



CEPIC Statement on Proposed Directive on Collective Management Organisations

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Members of CEPIC who submitted a position paper to their government: BVPA in Germany, BLF in Sweden

Introduction and General Comment on the Directive

CEPIC represents approx. 900 picture agencies and libraries in 20 countries. We have affiliates all over the world. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries, historical archives and museums, video companies. Our membership, which is mostly made up of micro and small to medium businesses, accounts for an estimated 50% of 2,1 billion revenues worldwide Euros in 2012 and more than 150.000 visual authors in direct licensing.

A description of our organisation is provided in the Appendix of this presentation.

Picture agencies often own the copyright on their picture material. More often, picture agencies represent photographers with whom they have a direct relationship. They market the pictures and share the revenues based on this partition of work. The text of the directive will affect picture agencies in their relationship with their photographers and with the local collecting society for visual art who handle the primary rights on visual artists but only the secondary reprographic rights on photography.

There is a symbiotic relationship between picture agencies and collective societies

The relationship between picture agencies and collecting societies is a two way relationship: as rights holders or the representative of rights holders and as users of creative content, CEPIC members both receive payments from private copying levies and pay royalties to collecting societies.

- **Picture agencies may apply for and receive payment on behalf of their photographers** for private copying, cable retransmission, TV broadcasting (the so called "pay back" system in the UK)

In these countries where a pay-back system exists, it is unfortunately not possible to determine in any accurate way how much is paid to picture agencies from collecting societies. Some collecting societies do publish yearly accounts, but they are very general and not segregated in any useful way. Applications to participate in the share of revenue are done on-line by each individual agency on behalf of their photographers. Collecting societies retain a "*management fee*"¹ of up to 20% on the fees they re-distribute. At individual agency level, the amount received is limited with an average maximum of 5.000,- € a year. This small amount will be redistributed to the photographers, either by using the key in the royalty agreement or, more rarely, holding a handling fee of max. 10%².

In Scandinavian countries and under the Extended Licensing scheme, trade associations representing visual rights holders are entitled to keep the funds collected by the local collecting societies of which they are a member and to use them to provide services to their members. In Sweden for instance our member BLF, trade association for freelance photographers and picture agencies, is a founding member of BONUS Presskopia. This case is specific to Nordic countries where trade associations are extremely representative and well organised and cover 90% of the trade they represent.

¹ Ref. Definitions in **Title 1 Art 3 (g)**

² It should be noted that collecting societies do not represent the photographers for whom photo agencies make Payback claims. The photo agency is the authorised representative.



In all other European countries, trade associations were created independently from collecting societies. These trade associations and their members are excluded from the decision making process of collecting societies, even if they participate in the share of revenue collected by the collecting societies.

➤ **Collecting societies for visual arts will also get payments by picture agencies**

- Collecting societies get revenues generated as a result of the **referrals from picture agencies**. When picture agencies license pictures reproducing fine art, they refer their clients to the local visual art collecting society to clear the additional rights required to use the pictures. Users will get the right to reproduce the photo from the picture library and the right to reproduce the artistic work depicted in the photo from the visual collecting society. Referrals work well in continental Europe, less so in the UK or in Eastern Europe.
- Collecting societies will usually charge for the rights of **reproduction and communication to the public of pictures of fine art works published on the (public) Internet website of picture agencies**.
- In some countries like France, Italy, Spain they have also, but only very recently, started wanting to charge for the reproduction in the **closed non-public database** of picture agencies as well.

However, in these two last cases, since the database of collecting societies is author-based not work-based and does not list all the works represented by the collecting society from their repertoire of authors, it is very difficult to accurately determine if the collecting society is entitled to charge for the license they grant on any specific work depicted in a picture ; in many cases they do not hold the representation of the author's exclusive rights but only the compensatory rights managed by them from revenues generated through private copying levies or cable retransmission, TV broadcasting levies.

