

**ZEGGAR Hicham (MARKT)**

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**From:** Olivia Regnier <Olivia.Regnier@ifpi.org>  
**Sent:** 21 November 2011 11:09  
**To:** MARTIN-PRAT Maria (MARKT); MCKENNEY Tobias (MARKT)  
**Cc:** GERBA Agata (MARKT); Lauri Rechardt; Olivia Regnier  
**Subject:** follow-up to our meeting  
**Attachments:** IFPI Model DR mechanism - feb 2006.doc

Dear Maria, dear Tobias,

Thank you again for our meeting last week. As promised, I enclose our "Model dispute resolution mechanism". We drafted it in 2006 but it is still valid – more than ever!

We are finalising the table and will send it to you in the coming days.

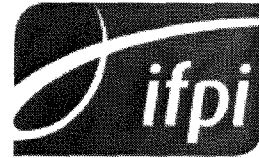
In the meantime, do not hesitate to come back to us if you have any comments or questions.

Kind regards,

Olivia

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## **Model for Dispute Resolution Mechanism**

20 February, 2006

*private and confidential*

### **Introduction**

The Commission's Recommendation on cross-border management for legitimate online music services urges Member States to set up effective mechanisms to resolve disputes between collecting societies and users, in particular in relation to tariffs and licensing conditions.

The lack of such mechanisms is one of the issues holding back the roll out of European music services. In the area of on-line music delivery the service providers, the recording industry and the collecting societies administering the rights in musical works have been negotiating about fair terms and conditions for almost five years without success. In countries where dispute resolution mechanisms exist the parties have been able to bring the disputes concerning the conditions for authors' societies on-line licenses to the Tribunals – unfortunately such tribunals only exist in the UK and Germany, and have been very recently introduced in Austria.

There is an imminent need to introduce such dispute resolution bodies in every Member State. To ensure that such national bodies have the required expertise and that their decisions follow the same fair principles through out the internal market these bodies should consist of dedicated judges that have special knowledge of IP matters, and the decisions should be made following the criteria of "fair value in trade" endorsed by the ECJ.

National tribunals should be introduced on the following model:

#### **1) Standing and Composition**

1. Collective licensing bodies and associations representing a substantial number of users may refer their disputes to the Tribunal. The Parties may file a reference to the Tribunal if the parties have tried but so far failed to reach a negotiated settlement.

2. The Tribunal shall consist of [three (3)] members appointed by /.../ among the [XXXXXX] judges.

***Example:***

“The tribunal shall consist of the chairperson or the deputy chairperson, and two other members. The members of the tribunal have to be qualified to hold the position of a judge.” *[German Copyright Management Law, S. 14 par. 2; similar in the UK CDPA, S. 145]*

**2) Scope**

1. The Tribunal has the authority to settle disputes regarding the level of the license fees and/or other remuneration charged by the collective licensing bodies and regarding other essential terms of the license to use copyright and/or related rights within their mandate in

- (i) existing license schemes or tariffs; and/or
- (ii) proposed new license schemes or tariffs.

***Example:***

“The tribunal can be called on by any party in a dispute involving a collecting society if it concerns

- a) the exploitation of works or subjects of neighbouring rights protected under the Copyright Act.
- b) the conclusion or amendment of a framework agreement.” *[German Copyright Management Law, S. 14 par. 1]*

2. The Tribunal has the authority to determine, upon application by either party, the rates for the period the issue has been under dispute, as well as for the future.

3. The decision of the Tribunal is final, [but it can be appealed on points of law, as well as on procedural grounds in the [Appeals Court of X] in case it is apparent that misapplication of law or procedural mistakes have materially affected the decision]. The resulting decision of the [Appeals Court] is final.

***Example:***

“ An appeal lies on any point of law arising from a decision of the Copyright Tribunal to the High Court, or [...]. *[UK CDPA S. 152 par. 1.]*”

**3) Applicable criteria for setting the rates**

The Tribunal shall determine the level of the license fee and/or other remuneration so as to reflect the value in trade of the rights in question.

Value in trade should be understood as being the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Tribunal shall base its decision, in particular, on relevant information on the usage, economic circumstances, and the market place presented by the parties. In establishing such rates and terms, the Tribunal may consider the rates and terms for comparable types of services and comparable circumstances under voluntary license agreements.

***Example:***

“Whether the remuneration which represents the consideration for the use of a commercial phonogram is equitable is to be assessed, in particular, in the light of the value of that use in trade.” *[ECJ Decision SENA v. NOS, C-245/00 of 6 February 2003]*

**4) Effect on pending negotiations**

As from the date of filing or when either party has filed a reference to the Tribunal the users represented by the association party to the proceeding:

- (i) Are deemed to have a license to be engaged in the activity covered by the existing or proposed licensing scheme subject to the proceeding;
- (ii) Shall pay to the licensing body an interim license fee or remuneration on the basis of what was last proposed by the users during the negotiations, or alternatively, upon application by the licensing body, an interim fee determined by the Tribunal. The interim fee shall be without prejudice to the Tribunal proceedings and the claims made by either party in the proceedings;
- (iii) Shall pay the difference between the interim fee or remuneration and the licensing body's existing or proposed reasonable license fee or remuneration into an escrow account.

***Example:***

“Where the parties do not come to an agreement about the tariffs applying to the exploitation in question, the rights are deemed to be granted if the user pays the remuneration at the level accepted by him or her to the collecting society, and the payment claimed by the collecting society exceeding the accepted amount is paid into escrow.” *[German Copyright Management Law, S. 11, par. 2]*

“In cases where the collecting society has refused to grant a license only because no agreement could be reached with regard to the determination of the license fee, the license is presumed granted if the user pays to the collecting society the amount calculated on the basis of the portion of the fee that both parties agree to, and if the user pays the amount requested by the collecting society and exceeding the agreed portion into escrow.

The court can on application of the user determine a lower amount to be paid into escrow. ” [*Austrian Copyright Act, S. 17 par. 3 and 4*].

#### 5) Final provisions

Unless otherwise agreed by the parties the Copyright Tribunal should deliver its decision within twelve (12) months from the date of the filing.

*Example:*

“The tribunal has to issue its proposal within three months from the day of the appointment of the chairperson. The parties can agree an extension of the deadline.” [*Austrian Copyright Act, S. 37 par. 1*]

#### 6) Other issues

Once a reference has been filed, third parties must be able to join the process or to submit information.

Normal civil procedural rules should apply to the proceedings and decision on costs.