SAA COMMENTS ON THE COLLECTIVE RIGHTS MANAGEMENT DIRECTIVE PROPOSAL

Society of Audiovisual Authors

EXECUTIVE SUMMARY

This paper only deals with titles I, II, IV and V addressing all collective management organisations (CMOs). SAA will therefore not comment on title III on the online multi-territorial licensing of musical works.

The SAA is positive on European regulation of collective rights management which pursues **governance, accountability and transparency objectives**. This is an opportunity to create a level playing field in Europe and contribute to **enhancing trust and confidence in CMOs**. The SAA is committed to working with the Commission, the European Parliament and the Council to achieve these objectives.

The Commission's proposal as it stands today falls short of reaching these objectives: drafted in the absence of any consultation with audiovisual authors' societies, it is very much inspired by music and does not take into account the **great diversity of CMOs in Europe** serving different rightholders in different sectors and administering models other than voluntary collective management. It also ignores existing monitoring and supervision mechanisms at national level that pursue the same objectives.

The Commission's proposal therefore raises serious concern as to the respect of the **cultural diversity, proportionality and subsidiarity principles**. The above-mentioned concerns add to an overly detailed approach to the internal functioning of CMOs as well as transparency criteria and tools that neither leave room for national level implementation nor for other practices pursuing the same objectives.

The SAA therefore suggests clarifying the objectives of the regulation and proceeding with a thorough examination of the proposed provisions in light of the proportionality and subsidiarity principles. This should lead to more focused provisions, in particular on the organisation and governance of CMOs and on transparency to **give CMOs and Member States more flexibility on the approaches and tools they can use to fulfil the directive's objectives.**

This document makes concrete proposals on the different chapters of the text to achieve this objective of a better balance. It also suggests **enlarging the scope of the text to include obligations on users and to cover all entities engaged in collective rights management activities** in the EU (independently of their country of establishment) and commercial entities that compete with traditional CMOs. This would at least ensure fair competition, proper information and transparency to all rightholders.

INTRODUCTION

THE SOCIETY OF AUDIOVISUAL AUTHORS

The Society of Audiovisual Authors (SAA) is the European grouping of collective rights management organisations who deal with audiovisual authors' rights. It gathers **25 societies** in 18 European countries who together represent more than **120,000 film, TV and web screenwriters and directors**. Established in 2010, the SAA's main objectives are:

➔ To defend and strengthen the economic and moral rights of audio visual authors (screenwriters and directors);

➔ To secure fair remuneration for audiovisual authors for every use of their works;

➔ To develop, promote and facilitate the management of rights by member societies.

To present the situation of audiovisual authors and their collective management organisations (CMOs) in Europe, the SAA published a **White Paper on Audiovisual Authors' Rights and Remuneration in Europe** in 2011 which was the first comprehensive survey ever made on audiovisual authors' rights and remuneration management in Europe. Based on the analysis, reflection and joint efforts of SAA members, this document highlighted existing problems and presented solutions building upon the experience and know-how of its members.

THE COLLECTIVE ADMINISTRATION OF AUDIOVISUAL AUTHORS' RIGHTS IN EUROPE.

Audiovisual authors' repertoire accounts for the second largest collections after music: € 442 million, 9.6% of the royalty collections for authors in Europe in 2010 [1].

Audiovisual authors' societies emerged as a result of the desire of audiovisual authors to group together so their rights and repertoires could be collectively managed. However, there is no single model for CMOs administering screenwriters and directors rights [2]. Here are the main features of SAA's members:

"There is no single model for CMOs administering screenwriters' and directors' rights"

➔ **Umbrella organisations** like Copyswede (SE) and Kopiosto (FI) in Nordic countries have been established by several rightholders' organisations who represent different repertoires; they have developed extended collective licences together;

➔ **Multi-repertoire societies** like SIAE (IT), SGAE (ES), SABAM (BE) and SPA (PT) represent authors from all repertoires (musical, audiovisual, literary and visual arts);

➔ SACD and Scam (FR/BE), DAMA (ES), SSA (CH) and EAAL (EE) represent both **screenwriters and directors**. In the UK and the Netherlands separate organisations exist (Directors UK and VEVAM for directors and ALCS and LIRA for all categories of writers);

➔ Some CMOs group audiovisual authors with **other categories of rightholders**: VG Wort (DE) and Literar-Mechana (AT) represent all categories of writers and book publishers; VDFS (AT) represents directors and actors; Suissimage (CH) and ZAPA (PL) represent audiovisual authors and producers.