Legislation on collective management matters to picture agencies

This symbiotic relationship is the reason why Cepic has always paid close attention to legislation on collective management. A series of statements can be found on our website addressing the following issues:

- (1) Lack of transparency (payments, rights categories covered, decision making process)
- (2) Issues with membership (refusal or limitation of membership)
- (3) Lack of appropriate dispute resolution mechanisms
- (4) Scope of licenses: Picture agencies and collecting societies for visual arts may compete for the same rights holders and sometimes for the same rights categories. In principle, there should be no overlap, but in practice it is a bit more complicated, especially in the digital world³. Clearly, any new collective license to be issued by collecting societies will affect the general market and any collective licensing scheme will be at the expense of direct licensing, which remain the best way to remunerate authors, especially in a field where prices are so low.

In general, our members criticize that although they contribute for a large part to the revenues sharing of collecting societies, they are deprived of any participation in the decision making leaving them

³ In the visual art field, a number of solutions to the issues of the 21st century have already been put forward by collecting societies. As we have seen with the Memorandum of Understanding on out-of-commerce books at EU level or with the present propositions of Extended Collective Licensing in the UK, collective societies tend to extend their power to new areas which are ruled by direct licensing. Within the Memorandum of Understanding on out of commerce books (which only binds the parties to the agreement), in September 2011, Collecting Societies already offer to indemnify libraries for images (still under copyright) in out of commerce books. This happens although the Collecting Societies only very partially represent the category of rights and right holders which content is intended to be covered under these agreements. It may a practical solution for publishers and libraries but it is unfair to the small players in our field who were not invited to the table of negotiations.



defenceless against any decision taken by the collecting societies which may affect them directly and adversely.

In several European countries, pay-back systems are under-developed or completely inexistent, which translates in monies either not being redistributed or being *de facto* allotted to other members of the collecting society. As small businesses, our members often have the sense that they are at the mercy of huge monopolistic bodies which unfortunately seem to be headed by administrators with no experience in an industry whose rights they are entitled (by law) to manage.

On the other hand, our members are also aware of the usefulness of collecting societies as tools in the hands of rights holders, if managed in a transparent way and with sound governing principles.

The Directive on collective management is a welcome initiative but the text is not ambitious enough and falls short in solving the issues of the Digital Age

For all the reasons above, our membership welcomes with great expectations a Directive which addresses the *modus operandi* of collecting societies.

However, we are disappointed by a text which is not ambitious enough. On the one hand, it is in some instances very technical and precise⁴, but on the other hand, it misses a great opportunity to solve the above mentioned issues in the sector of visual arts as the proposed Directive is mostly focused on the music industry. In particular, the text of the proposed Directive seems to apply concepts well adapted to the music industry to other sectors without adapting these concepts to the particularities of other sectors. Consequently, the proposal of the Directive lacks the required clarity and precision to adequately solve most of the issues we have raised.

We believe this not to be justified as the licensing on the Internet is not limited to the music and pictures make up for a very large volume of the number of online licensing through the Internet.

We wish a more ambitious text with a clean language adapted to all fields, not just to music. We understand that transactions on music make up 80% of the turnover of collecting societies, but in terms of on-line licensing, the volume of pictures available on the Internet is much more important than music and affects everybody. European authorities should not wait for Facebook or Instagram to set the rules.

Indeed, we must also take into consideration that collecting societies in visual art may possibly be called to play a role in revenue sharing of social media use of visual content, where, to use the wording of the proposal for a Directive, “*negotiations with individual creators would be impractical and entail prohibitive transaction costs.*”

This Directive, which is in the making, has a key role to play here. As small businesses deeply involved from the advent of the Internet with digital licensing, we wish the legislator to make sure that collective societies in all sectors work in a transparent way and do not apply any abusive practices on any stakeholder acting on the market.

⁴ For example when it requests collecting societies to communicate by “*electronic means*” as in **Title II**, chapter **I**, **Art. 6.4**.

