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*Association de producteurs  
de cinéma et de télévision*



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*European Federation of Joint Management Societies  
of Producers for Private Audiovisual Copying*



## **Joint Audio-visual Coalition Position Paper Proposal for a Collective Rights Management Directive (CRM)**

8 January 2013

### **INTRODUCTION:**

- **The Audio-visual (AV) Coalition - creators, creative contributors, technical crew, producers, distributors and publishers (see the end of this document for the exact list of signatories) - welcomes the Commission's Proposal.** The Coalition has a long experience in this field and is generally supportive of CRM. CRM is a useful tool which can operate to the benefit of rightholders (RHs) and users. Moreover, collective management organisations (CMOs) play an important role protecting and promoting copyright and cultural diversity. As a result, the Coalition welcomes measures to improve the CMOs' standards of governance and transparency. At the same time, the costs of such measures must also be carefully considered during the legislative process. We note that the Proposed Directive also implies certain minimum obligations for users.

- **CRM is not a one size fits all model for rights exploitation. The effective functioning of the AV sector is underpinned by the direct exercise of exclusive rights and recognition of the fact that copyright is more than just a mere right to be paid.** The Proposed CRM Directive recognizes that legal frameworks must remain flexible and distinguish between different types of copyright works and RHs.
- Unlike the music sector, CRM plays a less prominent role in the AV sector where the rights are consolidated in the producer thereby enabling it to “licence the majority of forms of exploitation of the audiovisual work, including on-demand uses, on an individual basis.”<sup>1</sup> Indeed, as recalled by the Cavada Report<sup>2</sup>, recently adopted by the European Parliament, “for the purpose of commercial exploitation, rights are transferred to the audiovisual producer, who relies on the centralisation of exclusive rights granted under copyright law to organise the financing, production and distribution of audiovisual works.” Indeed, this system ensures legal certainty, transparency and efficient licensing in the AV sector.
- **The cornerstone of the Proposed Directive is the important principle of rightholder choice.** No rightholder should be forced into CRM except where the rights in question are subject to mandatory collective administration under relevant international, EU and national law.
- **FREEDOM TO LICENSE: The Proposed Directive on Collective Rights Management should remain focused on the important issues related to the functioning of collecting societies. There should be no interference with the contractual freedom of the AV sector to license films and TV programmes in response to consumer demand in a competitive marketplace be it on a territorial, multi-territorial or pan-EU basis, including online.**

## **SPECIFIC COMMENTS AND PROPOSED AMENDMENTS**

### **Title I: General Provisions**

- There may be need for further clarity with respect to the following:
  - Scope of the principle of non-discrimination. As noted below, there is also concern that certain provisions may not be compatible with Extended Collective Licensing (ECL) and mandatory collective management (see e.g, Articles 5, 16 and 17).
  - Rules on membership and participation in internal decision-making, including ensuring that Article 6(2) does not prevent a CMO whose members are not individual RHs but rather associations of RHs (e.g. other CMOs, trade unions) from rejecting individual requests for membership.
  - Concept of categories of members. Article 3(c) should include a reference to trade unions.
  - General meeting and proxy votes.

<sup>1</sup> [Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market](#), Section 2.1, COM(2011) 427 final

<sup>2</sup> [Report on the online distribution of audiovisual works in the European Union \(2011/2313\(INI\)\)](#)

- **It is our understanding that the Directive (Article 3(c)) also covers umbrella CMOs (i.e., CMOs composed of CMOs). If this is not the case, clarification may be required.** While we support exceptions for smaller CMOs, their scope needs further consideration. The Proposed Directive should clarify that there is no impact on national Extended Collective Licensing (ECL) mechanisms.
- **The definition of “Collecting Society” should be clarified to ensure that “commercial” CMOs or “agents” which act in direct competition with CMOs are subject to the relevant norms in the Proposed Directive.** The definition of CMO should make reference to “a substantial number” of RHs, rather than “more than one”. The Proposed Directive’s governance requirements will not be appropriate for private companies. We propose notably a minor modification to Recital 4 along the following lines:
  - *“These difficulties do not arise in the functioning of independent rights management service providers who act as agents for [RHs] for the management of their rights on a commercial basis and in which [RHs] do not exercise membership rights **provided that they are not acting in direct competition with collecting societies in the fields of collection and distribution of amounts due to rightholders. In such cases, the criteria of ownership and control by member are not relevant.**”*
- **Article 8-9 - There should be a clear distinction between the role of the supervisory body and the person who effectively manage day to day operations.** In this regard, we understand that the “supervisory body” is basically the Board of Directors of the CMO. This provision must operate in a manner that accommodates the various systems in the EU while ensuring that an appropriate form of supervision is in place – certain decisions should lie with the supervisory body. The AV Coalition takes the view that there must be an appropriate balance of potential liability between the managing director and his staff on the one hand and the supervisory body on the other.
- **Article 11 - Deductions – We understand that the degree of detailed required does not extend to the specification of the actual amounts to be deducted as administrative costs *ex ante*, as those amounts or percentages cannot always be determined in advance.** We also suggest changing “rightholders” under Article 11(2) to “members”, as this could ensure that social and cultural services may be used less narrowly. Finally, we believe that the “may” in the second sentence of Article 11(2)(b) should be changed to “shall” in order to ensure that any access to the services mentioned in Article 11(2)(a) is provided on an equitable basis.