These CMOs administer several categories of rights for audiovisual authors, depending on their national legal framework and position in the audiovisual sector.

RIGHTS MANAGED BY SAA MEMBERS IN 2011

Country	SAA member	Cable	Private copying	TV broadcasting	Video Sales	Online on demand uses	Educational uses	Video rental	Other retransmission rights	TV archives	Video lending	Cinema/ public perf.		
Austria	Literar-Mechana	■	■	■			■							
Austria	VDFS	■	■											
Belgium	SABAM	■	■	■	■	■			■	■	■			
Belgium	SACD/SCAM	■	■	■	■	■	■	■	■	■	■			
Czech Republic	DILIA	■	■					■	■					
Estonia	EAAL	■	■	■	■	■								
Finland	Kopiosto	■	■				■				■			
France	SACD	■	■	■	■	■	■			■				
France	SCAM	■	■	■	■	■	■		■	■				
Germany	VG Bild-Kunst	■	■				■	■			■	■		
Germany	VG Wort	■	■					■			■			
Italy	SIAE		■	■	■	■								
The Netherlands	LIRA	■	■			■	■		■	■	■			
The Netherlands	VEVAM	■	■						■		■			
Poland	ZAPA	■	■	■	■			■	■	■		■		
Portugal	SPA	■	■	■					■			■		
Slovakia	LITA	■	■	■	■			■						
Spain	DAMA	■	■	■	■	■		■				■		
Spain	SGAE	■	■	■	■	■		■				■		
Sweden	Copyswede	■	■		■		■							
Switzerland	SSA	■	■	■		■	■	■	■	■				
Switzerland	SUISSIMAGE	■	■	■		■	■	■	■	■				
United Kingdom	ALCS	■					■	■						
United Kingdom	Directors UK	■		■	■	■	■							
	Totals	23	22	15	14	12	12	10	9	8	7	5		
	Percentages	95.83%	91.67%	62.50%	58.33%	50.00%	50.00%	41.67%	37.50%	33.33%	29.17%	20.83%		

✱ more information p. 6

[1] CISAC.
[2] See table page 21

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The cable retransmission right is collectively administered all over Europe in application of the 1993 Cable and Satellite Directive;

Private copying schemes are in place in all SAA countries (not in the UK but British audiovisual authors benefit from the private copying of their works collected in the other countries);

Whether by law or agreement, **broadcasting rights** are collectively managed by a majority of SAA members. These rights generate a very important source of income for audiovisual authors;

Online/on-demand rights cover both the online transmission of broadcasting and new online services. Handling these rights makes it possible for SAA members to adapt their agreements with broadcasters to include the online use of programmes. However, despite the efforts of audiovisual authors' CMOs, agreements with internet players are rare. Money collected for audiovisual authors for this group of rights is currently very low;

The rental right which is subject to an unwaivable right to equitable remuneration according to the 1992 Rental and Lending Rights Directive is administered by less than half of SAA members (the Directive didn't provide for the mandatory collective administration of this right);

Other secondary uses such as public performance rights (broadcasting in hotels, bars, etc.), lending rights, educational uses and archive uses are collectively managed by a number of SAA members;

Theatrical exhibition is only collectively administered in Spain and Poland for audiovisual authors.

There is absolutely **no harmonisation of the collective management of audiovisual authors' rights**. In contrast, in the music sector the vast majority of rights are collectively managed.

Current contractual practices like buy-out contracts (one-off payments for the transfer of rights with no further remuneration based on the exploitation of the work) are imposed on audiovisual authors by producers in many European countries. This prevents these authors from receiving fair economic returns from the exploitation of their works.

"Audiovisual authors have created or joined CMOs to balance their lack of a strong individual bargaining position vis-à-vis producers"

Audiovisual authors have created or joined CMOs to balance their lack of a strong individual bargaining position vis-à-vis producers (reinforced by a presumption of transfer of rights to the producer in many countries) and to ensure fair remuneration for the use of their works. CMOs act as a counter weight to the global oligopoly of vertically integrated transnational entertainment giants. In this way, they offer a scheme of rights management that better respects the specific interests of authors and thus promote cultural diversity.

