to writers would diminish rapidly together with accountability and transparency.

b) Loss of Control by Writers:

Those publishers in favour of removing the exclusive assignment will argue (and are already arguing) that what is good for them must be good for their writers. On a superficial level this argument has its attractions. However it ignores the fact that, unlike Authors' Societies, music publishers are owned by shareholders and are driven by the need to make and to increase profits. This means that decisions will be taken which will drive that profit. An example of this, and one which has been seen in many manifestations with record companies and music publishing companies, is where the publisher takes an advance from a collecting society in return for placing their rights with that society. The advance payment (which may be considerable) will not necessarily be directly attributable to any particular work or group of works and so the publisher may take the view that there will be no need to account to writers for this money which will rather go straight to the bottom line.

There has for some time been concern that writers should be able to move between Authors' Societies so that they may choose the most efficient. In answer to this the vast majority of Authors' Societies in Europe have made the necessary changes to their membership rules to allow this to happen. This has given increased choice to all writers. The abandonment of the exclusive assignment would effectively remove this choice from the writers who will have their performing right administered by the collecting society chosen by their publisher. Whilst it may in theory be possible to control the administration by terms in the publishing agreement in reality, because of

the inequality of bargaining power inherent in the negotiations with publishers for all but the highest profile writers, this will not happen.

Another potential consequence strikes at the very heart of Authors' Societies. If writers are forced to assign their performing right to music publishers they are likely to lose the representation that they have on the boards of such societies – if the writers do not control the destiny of the performing right it is easy to make an argument that they should not be involved in the governance of the societies that licence them. There is a model for this in the UK where, although writers have representation upon the board of the MCPS, they are in a minority and their influence is thus reduced and, in some circumstances, extinguished.

5. Specific Effects on Writers:

a) Loss of Transparency:

One of the arguments that is being used to justify the control of the performing right by the major publishers is that they will be able to place them with the most efficient and transparent societies and avoid the societies which are known to be less than transparent.

At first blush this is a not unattractive argument. We are all aware that there are societies, even within the EU, whose governance, distribution policies and accounting practises are, to say the least, questionable. However removing the exclusive assignment is using an hammer to crack a nut.

Larger more efficient Authors' Societies are able to put pressure upon less efficient and transparent societies to improve, but only if they control their repertoire. In extreme cases they may threaten to licence directly in that territory (which we believe has already happened in certain isolated incidents). By action of this sort Authors' Societies can be improved for everyone. No individual publisher will have the same power, because they do not have the same breadth of repertoire. Nor is it necessarily in the interests of an individual major publisher to improve conditions for those who are, ultimately, competitors.

Were the performing right to be controlled by major music publishers there is a danger that the publisher's imperative to drive their bottom line will lead them to favour the "top twenty" repertoire (those songs that are earning the most money) by using the rest of the catalogue as make-weight and paying the top repertoire at a higher rate.

6. Specific Effects on Authors' Societies:

Whatever the effects of the 2005 Recommendation and the CISAC Case, there is an implicit acknowledgement (seen in the recent Reflection Paper)

that the system of collective management of rights is a beneficial one. For many writers and smaller commercial rightsholders Authors' Societies represent the only practical way of monetising rights.

Were Authors' Societies to lose the exclusive assignment major publishers would be able to cherry pick the uses that they wanted to licence themselves. Logically they would select the most profitable uses leaving the less profitable uses to be administered by Authors' Societies. The result of this will be to increase the administration costs for all of the other members of the Societies as the contribution to overheads will be lost from the "profitable" licensing schemes (which rely on scale of repertoire) and the Societies will be left with the licensing schemes which are relatively more expensive to administer.

There is a further impact (and one that is becoming an increasing problem in the online world) of the major publishers (or vehicles established by them) becoming, in effect, competitors of the Authors Societies. There is no evidence that this increases the licensing pot but rather disadvantages smaller publishers, writers and minority repertoire.

Part of the difficulty that this scenario will present has already been played out in the record industry, where major record companies have traditionally licensed their own repertoire. Although the independent record companies have formed a body (Merlin) to licence their on-line rights the larger on-line services have, until very recently, ignored independent repertoire and it has taken several years for them to licence the independents.

The major effect of the end of exclusivity of assignment of the performing right is likely to be felt by the smaller European Authors' Societies, particularly in Eastern Europe. Whilst concerns have been expressed by some rightsholders over some of them, starving them of repertoire (and thus the opportunity and incentive to invest) is a short-sighted way of dealing with the problem.

7. Specific Effects on Users:

For the last five years at least users have complained that trying to licence music publishing rights for on-line use has become something of a marathon, requiring numerous licences which each have to be separately negotiated. The loss of the exclusive assignment will only make the licensing labyrinth more tortuous.

By allowing the major publishers to control the performing right and thus give them the ability to licence all of the rights in a musical composition is effectively to move from a regulated monopoly to unregulated monopolies. (The modern definition of a monopoly being any undertaking with the power

to influence the market). Granting such power to unregulated commercial ventures is unlikely to be in the interests of the user.

8. Specific Effects on Society:

Any loss of the exclusive assignment will have effects on society as a whole which those advocating the change may not have considered (or may not consider to be their concern).

The first of these, as set out above, is that any change is likely to lead to increasing dominance of the market by the major music publishers. This is likely further to entrench the dominance of the Anglo-American repertoire at the expense of minority and local repertoire (which will be left with Authors' Societies whose cost base is likely to rise). It is further likely that such repertoire will not be able to compete for licensing spend with major repertoire and so will not be made available leading to a diminution of cultural diversity across the EU.

9. Media Music Composers:

The effect of ending the exclusive assignment is likely to be most keenly felt by media composers. The issue of coercion is one which is very much at the forefront of ECSA's thinking. Under the present arrangements however it is only possible for fifty percent of the composer's performing right payments to be coerced: if the exclusive assignment is lost it will be possible for one hundred percent to be assigned to coercive production companies and broadcasters. The effects of this on media composers are really too horrible to contemplate.

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