Collective rights management in the digital single market

A Submission to the Intellectual Property Office from the Entertainment Retailers Association

March 2015

About the Entertainment Retailers Association

The Entertainment Retailers Association (ERA) is the trade grouping representing UK digital services and physical retailers in the music, video and games markets.

Formed initially as group of record retailers over 25 years ago, ERA has since grown into a broad-based advocacy group embracing many of the most dynamic and fastest-growing companies in the entertainment industry.

In the digital domain with which this consultation is concerned, ERA represents companies including: 247 entertainment, 7digital, Amazon, Blinkbox, Deezer, eMusic, Google Play, MusicQubed, Napster/Rhapsody, Omnifone, Rara, Rdio, Spotify

ERA members supply the sales data which powers the Official Charts Company (music and video charts) and GfK Chart-Track (videogames). Together with record companies' trade association the BPI, it owns the Official Charts Company.

ERA provides the organisational force behind the UK's Record Store Day, the annual celebration of independent record stores which has become the most successful new music industry promotion of the past two decades.

ERA works closely with its sister organisations in music, video and games and is a strong proponent of open markets, open standards and consumer choice.

ERA's broader perspective on policy matters, in particular licensing, is summarized in the ERA Manifesto, *Shaping The Future Of Entertainment,* which was published in February 2015 and is available to download from

http://eraltd.org/media/259532/era_manifesto_2015_sml.pdf

We would refer you in particular to page 17 which summarises ERA's vision in relation to "Fair and Efficient Music Licensing"

Background

ERA and its members are delighted to respond to the consultation on Collective Rights Management in the digital single market, and in particular the implementation of the Collective Rights Management (CRM) Directive;

The area of most concern to ERA members pertaining to collective rights management is music publishing;

Until internet and mobile technology made possible the creation of digital music services, retailers had little or no reason to deal with collection societies.

In physical product the publishing rights embodied in a sound recording (the so-called mechanical rights) are accounted for by the record company responsible for the release of the recording. The retailer therefore needs to negotiate a business relationship with only one party, the record company;

For digital services life is somewhat more complex. For an identical piece of music, they need to agree terms with at least three parties;

First they must secure a licence to the sound recording, then they must secure licences for two separate rights in the composition, the mechanical right and the performance right;

Previously these two publishing rights could both be licensed from the national collection society, in the UK PRS For Music, but following a 2005 Recommendation from the European Commission, several major and independent music publishers have withdrawn the pan-European mechanical rights for their Anglo-American writers from national collection societies;

Given the prevalence of co-writes, particularly in the singles market, it is routinely the case that the same piece of music could be subject to several music publishing licences, as well as the original sound recording licence;

This complexity is further amplified for digital services wishing to operate pan-European music services where they may have to engage in around 35 separate negotiations for publishing rights alone;

While the complexity of pan-European licensing is outside the scope of this particular consultation, ERA members believe that it provides essential context to the discussion.

On a daily basis ERA members must contend with societies who are unable to define exactly which rights they represent, with incompatible data and reporting standards;

So poor is the understanding of collection societies of which rights they represent that digital services are routinely obliged to report details of all of their transactions to each society with the societies then 'claiming' the rights they believe they represent. Commonly these claims add up to more than 100% of the monies actually owed, resulting in further non-productive work as competing claims are resolved;

ERA's comments below, therefore, are informed by a clear consensus among members that the status quo is bureaucratic, inefficient and more suited to an analogue, rather than digital world.

Summary

- ERA members support the aim of modernising collection societies;
- ERA members believe collection societies must be transparent about the rights they represent;
- ERA members acknowledge that in order to ensure compliance with licensing terms and to facilitate the payment of songwriters, that it is right that they should be obliged to share data with societies, but they believe this data sharing should be restricted to what is actually required to fulfill the licence;
- ERA members believe that it is essential to maintain a balance between streamlining the number of licensing points and ensuring there is competition between collection societies and licensing hubs;
- ERA members believe that national dispute resolution bodies ought to be capable of dealing with disputes and that there is no need to create additional bodies, but that these bodies should endeavour to provide fast, inexpensive and simple dispute resolution options;
- ERA members are keen to ensure that positive elements of The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 are not watered down.

ERA Comments on Specific Questions as regards the proposals for the implementation of the Directive

Questions 1 to 4:

ERA members would prefer Option 2 - Replacing the existing regulatory framework, including the 2014 Regulations, with new Regulations based on the Directive.

However, they feel strongly that existing protections in the UK regulations, spelt out on page six of the consultation document, should be preserved in any new regulations.

Question 12

In principle ERA supports measures which increase competition among CMOs, which streamline the number of licensing points and/or lead to a reduction in the costs of licensing. To the extent that the withdrawal of rights by a rights-holder is motivated by one of these objectives, it may well be justified.