"The European Parliament has recently called for a ban on buyout contracts"

In order to create an equitable European internal market for the digital dissemination of audiovisual works, the SAA has proposed the introduction of an **unwaivable right to remuneration for the making available of audiovisual authors' works**. Following the European Commission Green paper on the online distribution of audiovisual works, the European Parliament has recently called for a ban on buyout contracts [3], confirming that they contradict the principle of a fair and proportional remuneration. It also called for audiovisual authors to be provided with an unwaivable right to remuneration for all forms of exploitation, including the making available of audiovisual works.

The SAA is convinced that the best means of guaranteeing this right to remuneration is to uniformly entrust it to CMOs. The organised power of a CMO assures its members of a better bargaining position to defend their rights. This is why we support the idea of a European directive that addresses the collective management of authors' rights: it will contribute to enhancing trust and confidence in CMOs and their capacity to **represent, defend and guarantee fair remuneration to audiovisual authors** in an international, digital and fast-changing environment.

[3] European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union (paragraphs 44 to 50).

GENERAL COMMENTS ON THE PROPOSAL FOR A DIRECTIVE

"The SAA welcomes the proposal and supports its objectives"

The SAA welcomes the proposal for a directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (hereafter the proposal for a directive) and supports its objectives of **best governance, transparency and accountability**. Audiovisual authors' CMOs have been created by and for authors and are run by them: creators are their source and their only raison d'être. It is therefore their duty to best serve them.

However, as it stands, the Commission proposal raises a number of **questions and concerns** that have to be clarified or resolved before it can be considered a useful tool for audiovisual authors and their CMOs.

A PROPOSAL VERY MUCH INSPIRED BY MUSIC…

"The impact assessment only studied the music sector"

The proposal for a directive is based on the practice and situation of CMOs in the field of music. The collective administration of voluntarily transferred exclusive rights is taken as the model in an environment in which music CMOs manage all or almost all authors' rights. This situation allows music authors' CMOs to deliver online multi-territorial licenses, which is not possible for many audiovisual authors' CMOs in their current position.

This is the result of an impact assessment that only studied the music sector and ignored all other sectors. The music-only impact assessment logically highlights interconnected operational objectives in the two areas of intervention (functioning of CMOs on one hand and multi-territorial licenses on the other). These interconnected operation objectives are then extrapolated to all non-musical CMOs.

In addition, the proposal for a directive codifies **Commission competition decisions and CJEU case-law generated by music sector cases** and applies them to all CMOs without taking into account their specific legal, economic and market environment as any competition case would do.

…WHICH SEEMS TO IGNORE OTHER MODELS OF COLLECTIVE RIGHTS MANAGEMENT…

Outside the music sector, much of the work of CMOs concerns the administration of **legal licences, rights to remuneration, extended collective licences** and other collective rights management models. These are regulated by law and hence differ from voluntary collective licensing of exclusive rights. Most of these other models originate in pieces of legislation that are **policy decisions in the field of culture, a competence of the Member States**.

The aforementioned models do not require express consent from rightholders that could be documented a priori (as an example, extended collective licences cover rightholders who are not known when the licence is delivered). CMOs that mainly administer these regulated models are therefore not organised in the same way as CMOs that administer voluntary collective licences based on express consent. Measures of collective rights management that have been taken by Member States as an embodiment of their cultural sovereignty must be respected.

… AND EXISTING EXTERNAL MONITORING AND SUPERVISION MECHANISMS

"culture, a competence of the Member States"

A number of European countries have developed authorisation, monitoring and external supervision mechanisms to ensure the proper functioning of CMOs established in their territories. These pieces of legislation **pursue the same objectives as the proposal for a directive** but in a different way that is not addressed by the proposal. Will a level-playing field be achieved if these two sets of regulations are maintained in these countries while CMOs established in other countries "only" apply the directive? Shall supervision authorities monitor the CMOs they have authorised or shall they monitor the CMOs that do business in their country?

ARE CULTURAL DIVERSITY, PROPORTIONALITY AND SUBSIDIARITY PRINCIPLES RESPECTED?