To summarize:

- We welcome the provisions laid out in **Titles I, II IV**. The European Commission has clearly identified the issues to be dealt with: transparency in reporting to rights holders, users and the public, effective dispute resolution mechanisms.
- Nonetheless, in our opinion there is significant room for improvement in this proposal as we consider that the lack of clarity and precision in the wording as well as in the rules of implementation and enforcement to be followed by the Member States may result in legal uncertainty which can be detrimental to the achievement of the objectives set out by the text.
- In particular, the definitions of “*repertoire*” – what is protected - needs to be clarified all through the text in order to fit all categories of creation, not only musical creations, and protect efficiently all right holders in all categories: difference between “*work*” or “*types of works*”. Also, the definition of “*collecting societies*” must be clarified in respect to other intermediaries.
- In view of orphan works legislation and the agreements within the Memorandum of Understanding on out of commerce books, but also in view of Extended Collective Licensing initiatives at national member State level such as in the UK, **Art. 12 of Title II chapter 2** must be reworded in order to avoid an obvious conflict of interest and any abuses in the management of funds.
- In terms of volume of images licensed through the Internet, the picture industry is at least as important as the music industry and growing. The provisions of **Title III and Art. 36 and 40 of Title IV** should be extended to all on-line transactions in all sectors.

Specific comments on the draft Directive

I. Scope and Definitions

- The scope of the Directive is laid under **Title I Art. 2**

We welcome a Directive which, in acknowledgement of the role of collecting societies on the licensing market, codifies a number of accepted practices and makes sure that the same standards are applied in the entire European Union. Collecting societies play a central role in the copyright market: they manage rights on behalf of authors. But because they manage revenues which do not belong to them, they also have an increased responsibility.

In general we regret the lack of ambition of the draft Directive which leaves many issues in the visual sector unsolved. Again it should be reminded that pictures are nowadays licensed mainly for on-line uses. Therefore, it makes sense to also apply the higher transparency and efficiency requirements of **Title III** and **Art. 36** and **Art. 40** of **Title IV** to collecting societies in the visual field.⁵

- Definitions are provided in **Art. 3**

(1) The definition of “collecting society” needs to be clarified in respect to other intermediaries whose purpose is also to manage rights.

- Several of our members have pointed out the lack of clarity of the definition of collecting societies and the question was raised whether the provisions of the Directive apply to private entities such as picture agencies. It should be noted that although picture agencies manage rights, they are selective of which author and which content they represent. They carry out a number of additional duties such as preserving, indexing the picture material etc.

It is our understanding that, although picture agencies collect and distribute rights on behalf of rights holders, the draft directive does not apply to them.

Following the definition put forward in **Title I Art. 3 (a)**

- The “*management of copyright*” is only one amongst many purposes of picture agencies and not their “*sole and main purpose*” - they also conserve, index, market and distribute the pictures.
- They are not “*owned or controlled by their members*”, except for the limited case of photographers collectives¹

On the other hand, picture agencies fit under the definition of :

- Recital 4 which refers to “*independent rights management service providers who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights.*” and
- **Title 1 Art. 3 (b)** “*...any ... legal entity other than a collecting society ... who under an agreement for the exploitation of rights is entitled to a share of the rights revenue from any of the rights managed by the collecting society.*”

- The definition of **collecting society** needs to be extended to non European collecting societies which extend their management activities in Europe – such as the CCC (Copy Clearance Center/ USA) for instance. It should be clear that the transparency requirements laid down by the draft Directive is also applicable to them. Deciding otherwise, could be detrimental to the protection of rightholders and could result in the outsourcing and off-shoring of collective management activities to non EU Collective Societies that fall outside the Directive’s scope.

⁵ **NB:** Recital 4) of the Directive recognises that there “*significant*” differences in the “*national rules governing collecting societies, in particular as regards their transparency and accountability*”. Two of our member associations have provided their own answer to the Directive text at their government request.

(2) The Directive should specify whether it applies to “works” or “types of works” with no confusion between the terms and coherently all through the Directive’s text

In **Art. 3 j**, “*repertoire*” is actually defined as “*works*” (individual work). “*Repertoire means the works or other protected subject matter in which a collecting society manages rights*”.

Unfortunately, the definition of **Art. 3 j** is not followed all through the Directive in a coherent way. In particular under **Title II chapter I, Art. 5.2, Art. 5.5, Art. 5.6** where there is a reference to “*types of works*”.

Also **Article 5.2** under **Title 2 chapter 1** it refers to “*types of works*” instead of just “works”.

This lack of consistency poses problems in the visual industry where there is only one “*type of work*”, namely pictures but where rights are granted on selected content. We consider it necessary for the collecting societies to identify each one of the works of the rightholders they represent in the same way picture agencies do.

