

# **Memorandum of Understanding**

## **FOR THE FAIR DEVELOPMENT OF ONLINE MUSIC**

### **INTRODUCTION**

In the last 15 years, the recorded music sector has seen an unprecedented decline in its revenue, which has affected all participants to varying degrees.

Rapid growth in new ways of listening to music is leading to hopes that the market will stabilise or recover. That growth is being accompanied by a major change in the business model, which is shifting from a per-item purchasing model to an access- and service-based model.

Digital transition means that the use of and payment for music now involve complex routes, which are often regarded as insufficiently transparent. This is creating mistrust between participants. Awareness of the phenomenon is growing worldwide, as shown by the stances taken by artists, academic studies and official reports.

Against this background, music industry stakeholders came together within the mediation project organised by French Minister of Culture and Communication Fleur Pellerin, who appointed Marc Schwartz, Senior Counsellor at the French Court of Audit, as Mediator.

The public authorities and all stakeholders, wanting to act in the best interests of the music industry and aware of the collective desire to see a global recovery in the sector, are calling for balanced development that is mutually beneficial and ensures a fair distribution of value created between all participants, including new digital participants.

The signatories to this memorandum of understanding (hereinafter the "Memorandum"), having met in Paris on October 2, 2015, reassert their shared ambition to ensure:

- the development and vitality of the music industry;
- the preservation of cultural diversity and growth in innovation;
- the creation of greater transparency in interactions between participants;
- a fair distribution of value created by musical recordings.

For that purpose, they adopt the seven objectives that make up this memorandum of understanding (hereinafter the "Objectives") and undertake to implement them according to the agreed timetable.

### **OBJECTIVE 1: SUPPORT THE DEVELOPMENT OF LEGAL MUSIC OFFERINGS**

The music industry has seen a considerable decline in volume due to the development of new offerings, some of which have been illegal. In 15 years, the global music market has contracted by over 50% in value terms, the average price of an album has fallen by over 35% and the average price of a track by over 80%.

Accordingly, the public authorities and stakeholders are aware that supporting the development of legal, fairly remunerated offers is a key requirement in ensuring the recovery of the industry as a

whole. France, which has always sought to protect rights-holders in all creative fields, has particular responsibilities in this area.

This is why the public authorities are undertaking to continue their efforts to promote the protection of authors' rights and ancillary copyrights, at the national, European and international levels:

1.1.- By pro-actively implementing the government's strategy to implement the protection of authors' rights and ancillary copyrights, which has already resulted in the code of practice for participants in the online advertising market and the creation of the monitoring committee for payment solutions providers.

1.2.- By ensuring that the European Commission's plans to modernise authors' rights and ancillary copyrights fully recognise the issue of sharing value with new digital actors. In particular, they will seek to make proposals to clarify the status of online service providers that actively provide content to users, whose role must be recognised by being included in the scope of application of authors' rights and ancillary copyrights.

1.3.- By working with participants in cultural industries and with all stakeholders to improve the European response to infringements of intellectual property rights.

1.4 - To contribute to the consultation of the European Commission on the economic role of online platform and to the debates regarding the European strategy for Digital Single Market and to the building of a European framework that is favorable to the development of legal online music offers.

## **OBJECTIVE 2: MAKE THE MUSIC INDUSTRY'S ECONOMICS MORE TRANSPARENT**

The music industry's economics insufficient transparency can be seen in the way in which value is distributed between the various stakeholders. The increasing complexity of operating methods, globalisation and changes to the business model, which mean that revenues are received over a longer period, make it hard to gain an overview of the value chain.

As a result, it is difficult for artists to understand how they are being remunerated in return for assigning their exclusive rights, and questions are being raised about the fairness of that remuneration.

2.1.- The public authorities and stakeholders have decided to create a Music Economics Monitoring Unit (*Observatoire de l'économie de la musique*), which will be managed in a neutral manner and will have the following brief:

- preparing and publishing the industry's main economic data by collating and ensuring the consistency of information, which is currently sparse and incomplete;
- creating an environment where economic developments in the industry can be analysed jointly and where regular discussions can take place about its development issues;
- measuring and monitoring revenue flows, disparities in remuneration and the distribution of value between all participants: online service providers, rights-holders, new participants and online stores;
- monitoring the exposure given to original French artistic works across all media, and particular by online music service providers;

- organising, with the agreement of online music service providers, studies about their remuneration models: comparison between distribution models<sup>1</sup>, the respective volumes and values of back catalogues and new music etc.

The public authorities, working with stakeholders, will decide within six months of signing this Memorandum the arrangements for creating the Music Economics Monitoring Unit, which will bring together existing resources.

2.2.- Stakeholders undertake to work together as part of the future Music Economics Monitoring Unit, providing it with the information and data it needs to fulfil its mission. In its first meeting, the Unit will adopt rules of procedure including its operating methods, in accordance with the obligations of stakeholders.

2.3.- The stakeholders concerned hereby undertake to contribute actively to the study initiated by France's Department for Media and Cultural Industries (DGMIC) to measure the distribution of value based on a sample of contracts and a jointly selected methodology.

### **OBJECTIVE 3: ENHANCE THE EXPOSURE OF MUSIC AND CULTURAL DIVERSITY**

Paradoxically, the almost infinite availability of works on digital platforms – on which over 30 million tracks are available – creates a challenge for diversity in the dissemination of music. The exposure given to works by platforms and recommendation algorithms have a key influence on the choices made by users, who seem to be concentrating on a limited number of famous artists or successful tracks, more so than in the past.