From a cultural diversity perspective, the proposal is disappointing. The Commission considers CMOs merely as service providers and does not distinguish between creators and other rightholders. The above-mentioned concerns add to an overly detailed approach to the internal functioning of CMOs and transparency criteria and tools. This leaves no room either for the implementation at national level or for other practices pursuing the same objectives, raising questions over the respect of cultural diversity, proportionality and subsidiarity principles.

"overly detailed approach to the internal functioning of CMOs and transparency criteria and tools"

The SAA believes that, as it stands, the proposal does not respect these principles but is committed to working with the European Parliament, Commission and the Council **to improve the text in the below mentioned areas, thus achieving a better regulation.**

SPECIFIC COMMENTS

SCOPE

The proposal for a Directive addresses "collecting societies". This is a misleading expression which reduces the tasks of collective management organisations to only one: the collection of income. It ignores three major tasks: the negotiation of licences with users, the distribution of royalties to rightholders and important non-economic functions such as defending and fostering the moral and material interests of their members, notably through cultural and social initiatives. The SAA therefore recommends the adoption of a more meaningful expression for these entities: **"collective management organisations".**

"Collective Management Organisation not Collecting Society"

The proposal does not correctly reflect the nature and mission of CMOs: they weren´t, aren´t and **never will be pure service providers**. It is their very nature to act on a not-for-profit basis as trustees for their members and to provide license solutions on a repertoire scale for users. These features are valuable for rightholders, users of rights and the public alike and must be taken into account in any regulation. Recitals 3 and 4 should therefore be reviewed.

The proposal limits the application of the directive's provisions to traditional CMOs. New entities engaged in rights management activities that most often deal with Anglo-American repertoire and other commercial entities that compete with CMOs in certain markets are not covered. This would create an imbalanced playing field to the detriment of the CMOs' mostly European repertoire.

"defending and fostering the moral and material interests of their members"

The proposal for a directive should take the opportunity to create a true level playing field between CMOs and commercial rights agencies. Every entity that engages in the mass licensing market should be bound by the same rules. Unfortunately, the current situation sees CMOs in many European countries being efficiently regulated by national copyright laws, while commercial rights agencies are free to operate under the general civil law regulations or even from outside the European Union. This situation creates a market distortion in all areas of licensing where CMOs are no longer monopolists.

"create a true level playing field between CMOs and commercial rights agencies"

In order to secure a level playing field the proposal for a directive should force the Member States to tie regulations on licensing (like the obligations to publish tariffs and to obey to the principle of equal treatment) to the fact that a licensing entity has a dominant market position, irrespective of its status as CMO or commercial agency. **Transparency, good governance and accountability requirements should at least be imposed on these commercial entities too**.

Equally regrettable is the fact that the directive takes no action to foster **one-stop-shop licensing solutions**. When the general copyright debate is all about removing obstacles to fast, cheap and efficient licensing solutions the question arises, why we can`t find anything in the draft that addresses this goal? Even the chapter on the multi-territory licensing of music online only aims for a few-stop-shop.

In order to facilitate European wide one-stop-shop licensing solutions we see two simple, but promising approaches the directive could aim for:

"facilitate European wide one-stop-shop licensing solutions"

❶ The proposal for a directive should introduce an official procedure that any group of entities engaged in mass licensing could enter when an interest in combining repertoires is articulated. This legal procedure should prevail over the general competition rules. Otherwise, any attempt to create a one-stop-shop via cooperation between CMOs is prevented from the start by the "CISAC" case ruling that only allows bilateral negotiations.

❷ Another move in the right direction would be the creation of a **European Arbitration Court.** This court would be responsible for dealing with users' complaints against multi-territory tariffs of CMOs. Without such a European solution, Europe-wide tariffs do not stand a chance because such a tariff would be subject to examination by independent national courts. The result of several national court cases that deal with one European tariff will never be congruent and that would be the natural end of a European tariff. Therefore, harmonization of the administration of justice would be needed to facilitate multi-territory licenses and tariffs.

