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## **GESAC's Preliminary Views on Several Aspects of a Future EC Initiative on Collective Rights Management**

### **Entrustment of Rights to Authors' Societies**

During the Hearing organized by the Commission last April 23rd, some participants supported the idea that authors' societies, and more generally all collecting societies, should no longer be authorized to require from their members the entrustment of their rights on an exclusive basis.

GESAC is totally opposed to such suggestion.

In this context, GESAC considers it necessary to explain how European authors' societies manage their members' rights today (I) and list the negative consequences that would ensue from such measure (II).

#### **I. The situation in Europe: exclusive mandates and flexibility**

##### *1° Exclusive mandates*

Currently, European authors' societies have the possibility of requiring that the entrustment made to them by their members to manage their rights on their behalf be of an exclusive nature. This means that when a rights holder (publisher, author, composer) entrusts the rights to its works to an authors' society, only this society is entitled to grant licences for such work. The rights holder would therefore no longer have the possibility of negotiating in parallel for the same rights. This situation is the rule amongst musical collecting societies in Europe.

##### *2° Flexibility*

This rule does however not mean that authors, composers and publishers be denied the right to manage their rights individually.

In fact, today, in Europe, rights holders enjoy a high degree of flexibility as regards the management of their rights: they can either choose to entrust their rights to authors' societies

or to manage them individually and in the latter case they may limit their entrustment in several ways.

Indeed, in its decisions adopted in 1971 and 1972, the Commission recognized the possibility for rights holders to limit the entrustment of their rights to authors' societies to certain categories of rights or forms of exploitation of the said rights or to certain territories.

The GEMA categories were adapted to online exploitation by the GESAC-ICMP Common Declaration, whereby authors' societies committed, inter alia, to include in their statutes two separate categories dedicated to interactive and non-interactive exploitations.

Moreover, in the hearing held on April 23<sup>rd</sup>, there seemed to be consensus that these categories were sufficient to achieve a reasonable balance between the legitimate request for freedom of entrustment made by the rights holders and the need for providing collecting societies with the possibility of operating in the most efficient way in the collective interest of their membership.

This balance would be totally jeopardized by the compulsory generalization of non-exclusive mandates.

## **II. The effects of the prohibition of exclusive mandates**

The prohibition of exclusive mandates, as it is currently imposed on ASCAP and BMI in the United States, (1°), would weaken the negotiation position of the collecting societies to the detriment of the creators' community (2°), would modify the position of the creators concerning the administration of their works (3°) and would increase the administrative burden of licensing operations (4°).

### **1°) The prohibition of exclusive mandates imposed in the United States on ASCAP and BMI**

According to the US regime, performing rights societies cannot allow for the entrustment only of categories of rights, as it is the case in Europe. A rights holder is therefore only able to become a member of the US societies BMI and ASCAP by entrusting them with his rights for all exploitations. Moreover, the delay to withdraw from American societies is generally longer (notably in BMI, 2 years for writers and 5 years for publishers).

On the other hand, ASCAP and BMI, according to their consent decree, have to operate on a non-exclusive-mandate basis (SESAC, a smaller society, is allowed to request exclusive mandates).

Consequently, it appears that in the United States the balance between the individual interests of the rights holders and the collective administration of authors' rights is achieved in a totally different way than in Europe. The regime of non-exclusivity appears as a means of balancing the fact that rights holders are not allowed to grant their rights to collecting societies only for certain categories, such justification being absent in Europe.

The conclusion is that one cannot take one isolated element of the American legal framework (in this case non-exclusivity) and pretend that it will work seamlessly in Europe, since it

would introduce, not only the problems that American societies and rights holders face in their country, but additional ones, too. Some of these problems are discussed below.

### *2°) The weakening of the bargaining position of collecting societies*

It must first be noted that in Europe authors' societies very often operate, not on the basis of a mandate from their members, but on the basis of an assignment of the ownership of their members' rights. Authors' societies find themselves thus invested with these rights. A non-exclusive regime would contradict such transfer of ownership. Indeed, it is difficult to conceive any such transfer of ownership if it is not exclusive.

Furthermore, a non-exclusive regime would mean that users, when they negotiate licenses with collecting societies, would have the possibility to carry out parallel negotiations with societies' members, obviously in order to get better conditions from them and put pressure on the societies to lower their tariffs. It is not necessary to emphasize the difficulty of the situation in which European societies would be placed in their attempt to negotiate adequate remuneration for rights holders.

Moreover, after having concluded an agreement with an authors' society and notwithstanding such agreement, the user would have the possibility to negotiate agreements with individual rights holders, here again in order to obtain better conditions than those agreed with the authors' society. In this case the work(s) concerned would be withdrawn from the scope of the authorization granted by such society.

In an environment without exclusive mandates, certain operators may pressure individual songwriters with take-it-or-leave-it deals for specific exploitations, in order to get a better deal than what they would normally get from a collective management society. The songwriter would be forced to either accept the deal or see the same deal offered to the next songwriter on the operator's list.

