IPO CRM Directive Implementation

Response from the Association of Independent Music (AIM)

Part One: Introduction

AIM is a trade body established in 1999 to provide a collective voice for the UK's independent music industry. It is one of a number of independent music trade assocuations which together make up the Worldwide Independent Network ('WIN').

AIM represents over 800 member companies, from the largest and most respected labels in the world, to small start-ups and individual artists releasing their own music for the first time. AIM promotes this exciting and diverse sector globally and provides a range of services to members, enabling member companies to grow, grasp new opportunities and break into new markets.

The UK's independent music sector produces some of the most exciting and popular music in the World, and makes a huge contribution to the country's economy. AIM's 800+ members span every musical genre and every corner of

thing in common: the artists and the music come first.

AIM oversees a sector whose artists have claimed eight of the last eleven Mercury Music Prizes and regularly accounts for 30% of all UK artist album awards (silver, gold, platinum). Artists signed to member labels include: Adele, Amadou and Miriam, Arctic Monkeys, Basement Jaxx, Bjork, Franz Ferdinand, Friendly Fires, Justice, Maximo Park, Radiohead, Roots Manuva, Royksopp, The Prodigy, The Strokes, The White Stripes and thousands of others.

These responses are submitted on behalf of AIM. Where responses have not been provided to specific questions, this is because these questions are not directly relevant to AIM or its members, and/or may be better answered by other parties, including Collective Management Organisations. We are happy to input

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further on this consultation on any points on which the IPO requires additional

Part Two: AIM responses to IPO CRM Directive implementation:

Question 6: If you are a rightholder or a licensee, do you either have your rights managed or obtain your licences from an organisation which you think is an IME? If so, could you please identify the organisation, and explain why it is an IME.

An area of concern for independent sound recording right holders is the lack of control over, and visibility of, their rights when these are managed by third parties acting as 'go between' for the rightholder and the CMO, sometimes without the knowledge and/or consent of the rightholder. Third party management of performance or other collectively managed rights is an area of commercial activity which has grown considerably in recent years. This is in response to awareness of the value of collectively managed rights increasing, and questions being raised over the efficiency of arrangements between CMOs in different countries. This has led rightholders to seek alternative ways to ensure their repertoire is properly represented both locally and overseas, as is appropriate for today's globalised market.

AIM and WIN have been active in increasing awareness of the value and management of these rights to independent rightholders and helping these companies to be more pro-active in managing these rights. This work gave rise to the creation of reciprocal arrangements now in place with CMOs around the world, but it has also revealed an alarming number of disputes and double claims. These issues date back several years and evidence a significant loss of income to the true rightholder, again without their knowledge and/or consent

It is AIM's view that direct membership is generally the most effective way for a company to have visibility and control over their repertoire, rights and revenues. The downside is that it places the administrative burden of dealing with CMOs onto the companies, who are also required to have a skill base with sufficient expertise to manage the task effectively. This places a burden onto CMOs to

have effective processes in place to support and represent this category of right holder member. Nonetheless, rightholders are free to make their own choices as to how to manage these rights, and we are aware of rightholders who have found working with a third party to be beneficial to their business, particularly with regard to collecting revenues from outside the UK.

There are several categories of third party operators who manage performance rights for independent producers. These are aside from the independent companies themselves, as direct members of a CMO (in the UK this would be PPL).

The main categories of third party operators in this space are as follows:

1. Major labels through their wholly owned 'label services' companies, which offer certain administrative and other functions to independent rightholders. These companies may offer services such as digital distribution and/or marketing support to independents, to leverage their parent company resources. These companies often place the repertoire which they manage (and in which they do not own these rights) into the technical management systems of their parent companies. These systems can then lead to independent clients' repertoire being registered across a range of CMOs around the world in the name of the major label parent company or its service company, without the knowledge and/or consent of the rightholder and with no record of the rightholder itself with the various CMOs. This has led to confusion over where rights and repertoire are registered, and difficulties in the rightholders being paid, and being able to revert representation back to themselves at CMOs, in instances where the commercial arrangement has come to an end, or changed in some other material way. The same problem applies across the board where an independent licenses a track to a third party (usually a major) for compilation use.
2. Independent 'label services' companies. A number of these companies have been very successful providers of other services to independent rightholders, such as digital distribution, and have added the new service of managing collective rights onto these previously existing services. There is a body of evidence to suggest that the levels of expertise required to offer this new, specialist service do not match the realities of delivering

the service. Since these services are targeted exclusively at independent rightholders, any deficiencies will be to the exclusive financial detriment of independent rightholders.

3. Agencies offering a service dealing exclusively with the management of collectively administered performance rights for independent record companies[1]. These companies are experts in this area, and offer a useful service to independent rightholders who have actively decided to use the services offered. The key benefits for an independent rightholder to use an agency like this are to reduce administrative overheads, and to use the expertise of a service provider working exclusively in this area.

We raise this in the context of this consultation in the hope that it assists the IPO in understanding the range of options available on a practical level to manage rights which are licensed collectively, but which may be administered on a practical level by any number of third party providers. This area is not without its problems, and this needs to be borne in mind by government in implementing the CRM Directive, such that adequate provision is made to ensure the legislation addresses the whole collective rights picture, not just elements of it, to deliver overall benefit.

Question 12: What will be the impact of allowing rightholders to remove rights or works from the repertoire?

Allowing rightholders to remove rights or works from CMOs will be beneficial to rightholders, to the extent it will allow them to choose which CMO is most suited to their business. Perhaps it is appropriate for a rightholder with offices in several countries to place all their rights in their 'home' CMO, for that CMO to represent the rightholder's entire repertoire internationally through bilateral agreements. This would prevent the rightholder from having to manage multiple CMO memberships, and service identical repertoire delivery and data management to multiple CMOs.