"the directive should apply to all CMOs active in at least one EU Member State"

Finally, the proposal only addresses CMOs established in the Union. Does this mean that the directive would not be binding for **CMOs located outside the EU** even when they operate in the EU, or is it left to Member States to regulate these CMOs? To avoid CMOs or subsidiaries circumventing the obligations provided for in the directive by setting up outside the EU, the directive should apply to all CMOs active in at least one EU Member State.

MEMBERSHIP

Article 5.2 empowers rightholders by giving them the right to authorise the CMO of their choice to manage the **rights, categories of rights or types of works** for the Member States of their choice. It fails, however, to indicate who should define these rights, categories of rights and types of works.

This provision is inspired by the GEMA decisions of the European Commission. These require music societies to give their members the right to assign their rights either in their entirety or by dividing them by category. The decisions have defined categories of rights in relation to musical works. What about categories of rights in other sectors? Does the Directive assume that the GEMA categories should apply in other sectors or is it left to Member States or even to each CMO to decide?

As far as the collective management of audiovisual authors' rights is concerned, it is important to consider the great diversity of societies (as highlighted in the introduction) as well as the different combinations of rights, rightholders and works that they manage and the diverse origins of their mandates (by law or authorised by rightholders). Taking this into account, SAA recommends that no uniform categories of rights apply in this sector and that societies should remain free to combine the rights, rightholders and works they need to fulfil their mission according to their legal, cultural and economic environments and traditions.

"societies should remain free to combine the rights, rightholders and works they need to fulfil their mission"

Article 5.3 provides rightholders with the **right to terminate their authorisation or to withdraw rights from a CMO** upon serving notice within a period not exceeding 6 months, including a possible effect at the half-way point of the financial year. This provision could be problematic, in particular in relation to users whose licences are for 3 to 5 years. Frequent changes in the repertoire represented by the CMO can breach the legal certainty and security that users expect. One year is generally considered the standard[4] as it provides the balance between maintaining low management costs and providing reasonable legal certainty to users. The SAA recommends that, if the 6 month notice period is to be maintained, then it shall only take effect at the end of the financial year.

[4] In the chapter dedicated to collective management in "European Copyright Law, A Commentary" edited by Michel M. Walter and Silke Von Lewinski, Anke Schierholz considers that the accepted standard is one calendar year.

In addition, this paragraph does not set any limit to the entry and withdrawal possibilities of rightholders. This could lead to potential abuses of this right with a risk of destabilizing the CMOs and consequently breaking the legal security granted to users. CMOs should be able to set up rules that would **prevent abuse, such as limiting entrance and withdrawal** to and from a society to no more than 3 times.

Article 5.6 requests that rightholders give **express consent** specifically for each right or category of rights or types of works which they authorise the CMO to manage. This provision does not work for CMOs who mainly administer legal licences, extended collective licences and other **collective rights management models regulated by law**: in these cases, there is no express authorisation by rightholders but an authorisation by law to collect for certain categories of rightholders. This provision needs to be reviewed to take these situations into account.

ORGANISATION AND GOVERNANCE

Good governance and the achievement of best practice should be paramount for any commercial organisation, and no less so for CMOs. SAA is in total support of moves to promote and **ensure good governance practices for CMOs and other organisations handling rights.** SAA members are all currently reviewing their governance structures with these principles in mind. We are therefore strongly supportive of the objectives of the proposal for a directive. The interests of CMOs individually and collectively are best served by the application of good governance across the entire sector.

"There are no costs in a CMO that do not get paid by the members"

As member-driven organisations governed by their members through elected directors of the board it is important to bear in mind that additional governance and compliance costs, whether via a regulatory or self-regulatory approach, will be costs that result in higher management fees for rights. There are no costs in a CMO that do not get paid by the members in one way or another. It is therefore critical to ensure that the obligations in the proposal for a directive are proportionate to achieve its (valid) objectives and do not lead to unnecessary costs or over-regulation.

CMOs always have to balance the flexibility afforded to the member in terms of membership and rights with the ability to issue blanket licences of rights to licensees. The proposal for a directive **must not compromise the ability of the CMO to continue, with its members and board, to decide the appropriate balance for the society**, based on the categories of rights, types of works and the uses it licenses.
The SAA understands and agrees with the objectives behind articles 7

"a CMO is controlled by its members and managed according to the principles and goals defined by them"

(general assembly), 8 (supervisory function) and 9 (managers) which are to ensure that a CMO is controlled by its members and managed according to the principles and goals defined by them. However, it seems that, as they stand and taking into account some uncertainties, these provisions enter into too much detail in some respects. The Commission cannot possibly want, as a result of imposing an overly detailed and complex organisation, authors to receive less money than before.

