

COU13-1059

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Mr David Gilo
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Israel Antitrust Authority
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Israel

By post and email: gilod@aa.gov.il ; lishka@aa.gov.il

Dear Sir,

Re: TALI's status and operations

CISAC, the International Confederation of Societies of Authors and Composers, is a non-profit nongovernmental organization, composed of 227 authors' collective management societies from more than 120 countries. Through its membership, CISAC represents some 3 million authors, composers, screenwriters, directors, sculptors, painters, designers, photographers, choreographers and publishers. These creators are drawn from a wide variety of artistic fields, including music, drama, and literature, artistic and audiovisual. One of CISAC's member organisations is TALI, the Israeli society of screenwriters and directors.

We are writing to express our grave concerns with respect to the Israeli Antitrust Authority's ("the Authority") claims against TALI. It was recently brought to our attention that, according to the Authority's contentions, a collecting society should not exist for audiovisual rights in Israel. We were also informed of the Authority's allegations that collective management in the audiovisual sector is anti-competitive and could have negative effect on the market. These arguments are out of step with international approaches and the experience that CISAC and its members have had in many countries around the world. Indeed, we are unaware of any other country where the existence of a collective management organization in the audiovisual sector was called into question by the local antitrust authority.

We are aware that the Authority is in the process of establishing its position on the matter, in the context of pending legal proceedings before the Israeli Antitrust Court. To assist with the development of your position, and in order to emphasize the importance of TALI's operations to audiovisual creators, we would like to share from our experience and make the following observations.

First, it has long been established that without a representative society, creators' voice in general, and audiovisual creators rights in particular, are silenced and their legal interests undermined. It is a common practice in countries in all parts of the world that the rights of audiovisual creators are collectively managed by a representative society. This practice not only benefits the creators themselves, but also users and society as a whole.

Second, collective management provides a useful solution where economic and commercial realities pose an obstacle to the effective enjoyment and remuneration of creative works, realities which can and do arise in the context of audiovisual rights. Authors' societies ensure that the rights granted to audiovisual creators under domestic copyright legislation are effectively managed and protected, and they assist commercial users in obtaining the licenses they require in order to use these rights quickly and efficiently. Competition law in Europe and elsewhere regard audiovisual collecting societies as useful mechanisms, which support a competitive and diverse market for the licensing of audiovisual rights. Indeed, in a long list of court decisions and rulings, the indispensable role of collective management organizations in the functioning of the licensing market has been recognised. In Europe, the law embodies the decided position that collecting societies are necessary and beneficial for the market and for society. As an example, the newly-proposed Directive on Collective Rights Management reflects the view of the European Union on the benefits of collecting societies: "*Collecting societies enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets. Moreover, they have an important social and cultural role as promoters of the diversity of cultural expressions by enabling the smallest and less popular repertoires access to the market.*"¹ In some cases, EU law has even favoured restrictions on the behaviour of individual rightholders that may undermine collective management.²

Third, competition laws and rulings in Europe and elsewhere have never challenged the existence or utility of collecting societies, but have instead addressed particular practices by them.³ Thus, the European Court of Justice held in 1989 that copyright management societies "*pursue a legitimate aim*" and that "[t]he contracts concluded with users for that purpose cannot be regarded as restrictive of competition . . . unless the contested practice exceeds the limits of what is necessary for the attainment of that aim".⁴ Even decisions ultimately prohibiting certain activities of collecting societies have proceeded from the axiom that collecting societies themselves must be maintained as an available means for the management of copyright.⁵ The same is true with respect to audiovisual societies.

¹ 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, COM (2012) 372 final, recital 2. See also the related Impact Assessment, SWD (2012) 205 final, p. 10 ("Collecting societies play a valuable role in facilitating licensing of copyright and related rights and lowering transaction costs. Notably, they allow commercial users to clear rights for a large number of works, in circumstances where individual negotiations with individual creators would be impractical and entail prohibitive transaction costs. They allow rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets." (internal citations omitted)). The United States Supreme Court has come to similar conclusions with respect to the importance of collective licensing. See *BMI v. CBS*, 441 U.S. 1, 20–23 (1979) (describing the economic necessities behind collective organisation and commercialisation of licenses).

² See, e.g., Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993 L248/15, art. 9 (providing that cable retransmission rights may be managed only through collecting societies); *GEMA statutes* ('*GEMA III*'), OJ 1982 L94/12, recitals 44–53 (holding that contract terms forbidding rightholders from paying users a share of the rightholders' royalties in exchange for preferential treatment are "indispensable to effective administration of copyright" because such payments defeat the purpose of collective management).

³ See, e.g., Opinion of Advocate General Mayras in Case 127/73, *Belgische Radio en Televisie v. SABAM and NV Fonior* ('*Mayras Opinion*'), [1974] ECR 320, 325 ("However, the matter at issue is not the principle of membership of a copyright association, but [two specific clauses in this association's standard assignment contracts].").

⁴ *Ministère Public v Tournier*, [1989] ECR 2521, para. 31; see also *BMI v. CBS*, 441 U.S. at 24–25.

⁵ See, e.g., *CISAC*, OJ 2008 C323/12 (summary only), recital 42 (noting that "individual management is in many instances not feasible") (full decision available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf); on appeal: *CISAC v. Commission*, not yet published (annulling in part the Commission's finding of anti-competitive concertation).

Finally, I would like to bring to your attention that, upon becoming aware of the arguments raised by the Authority against TALI, CISAC conducted a study among its worldwide audiovisual societies, to establish whether any other society had to confront similar allegations that challenge their mere existence. Our research, which covered over 30 countries, has revealed that not a single society was confronted with similar arguments. Specifically, fourteen of our member audiovisual societies operate in the EEA, and we know of no case in which any of these societies' existence or importance in the licensing market has been challenged.

We do hope that the above information will assist you and the Authority in developing its position and in reaching the conclusion that TALI's existence is not only essential to the continued development and flourishing of the Israeli audiovisual sector, but also crucial to the livelihood of local screenwriters and directors.

We stand ready to provide any additional information that you may require, and contribute from our experience and expertise in the area of collective management in general and authors' societies in the audiovisual sector in particular.

Yours sincerely,



Olivier Hinnewinkel
Director General

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