In this respect, photographers always grant authorization on their exclusive rights for only the pictures (works) they submit to the picture agencies for representation. Picture agencies are required to provide a monthly/ quarterly detailed reporting, listing the different uses, media and licensing fee per picture (per work). Even Microstock agencies who manage a high volume of transactions at a very low fee provide accurate usage reporting to their photographers for each and everyone of the works they represent. In effect, by referring to “*type of works*”, the draft Directive creates the assumption that the collecting societies in the visual sector have the authority on an entire category of works and therefore on the whole visual content of any represented photographer (right holder). When actually, this is exactly what the draft Directive intends to avoid under the provisions of **Article 5**. If collecting societies, unlike picture agencies are excepted from this rule, this may lead to abuses against users who will be charged for just any picture of one single author, simply because his/her name appears in the database of the collecting society⁶!

(3) The draft Directive should take into account existing mandatory licensing models (cable retransmission right, private copying remuneration etc....) which under national laws and EU Directives can only be managed by collective societies. Several provisions should be amended accordingly.

II. Transparency requirements

The modus operandi of collecting societies in terms of transparency is set in Titles II

General Assembly and Supervisory Board

- All issues linked to the management and distribution of funds as specified in **Art. 12 (Title II, chapter 2)** – which is the *raison d’être* of the collecting society – should be left to the General Assembly with no possibility, as provided by the Directive in **Title II chapter 1 Article 7.5** to delegate this decision to the “*body exercising the supervisory function*”. It is essential, for the Directive to avoid possible conflict of interests in such an important matter..
- In such spirit, we welcome the establishment of a “supervisory board” (**Art. 8**) but not at the expense of transferring to this board functions that actually belong to the General Assembly – such as in **Art. 7.4**. Neither do we understand why directors exercising supervisory function would be exempted from such reasonable requirements as managing in a “sound and prudent manner”, excluded from “internal control mechanisms” or “conflict of interest” (Ref. **Art 9.1, 9.2**)

⁶ This supposition is not merely theoretical as existing cases in negotiation may show.



Management of rights revenue

- **Art. 10 in Chapter II** requires that the collecting society be “*diligent*” in the “*collection and management of funds*” without any further definition of diligence. This term should be clearly defined because otherwise this would open the door to interpretation and therefore legal uncertainty⁷.
- **Title II Chapter 2 Art. 10.2 Collection and use of rights revenues** We fully agree with the principle of separation of assets. This is of course, as an accounting rule, an important principle. But our view goes further as in at least three countries, which are France, Spain and the UK, collecting societies are setting up their own picture agency. With less than 20,000 images in all cases, they have a very small stock of images. Considering that ADAGP, VEGAP and DACS in offer pictures of artists for whom they hold the exclusive right, there is nothing to oppose to the constitution of in-house picture libraries. However, it is essential that these picture libraries are run as any other independent profit organization operating in the market and not fed with monies collected from the rights revenue.
- **Title II, chapter 2, Art. 12..**

Paragraph 1 gives the Collecting Societies up to 24 months to distribute and pay all rights revenue collected (with the exception of rights revenues generated through online licensing as per article 25) which we consider excessively long. At least, the Directive should differentiate between compensatory rights and exclusive rights. While the first category relies on information from the users, the second category is quite straightforward with users requested to pay rapidly for the usages.

In any case, it is reasonable to expect that collecting societies who want to run an image library, such as DACS, VEGAP or DACS, follow the normal image library rule of paying their suppliers monthly to quarterly.

Paragraph 3 poses problem in view of orphan works legislation, of the Memorandum of Understanding on out of commerce works and, also, in view of national initiatives such as in the UK to implement Extended Collective Licensing schemes.

“Where the amounts due to the right holder cannot be distributed after five years from the end of the financial year in which the allocation of rights revenue occurred and provided that the collecting society has taken all necessary measures to identify and locate the rights holder, the collecting society shall decide on the use of the amounts concerned in accordance with Art. 7 (5) (b), without prejudice to the right of the right holder to claim such amount from the collecting society.”

This article poses an obvious conflict of interest. The organisation identifying and locating the right holder, the one carrying out a “diligent search” cannot be the one deciding to keep the funds. We think that this will reduce the incentive of Collecting Societies to find the copyright holders.