Article 7.8 provides every member with the right to appoint any other natural or legal person as a **proxy** holder to attend and vote at the general meeting in his name. This provision raises two concerns:

➔ the first one relates to the absence of possible limits to this right. These exist in many CMOs in order to respect the ownership nature of the membership (e.g. no proxy can be given to a non-member), the balance between different categories of members (e.g. no proxy can be given to another category) or to prevent abuse (e.g. no more than a certain number of proxies can be held by the same person);

➔ This provision aims at providing a tool for members to exercise their participation right when they can't participate in the general meeting, but ignores and, in effect, bans other possible tools that pursue the same objective such as postal or electronic voting.

"Guarantee the encouragement of high participation levels at the general assembly"

This provision needs to be reviewed in order to guarantee the encouragement of high participation levels at the general assembly but without imposing any specific tool where other practices efficiently fulfil the same objective.

The **supervisory function** as described in article 8 corresponds to the tasks of the boards of directors of most CMOs. However, the proposal never refers to these boards. As a result, it remains unclear if these boards can perform the supervisory function or if the proposal commands that a separate body be established. The SAA would recommend that, as long as the CMOs' boards fulfil the conditions set out in article 8, they be considered as exercising the supervisory function.

There is a specific problem with the definition and use of "**director**" in the proposal. This is a very generic definition that covers four distinct groups of individuals:

- ➔ Any individual managing director;
- ➔ Any member of the administrative board;
- ➔ Any member of the management;
- ➔ Any member of the supervisory board.

"Balancing good governance and reactivity and speed of decision making"

Because **the definition embraces members of the management team** it raises the possibility that decisions about members of the management that would normally be taken by the board, would become decisions for the wider membership through the general meeting (see Article 7.4). We do not believe this is the appropriate and effective way for such decisions to be taken and we seek further clarification of the intention behind this definition.

In addition, in a world where decisions have to be taken rapidly, giving exclusive jurisdiction to the general meeting on daily management issues could result in delays that would weaken the organisation, by forcing them to wait for the annual meeting to take a decision. Organizing several general meeting in a year is materially and financially impossible.

MANAGEMENT OF RIGHTS REVENUE

The principle of separation of the rights revenue from the assets of the CMO set out in article 10.2 sounds fair and forms part of sound accounting practices. However, drafted in general terms, it raises a question as far as cash flow is concerned: does it prevent the CMO from using rights' revenue to finance its activities before it is able to distribute and deduct its management fees? Does it mean that a CMO has to finance its activity with a bank loan if it doesn't have its own significant assets? Does it mean that separation applies to bank accounts too? To avoid these excessive interpretations, the SAA recommends that this provision be clarified as an **accounting separation principle**.

Article 11.2b aims to ensure that rightholders who have terminated their authorisation or withdrawn their rights from a CMO continue to have **access to the social, cultural or educational services** funded through deductions from rights revenue. It is difficult to understand the justification for such continued access to solidarity funds by rightholders who have decided to breach this solidarity by leaving the society. It has to be clarified which types of social, cultural and educational services are concerned by article 11.2b (pension schemes for example) so that it does not unnecessarily upset the balance of all the services provided.

"Additional objective reasons for non-attainment of high-diligence standards"

Article 12 sets up some distribution rules: it provides for an obligation to regularly and diligently distribute and pay amounts due to all rightsholders represented by the CMO. It has to be mentioned here that CMOs do not directly pay all the rightholders they represent. Some of them are represented through another CMO who in turn pays them. The Nordic model does not fit into this description either as Nordic CMOs often do not pay all the rightholders they represent directly. It has to be clarified that the obligations set out in this article only apply with respect to rightholders directly paid by the CMO.

The Directive sets up a **high diligence standard of 12 months for distribution** to rightholders but assumes that there can be objective reasons why the standard cannot be met (e.g. delay in users' reporting, difficulty in the identification of rights or rightholders, or the matching of information on works with rightholders). However, there are objective reasons missing i.e. disputes with users, court cases and non-attainment of minimum distribution thresholds. These should be added.