The most significant downside to allowing rightholders to remove rights or works

[1] Many of these companies offer similar services to other rightholders such as individual performers.

from the repertoire is that when this happens, the CMO is not able to offer a broadly 'collective' set of repertoire to licensees. If for example larger rightholders remove their rights from any licensee or set of licensees, they may set up preferable commercial terms than the CMO may be able to offer. If larger rightholders withdraw their rights from collective structures, CMOs will be left with only the smaller and less well recognised repertoires to license. These may be perceived as less commercially valuable than those offered by the larger rightholders, resulting in less revenues flowing from CMO licensed users, but without a significant drop in the amount of work the CMO will have to do to process these licences, thereby proportionately increasing the cost to revenue ratio. The ability for rightholders to remove rights or works from collectively managed structures brings about a real risk of eroding the very efficiencies that collective licensing and management of rights can offer. This could be a significant threat to the essential functions offered by collective licensing, particularly for smaller and less well-known rightholders.

Questions 20 to 15: General comments on undistributed amounts

We have two observations to make on this part of the consultation.

Observation 1:

It is widely acknowledged that in some licensed contexts it is impossible to reach 100% accuracy of payment of revenues to rightholders in every instance of their repertoire being used. This is the nature of dealing with thousands of items of repertoire belonging to thousands of rightholders, being licensed and used by thousands of licensees in a very wide range of contexts (particularly public performance uses).

It is also acknowledged that some users will be unable to provide accurate (or any) usage information, and that some usage information which is available from users may not be accurate or complete enough to assist a CMO in allocating revenues against usage accurately. As noted above, this is particularly the case for public performance, where music repertoire may be used by commercial licensees such as shops, bars, restaurants and hairdressers. The number and

diversity of these groups of users makes it unreasonable to expect detailed usage reports, and therefore makes it very hard for a CMO to track usage accurately. In this context therefore, it is very rare for there to be any instance where an item of repertoire has been used, and has then been identified to a CMO, and then no rightholder can be matched to it.

It therefore falls to the CMO to devise methodologies to allocate revenues as accurately as possible, per type of user, such that rightholders are paid in as accurate and fair a manner as is possible. These methodologies may be calculated on the basis of 100% of revenues received, which are then allocated against proxies to result in a relatively fair distribution to rightholders. It is therefore possible that there will be no undistributed revenues after the proxy or allocation processes have been carried out. However, an absence of 'undistributed' revenues does not mean that the process has resulted in accurate payments. They are only as accurate as the proxy system in place allows them to be. When dealing with 'undistributed revenues' the IPO should therefore also be taking into account the extent to which revenues are distributed inaccurately by CMOs, by virtue of poorly researched, or poorly devised proxy processes. It should be noted that the CMOs with whom AIM works closely have made very good progress in this area in recent years, and this should be highlighted to the IPO. However this is an ongoing process, and transparency as to how payments are calculated should remain a priority in terms of how government seeks to implement the CRM Directive.

The situation for collectively licensed commercial music services is different to that outlined above. These services are capable of providing accurate usage reports, and we support the elements of the Directive which place reporting obligations on users. See our response to question 29 below for more detail specific to this point.

Observation 2:

It is noted that the limitation period set forward in the Directive (after which revenues not allocated to a particular rightholder are to be deemed 'undistributable') is to be three years (Article 13.4). The usual limitation period to bring a claim under English law is six years. We are concerned that implementing

this across all CMOs may be to the detriment of smaller rightholders. We understand that there is a difference between the date at which a CMO deems monies to be undistributable and the date at which a claimant may take legal action for breach of contract. However we are concerned that if monies are paid out by a CMO several years in advance of the usual lawful period during which a claim may become active, this will result in the resolution of disputes over wrongful payments being made through the courts only, rather than remaining within the jurisdiction of the CMOs, where a more efficient and less costly dispute resolution process should be available.

Question 26: Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?

It is for the CMOs to respond to this question, as they will be well placed to offer specific case studies or examples to illustrate the extent to which discrimination occurs from CMO to CMO, with regard to 'foreign' repertoire. It is however essential to point out that in the sound recording producer environment, the major repertoire owners represent themselves locally in almost all CMOs. It is therefore only the independent rightholders who rely on bilateral agreements for representation in countries outside their own. While it may be the case that the major rightholders' repertoire faces discrimination (we have no information on this), it is certainly the case that if discrimination does exist, it will be disproportionately negative in its effects to the huge number of smaller, independent rightholders who rely on the network of representation agreements to access revenues which are rightfully theirs overseas. This is an area in which the independent producer community has been particularly active in recent years, through the work of local independent trade associations such as AIM in the UK, and its sister organisations in other countries, and through the Worldwide Independent Network (WIN), which is a network of 26 independent music associations around the world. We would be very happy to speak to the IPO in more detail about this work, if this would be useful to the consultation process.

Questions 27 to 29: general comments

As noted in the general comments to questions 20 to 25 above, it is

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acknowledged that in some contexts it will be difficult or impossible to obtain sufficient information from users to ensure payments are matched accurately to usage in every instance. This is particularly the case for public performance usage.

In the contexts of music usage by commercial music services, such as broadcasters or digital services, detailed usage reports should be readily available. We understand that in some cases, usage data can be provided by these services - as it is impossible for some services to operate without some form of playout or logging system to serve music repertoire to its users – but that this is not forthcoming from services to the extent required by CMOs. This prevents CMOs from being able to match revenues accurately to rightholders. We support the CMOs in their attempts to work with licensees to encourage them to provide accurate and usable usage data in the required level of detail to enable the creators of the repertoire upon which the licensee business are built, to be paid accurately and fairly.

AIM
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