Such situation would thus obviously weaken the negotiation position of the authors' societies, which would not be in an easy position to obtain adequate remuneration, would the users be in a position to get a low remuneration through direct negotiation with individual rights holders.

In addition such situation would lead to different remunerations being agreed depending on the results of the individual negotiations whereas, in a situation with exclusive mandates, operators are not able to play one songwriter against the other for a better deal, since the tariff of the authors' society will be the same for any piece of music.

### *3°) A fundamental modification of the position of creators*

It needs to be emphasized that in an exclusivity regime, the creator who opts for collective administration of his rights relies on his collecting society to administer his rights and to pay him remuneration according to its own statutes and by-laws. Such society is the only one entitled to carry out such operations due to its position of exclusivity. It is important to note in this perspective that the creator participates in the administration (directly or indirectly via elected bodies) of the collective management society he or she has chosen.

In a regime of non-exclusivity, the publishers are allowed, in the framework of the publishing agreements concluded with authors, to license themselves the authors' rights to users, such license then being regulated according to individual negotiations between authors and publishers, in particular concerning the remuneration recognized to authors, which could be, especially if the author is not famous, less favourable than those applicable in the collecting society.

In those conditions, it is perfectly understandable that ECSA so adamantly opposes the ban on exclusive grants of rights.

#### *4°) Increasing the administrative burden of licensing operations*

Non-exclusive regimes also increase the administrative burden and the associated costs.

First of all, the authors' society will need to keep record of which musical works are covered by the licences it has granted and which ones have been directly licensed by the rights holder himself. It will also need to make different distributions taking into consideration each and every specific license granted by individual rights holders. There would be cost implications for adapting databases and systems for processing the distributions.

If the situation is complex in a scenario where the rights holders would report the direct licensing of their works, it would become even more burdensome if rights holders did not inform the society of the license they had issued. The licence granted to the user would still be valid, but the authors' society would simply not know about it. An equally complex situation could appear in cases where the rights holder has reported that a direct licence will be granted, but then negotiations with the user fail, and this failure is not communicated to the authors' society. A similar case can emerge when the commercial user reports direct licensing but the rights holder affected denies the conclusion of the licensing agreement.

Moreover, it is inevitable that overlaps in licensing and payment occur. Apart from the direct implications of duplication, such situation will create an administrative burden derived from the correction (reimbursements or additional claims) of said overlaps.

It needs to be also borne in mind that the American legislation on co-authorship may facilitate parallel licensing. In Europe, however, the authorisation must be granted jointly by all rights holders of a same work. This would create further difficulties, if one rights holder would engage in direct licensing and the other not. A similar situation arises if an adaptation (arrangement) of a work is used and only one of the affected rights holder grants direct license.

The question is to determine who will pay for this increase in administrative costs. Will users bear these costs, the financial benefits from parallel licensing thus being then significantly reduced? Should those rights holders engaging in parallel licensing bear these costs? Or will all rights holders collectively bear these costs which would mean that cost would mainly be borne by those rights holders who do not engage in parallel licensing, thus suffering from a double harm (reduced remuneration and increased management costs)?

Small rights holders, which do not have the means or the appeal to license their works directly, will likely be the ones bearing this double harm. This will surely have an impact on the small repertoires, and therefore on cultural diversity.

### **Conclusion**

For all of the above reasons, GESAC and its members consider that the possibility of requesting exclusive mandates from members of authors' societies is essential for the latter in order to operate in the best possible conditions for the collective interest of rights holders, and to provide users with the certainty they need to conduct their business operations.

American societies report that parallel licensing creates many problems that they have to deal with on a daily basis:

- Reduced remuneration for songwriters;
- Issues with the reporting of a parallel licence;
- Overlaps in licences and payments;
- Increased administrative burden and higher management costs associated to the increased administrative burden and which they are not allowed to charge on rights holders engaging in parallel licensing; and
- Pressure from publishers to songwriters to engage in direct licensing.

Moreover if non-exclusive mandates are advocated by certain commercial broadcasters, which have in the past been traditionally hostile to societies, such position represents a minority view. In fact what most TV broadcasters, public service ones for example, need is blanket licences because they are repertoire-blind and do not wish to be bothered with negotiating with individual rights holders for specific uses of music.

We therefore suggest the Commission not to follow the proposals made by certain commercial broadcasters, which are hostile to collective management societies.

It is thus essential that the Commission does not move away from the line expressed by former Commissioner for the Internal Market and Competition, Mr. Mario Monti, when he said that “[t]he specific characteristics of collective management therefore generally justify a position of exclusivity for management societies vis-à-vis users, so that rightholders and users alike can derive maximum benefit”<sup>1</sup>.

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<sup>1</sup> Answer given by Mr Monti on behalf of the Commission on 12 November 1996 to a Parliamentary Question by Klaus-Heiner Lehne (PPE).