Some countries provide for periods shorter than 5 years (e.g. Austrian law, 3 years) and others for longer periods (e.g. French law, 10 years) before rights revenue can be considered **non-distributable** and therefore used for other purposes. The proposal is looking to harmonise this period, but without prejudice to the right of rightholders to claim such amounts. This is a problem for CMOs administering rights revenue on a claim basis: for these societies, it is difficult to take decisions on rights revenue due to unknown rightholders if they retain the right to claim without any limit. If **the periods for distribution and**

claims are not identical, the only solution is to make provisions or reserves for possible claims until the claim period expires. This can lead to significant amounts of money being held in reserve (a frequent criticism of CMOs). All the consequences of such a provision should be carefully analysed. As it stands, it is understood that the proposal does not want to harmonise the claim period but leaves it to civil law or possible lex specialis in Member States.

RELATION WITH USERS

The proposal for a directive addresses CMO´s obligations vis-à-vis their members in detail. In contrast, the equally important relation between CMOs and users is dealt with only marginally in Chapter 4, Article 15. This lack of political will on the side of the Commission is deplorable not least because a well balanced regulation in this part would benefit the rightholders a good deal more than some of the regulations in the other Chapters. The current Chapter 4 should therefore **strike a better balance between CMOs and users' obligations.**

"The quality of users' reporting is essential for CMOs' to carry out accurate and timely distribution"

The quality of users' reporting is essential for CMOs' to carry out accurate and timely distribution to rightholders. Users should therefore comply with high-level industry data transfer standards in this field, including the use of international identifiers.

Article 32 on **licensing terms for online services** (currently in the title dedicated to multi-territorial licensing of online music) would be useful as a general provision for all CMOs.

Too many users try to delay payments by using all possible dispute resolution mechanisms to contest tariffs. There is a need for provisions of **payment in escrow** in order to discourage such delaying processes.

Article 15 refers to the **economic value of the rights in trade** for the determination of tariffs, with no reference to a reasonable remuneration of the rightholders, the global value of the CMO's repertoire or a "high level of protection" which is the aim of all EU directives on copyright.

In principle, holders of exclusive rights can decide for themselves under which (financial) conditions they are prepared to grant permission for the use of their works. When CMO's represent exclusive rights for their members, in most cases, the remuneration is negotiated as a **percentage of the revenue created by the exploitation of the works**, with a fixed minimum. However, in practice the tariffs are set in negotiations with market parties such as (collectives of) major users or trade organisations that often possess considerable negotiating power. Copyrights don't have a "cost price" in the economic sense of the word; the price comes into being as a result of the aforementioned negotiations in order to associate the authors to the revenue of the exploitations. It is not frequent that the CMO's have a determinant economic position in the negotiations.

"when an author has decided to opt for the collective management of one category of rights, this decision must prevail over any presumption of transfer of rights"

The "economic value" of the right is in this respect not a suitable criterion and can only lead to confusion. This provision needs to be reviewed, taking the aforementioned into consideration. It is equally important to consider that when an author has decided to opt for the collective management of one category of rights (by the affiliation contract), this decision must prevail over any presumption of transfer of rights. This is crucial to global legal security for all interested parties and to make sure that the author will get his remuneration through a reasonable and efficient process.

TRANSPARENCY AND REPORTING

As a general remark, it has to be emphasised that the SAA supports the transparency objective of the proposal: as already mentioned, audiovisual authors' **CMOs have been created by and for authors and are run by them**. It is the CMO's duty to best serve them. A great deal of the information described in the proposal is already required to be disclosed under various national statutory and regulatory requirements and is readily made available by CMOs[(5)].

[(5)] See the links to the SAA members' annual reports in annex 2.

The transparency and reporting chapter raises some concerns, mainly due to the **disproportionate degree of details** it requires. In addition, some concepts would have to be translated at national level into operational tools. Taking into account the diversity of CMOs and repertoires, this would not necessarily lead to uniform application,

nor in diminishing the deductions from member royalties. As a consequence, the transparency may result in the reduction of revenues paid to authors and rightholders.