⁷ It might be useful to know that the collecting societies who are members of the British Copyright Council have agreed on a new Code of Conduct which now appears almost without exception on their sites.

Transparency Reporting

- **Title II Chapter 5 Article 16 , Article 18** - While it is absolutely correct to request a timely information to rights holders and users on amount collected and paid, management fees charged and other deductions made, there should also be a requirement:
 - To present the data in a clear and comprehensible way.
In the existing reporting provided by collecting societies, amounts are segregated in unmeaning totals or separated in the reporting so that users or rights holders will need a lot of time to cross check rights holders and amounts received, when possible at all.
 - A collecting society should not make excessive and unprofessional demands upon image libraries and others who are eligible for royalties under the Payback scheme concerning the way in which they are required to submit their annual information.

III. A more ambitious Directive

Limitation of transparency requirements

- **Article 8.3. (Title II chapter 1)** and Art. 20.5. (Title II chapter 5) limit the application of the directive's requirements to the size of the collecting society. We request the deletion of **Art. 8.3.**, **Art. 20.5** which, in effect, are discriminatory against a certain category of rights holders. In the visual art *photography* field, amounts collected and distributed are not as high as in the music sector. It is not justified to request smaller collecting societies not to fit the minimum requirements of the Directive.

Extension of music licensing requirements to the visual field

In general, we do not understand why standards set for on-line music licensing cannot apply to all on-line licensing. In the visual sector, an important volume of images is traded on-line, from the images licensed to all kind of websites to images published on the Internet version of dailies and magazines. This part of the market is growing. We are therefore asking that the provisions of **Title III and Art. 36 and 40 of Title IV** be extended to all on-line transactions in all sectors.

More particularly, we would like to make the following points:

- **Recital 23** acknowledges that "*commercial users need a Licensing policy that corresponds to the ubiquity of the online environment*", but limits the scope of these rules to the music sector.
- Under **Title III**, the Directive calls for the establishment of "*competent authorities*" called to review the "*compliance*" of collecting societies with the requirements set under this title. **Title III**, however, is limited to online music licensing. It is not comprehensible why the competence of these authorities should be limited to on-line music licensing and not extend to the management of third-party funds, in particular orphan works.
- In general, it is not comprehensible why the requirements put forward in **Art. 22, Art. 23, Art. 24, Art. 25 and Art. 26** are only limited to the online licensing of musical works and are not applicable to all on-line licensing and collecting societies which grant licenses for online rights.

- THE END -



About Cepic

CEPIC is a European non for profit trade association in the field of image rights. CEPIC was founded in 1993 to present a unified voice to advise and lobby on new legislation emerging from Brussels. Registered as an EEIG (Economic European Interest Group) in Paris in 1999. As the Centre of the Picture Industry, CEPIC brings together a thousand of picture agencies and photo libraries in 20 countries across Europe, both within and outside the European Union. It has affiliates in North America and Asia. The annual CEPIC Congress as the largest global gathering of the international photo community extends CEPIC's network on all five continents. CEPIC's membership includes large and smaller stock photo libraries, major photo news agencies, art galleries, historical archives and museums, video companies, for estimated revenues around 2,1 billion Euros. It has among its membership the larger global players such as Getty, Corbis or Reuters. Through its membership, CEPIC represents more than 150.000 authors in direct licensing.

Our members are expert in the conservation and marketing of imagery: they produce, collect and distribute content – moving and still images: footage and photographs for the major part, but also illustrations, cartoons, graphics, maps and 3D images. They have been digitising content from the advent of the Internet, making the resulting digital asset available for commercial use, such as to newspapers, magazines and broadcasters, off and on-line, as well as in non- commercial environments for the purposes of research and education. Picture agencies and photo libraries also act as commercial rights management service providers on behalf of creators.

CEPIC achieved observer status at WIPO (World Intellectual Property Organisation) in 1997. CEPIC has been a member of IPTC since 2005, of ICOMP since 2009 and joined the Linked Content Coalition early 2012. It is part of the ARROW project and, together with partner, EVA for collecting societies for visual arts, released a feasibility study on the inclusion of visual material in the ARROW system. In 2013 and 2014, it will be part of the EU funded project, RDI (Rights Data Integration) proposed by the Linked Content Coalition.

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