ERA acknowledges, however, that there is an innate tension between these priorities. In an ideal world, a one-shop stop point of licensing for pan-European rights might be helpful. However, licensees should be able to license from more than one place to facilitate competition between licensing hubs. Armonia is currently the only multi-territorial licensing hub in the EU. To enable competition between Armonia and any other future licensing hub, EU collecting societies and Option 3 publishers need to license their mechanical and performance rights to Armonia or other future hubs. There need to be at least two EU licensing hubs that are able to license the same mechanical and performance rights on a Pan-EU basis to ensure viable competition.

ERA members agree definitively that the status quo, which requires around 35 licences for a pan-European service suffers from having too many licensing organizations, with whom licensees need to deal. They would therefore like to see regulators encourage a reduction in this number or a streamlining of licensing processes by creating several strong licensing hubs that can compete with each other.

Question 15

Outdated and inaccurate data held by collection societies continues to be an issue for the entire industry. ERA members propose that collection societies be obliged to update records at regular intervals, e.g., once per month which would enable greater efficiencies in the licensing process.

Questions 27 to 29

ERA members believe that Recital 33 is a crucial part of the Directive. A CMO's information requests must be limited to what is reasonable and necessary and at the user's disposal, recognizing the size of the licensee's business. Overly onerous data requirements by CMOs could otherwise act as a barrier to entry by new digital services and are a drain on efficiency for all businesses.

ERA members fear that current excessive demands for information from services by CMOs are often motivated (i) by a 'fishing expedition' mentality which goes far beyond what is necessary for the fulfillment of the licence and (ii) effectively transfers the costs and responsibility for maintaining accurate data from CMOs to digital services (iii) are not reciprocated by the provision of rights information to licensees by CMOs (iv) are not reconciled with rights information and summarized back

to licensees in a manner allowing licensees to “check the working”

ERA believes that current practice is unduly weighted in favour of the CMO and against the interests of the customer, the digital service.

ERA proposes that current practice should be reversed such that CMOs should be obliged to provide licensees with accurate and up-to-date data on which specific rights they control together with the CMO’s market share. Licensees should then have to provide only information in relation to the rights the CMO controls and the use the licensee has made in relation to those rights. CMOs should confirm total amounts payable by return, with reference to such usage.

In the event a CMO wishes to query or reconcile licensee usage and corresponding payments, CMOs should distinguish between disputed and undisputed amounts. In repect to the disputed amounts CMOs should providev a clear statement of the rights in question, the amounts in error, and the recalculated total which the CMO believes is payable. This should then form the basis for further reconciliation.

Proprietary data formats are to be avoided and CMOs should be encouraged to standardize formats internationally.

CMOs should not be able to bring proceedings regarding content which is not documented in their databases.

Question 35

The effective monopoly power given to CMOs to grant licences has to be balanced with an obligation of transparency to avoid the suspicion and possibility of malpractice.

ERA members can think of no circumstances in which it can be justified for CMOs to obscure or withhold data on precisely which rights they purport to represent.

Question 38

ERA generally supports the principle that licensees should use national organisations for the resolution of disputes. Given the fact that the Directive applies across the European Union, where there is a dispute over rights in multiple territories, licensees should have the choice of which jurisdiction is most appropriate.

ERA members believe there is no need to establish new authorities and that the current UK authority is perfectly competent to retain oversight. However, proceedings before the Copyright Tribunal need to be improved as they are lengthy (e.g., it can take approximately 18 months before proceedings are heard) and their costs can be very high (i.e., often reaching 7-digit £-amounts for one case). In addition, outcomes are uncertain given there are only limited Copyright Tribunal precedents. All this can discourage license-seekers from initiating Copyright Tribunal proceedings even if they have good arguments to challenge a proposed tariff. Existing bodies should therefore be required to operate fast track simple dispute resolution procedures. More importantly, to be efficient, a complaints-handling mechanism need to enable license-seekers to easily obtain a temporary license during the Copyright Tribunal proceedings by making reasonable escrow payments to be determined by an independent body. Currently, service providers that initiate proceedings before the Copyright Tribunal regarding

the “reasonableness” of a tariff proposed by PRS need to initially pay the tariff PRS requested if they want to launch the service without a copyright infringement and need to concurrently apply for interim relief before the Copyright Tribunal.

An improved and efficient complaint-handling-mechanism is a “must” given that PRS stopped applying its published Online Music Licenses (OML) tariff for all but some smaller online music services and applies a case-by-case approach that leads to a situation in which service providers receive offers from PRS that, according to PRS are matched, against deals PRS concluded with comparable service providers, without any transparency for the license-seeker. In other words, PRS uses the non-discrimination obligation against license-seekers to restrict the scope of licensing negotiations without transparency to the license-seeker regarding if there is a comparable benchmark deal and, if so, what its limits are.

Failure to implement an improved and efficient complaint-handling-mechanism risks new businesses failing to launch and / or the costs of dispute resolution making the process futile.

It should be made clear in new U.K. Regulations that the Copyright Tribunal or another responsible U.K. based independent and impartial dispute resolution body has jurisdiction over all multi-territorial licenses granted by publishers or licensing hubs that are based in the UK. Otherwise, publishers/publishing hubs could avoid the review of their proposed tariffs by granting multi-territorial licenses instead of national licenses.

Entertainment Retailers Association
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