We therefore urge the Commission to **undertake consultation and impact assessment procedures on the costs to CMOs** of the provisions contained in articles 16, 17, 18, 19, 20 to establish how these can be absorbed in the general overheads without increasing the deductions operated on royalties. Without such an assessment we fear that only big CMOs may be able to cope with such obligations and small organisations would disappear leaving 3 or 4 huge oligopolistic CMOs. SAA members would be ready and willing to work with the Commission on this.

"articulation of the objectives pursued and the proposed provisions in light of cultural diversity, proportionality and subsidiarity principles"

An element of proportionality could be achieved through the possible **exemption of small CMOs** from some provisions of the proposal (in articles 8 and 20) but the criteria set out by the proposal are so low that none of SAA's membership fulfil them despite the small size of some of our member societies.

In conclusion, the adoption of such a proposal for a directive needs further examination and discussion on the articulation of the objectives pursued and the proposed provisions in light of cultural diversity, proportionality and subsidiarity principles that any EU regulation should respect.

ANNEXES

1. RIGHTHOLDERS REPRESENTED BY SAA MEMBERS

Country	SAA member	Directors	Screen-writers	Other writers and journalists (educational, theatre, literature)	Performing arts, directors, choreographers	Creative technicians (by law or contract)	Visual Artists and Photographers	Book publishers	Music composers	Music publishers	Audiovisual producers	Performers
AT	Literar-Mechana		■	■				■				
AT	VDFS	■				■						■
BE	SABAM	■	■	■	■		■	■	■	■		
CZ	DILIA	■	■	■		■		■				
EE	EAAL	■										
FI	Kopiosto	■	■	■	■	■	■	■	■	■		■
FR/BE	SACD	■	■		■							
FR/BE	SCAM	■	■	■								
DE	VG Bild-Kunst	■				■	■	■			■	
DE	VG Wort		■	■					■			
IT	SIAE	■	■	■	■		■		■	■		
NL	LIRA		■	■								
NL	VEVAM	■										
PL	ZAPA	■	■			■					■	
PT	SPA	■	■	■	■	■	■		■	■		■
SK	LITA	■	■	■	■		■					
ES	DAMA	■	■									
ES	SGAE	■	■	■	■		■		■	■		
SE	Copyswede	■	■	■	■	■	■					■
CH	SSA	■	■	■	■							
CH	SUISSIMAGE	■	■			■					■	
UK	ALCS		■	■								
UK	Directors UK	■										
	Totals	19	18	14	9	8	8	5	5	5	3	3

Austria

→ LITERAR-MECHANA www.literar.at
www.literar.at/dwn/uu/ver/tae/GB_2011.pdf
2011, de
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www.vdfs.at/files/report_board_of_directors_2010_de-en.pdf
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Belgium

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Czech Republic

→ DILIA www.dilia.cz
www.dilia.cz/ke-stazeni/?p=ostatni
2011, cz

Finland

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http://www.kopiosto.fi/kopiosto/kopiosto/kopiosto_in_brief/en_GB/kopiosto_in_brief/_files/78046494573331045/default/kopiosto_vsk2011_ENG_WWW.pdf
2011, en

France

→ SACD www.sacd.fr
http://www.sacd.fr/uploads/tx_sacdresources/r_annuel2011.pdf
2011, fr
→ SCAM www.scam.fr
http://www.scam.fr/Portals/0/Contenus/documents/rapports_activite/RapportActivite2011.pdf
2011, fr

Germany

→ VG BILD-KUNST www.bildkunst.de
http://www.bildkunst.de/html/pdf/geschaefts-bericht_2011.pdf
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Hungary

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Italy

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Netherlands

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Poland

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2011, pl

Portugal

→ SPA www.spautores.pt
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2011, pt

Romania

→ DACIN-SARA www.dacinsara.ro
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2011, ro

Slovakia

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http://www.lita.sk/files/2011_Vyrocna_sprava.pdf
2011, sk

Spain

→ DAMA www.damautor.es
http://damautor.es/memoria.html
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http://www.sgae.es/acerca-de/informes-y-auditorias/
2011, es

Sweden

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http://www.copyswede.se/wp-content/uploads/2012/08/CS_ARV_2011_eng.pdf
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Switzerland

→ SSA www.ssa.ch
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United Kingdom

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December 2012

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