- Article 12 - **Distribution of amounts due to RHs** - Article 12(3) sets out measures to identify and locate RHs.<sup>3</sup> **The Proposed Directive should clarify whether lists of non-identified works must be made public and include additional safeguards to deter fraud.** This also goes to the transparency issue. Article 12 may raise difficulties for certain CMOs in the framework of ECLs.

## Chapter 5 - Transparency and reporting

- Article 18 - **Certain agreements emerge from complex negotiations between CMOs and user platforms (e.g., cable companies) and are sometimes kept confidential often at the request of the user platform. As a result, such information may be commercially sensitive.** We understand that Article 18(1) does not extend to such special tariffs. Instead, it establishes an obligation with respect to “*standard licensing contracts and applicable tariffs*” that goes to the provision of general terms and prices. This does not extend to individual agreements and non-disclosure agreements (NDAs).
- Article 18(1)(b) - **In the case of mandatory collective licensing (e.g., in the AV sector for cable retransmission and in many Member States for private copy), where a CMO is the sole entity charged with administration, it should not be subject to the obligation to publish the repertoire of the works managed under the compulsory scheme. The repertoire will by definition be all works in the relevant category of rights/type of content.** We also propose a Recital stating that this provision is without prejudice to national ECLs and mandatory collective management where permitted by law. This Recital would extend where applicable to Articles 16 and 17 as well.
- Article 18(2) - **Information to RHs, other societies and users on request by electronic means without undue delay.** Article 18 also contains a provision related to works that cannot be properly identified which requires that a CMO must upon the request of any RH or any CMO make available any information on works for which one or more RHs have not been identified. **This provision appears to have been formulated with musical works in mind and may need to be amended to take into account the nature of AV works.**

### Title III: Multi-territorial licensing (MTL) by authors' CMOs of online rights in musical works

- The AV Coalition understands the logic behind this specific approach to facilitate the **granting of MTLs by CMOs of authors' rights in music** to online services based on the *European Licensing Passport* (ELP). **The same logic does not apply to AV works. Given the specific nature of the AV sector, the EPL system would be unworkable for the licensing of AV works given the structure of the sector and the limited role CRM plays therein.**

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<sup>3</sup> See also Article 18(2). Recital 15 notes that CMOs must “*undertake diligent and good faith reasonable measures to identify and locate the relevant [RHs]*” and Members should approve rules governing situations where amounts collected cannot be distributed.

- Article 33 - **Derogation for online music rights required for radio and TV programmes** – The AV Coalition does not support this derogation which effectively exempts a category of music authors' CMOs from the Title III. CMOs that do not meet EPL criteria should not be permitted to grant MTLs. **Article 33 should be deleted.**

#### **Title IV - Enforcement measures**

- Article 36 - **Alternative Dispute Resolution (ADR)** – **ADR should also be available for CMOs managing other rights with regard to similar types of disputes.** This should be available at least as an option. Moreover, there is a need for measures to protect RHs against insolvability of users (for example who go bankrupt or become insolvent during a dispute). Funds relating to challenged amounts could for instance be put in escrow or in other accounts that are protected from creditors.

#### **Audiovisual sector coalition / List of signatories**

- **CEPI** - European Coordination of Independent Producers, *Elena Lai, Secretary General* - [cepi@europe-analytica.com](mailto:cepi@europe-analytica.com)
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