To preserve cultural diversity and facilitate the emergence and exposure of all talent, the public authorities undertake to:

3.1.- Confirm and increase the effectiveness of undertakings to broadcast original French songs in order to increase musical diversity on the radio.

Online music service providers undertake to:

3.2.- Ensure that their offering gives significant exposure to original French artistic works and thereby increases and promotes diversity in musical catalogues and works. The diversity of catalogues and works will be measured both in terms of exposure given to musical genres and in terms of the renewal of talent and creation.

### **OBJECTIVE 4: PROMOTE CONTRACTUAL BEST PRACTICE THROUGH A CODE OF PRACTICE**

The "13 commitments for online music" signed in January 2011 as part of the mediation project led by Emmanuel Hoog led to real progress regarding contractual relations between producers of phonograms and digital musical platforms.

The negotiation-based approach is helpful, because it is based on the voluntary commitment of participants. It was the prelude to an industry "code of practice", as recommended by the Lescure

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<sup>1</sup> Comparison between the "prorata numeris" model and the "user-centric" model.

report and provided for by the bill on artistic freedom, architecture and heritage. However, the "13 commitments" document only applied for a two-year period and was not renewed.

4.1 - Publication of general conditions of sale. All phonogram producers undertake to publish their general conditions of sale in respect of non-physical exploitations of music.

4.2 - The long-term nature and stability of contracts. Phonogram producers undertake in good faith to favor the renewal of contracts concluded with the publishers of online music services on terms similar to their current contracts, subject only to the following commitments being taken into account.

4.3 - Justification of advances. Phonogram producers undertake:

4.3.1 to limit advances to amounts that are closely linked to real data from the digital music market or to precise and identified costs or services (technical services relating to catalog access, marketing costs, etc.);

4.3.2 to favor the staged payment of advances throughout the contractual period and without cost; in the event of significant unpaid bills, the publishers of online services undertake to withdraw the catalogs of phonogram producers;

4.3.3 to define reasonable profit targets in good faith with effect from the first contract renewal;

4.3.4 to define the terms and conditions of distribution and payment to performers of the advances that they receive from the publishers of online services.

4.4 - Transparency of guaranteed minima. Phonogram producers undertake:

4.4.1 to limit the guaranteed minima required from the publishers of online music services to amounts based on transparent methods of calculation using real data from the digital music market;

4.4.2 to define reasonable profit targets in good faith with effect from the first contract renewal;

4.4.3 to define the terms and conditions of distribution and payment to performers of the guaranteed minima that they receive from the publishers of online services.

4.5 - Paid services. The publishers of free on-demand music services undertake to implement paid added-value services in order to increase the rate of conversion of users of free services to paid services.

4.6- Platform Diversity and emergence of new players. In the case of music platform qualified as small and middle size companies (European definition) producers of phonogram commit to:

4.6.1 limit the advances potentially required from the publishers of online music services to a significant proportion of the guaranteed minima as defined in 4.1, without such advances being capable of reaching the whole of that amount or *a fortiori* exceeding it;

4.6.2 allow the publishers of services to continue indefinitely to recoup advances paid pursuant to previous contracts;

4.6.3 ensure that the cumulative amount of guaranteed minima in whatever form (guaranteed minimum or pre-purchase, per period and/or per usage, per stream, download and/or subscriber, etc.) is fixed in good faith depending on the proportional remuneration provided by the contract in year N-1, excluding guaranteed minima, indexed according to actual variations in the digital market concerned or in the internet advertising market, and according to significant developments in the economic model of the online service;

4.6.4 in order to promote the development of legal online music offers, to limit the guaranteed minima required from the publishers of new online music services in the year of their launch to reasonable amounts based on the costs of setting up the contract;

4.6.5 in the case of online streaming services, to define and apply methods of calculation of guaranteed minima based on actual data from the online music market and on actual data from the internet advertising market.

4.7- Taking account of market shares Phonogram producers undertake to ensure that conditions negotiated contractually, including as regards guarantees of voting rights, accurately reflect producers' market shares.

## **OBJECTIVE 5: ENSURE FAIR REMUNERATION FOR ARTISTS**

The music industry, like other creative industries, is in the midst of a digital transition from a usage-based business model (per-item purchasing of musical works) to an access-based business model (fixed-price access allowing unlimited consumption).

In today's music industry, online music services are continually introducing new offers, and the remuneration of access to works is taking diverse forms. Contractual relations have appeared in which the catalogue owners obtain significant fixed sums (advances and minimum revenue guarantees) from digital service providers in return for access to those catalogues, and they may acquire equity stakes in these service providers.

These changes illustrate a major shift in business models. Platforms' revenue comes in particular from monthly subscription fees paid by their customers, not from purchases of tracks or albums, which were easily attributable to their rights-holders. To calculate rights-holders' remuneration, platforms use revenue distribution models, which are questioned by artists.

In addition, the digital music economy is still much smaller than the physical music economy. The market is a long way from the levels seen in the early 2000s, and is still being affected by free-to-use services (legal or otherwise) and the decline in unit prices.

The artist community is expressing increasing concern about the effect of these changes on its revenues. The complexity of the financial circuits involved in the new music economy is creating, among artists, a great deal of misunderstanding about how value is really distributed, difficulties in tracking their entitlement to revenues, and growing scepticism about how they are being treated.

**The stakeholders are aware of these developments and believe that it is vital, in the interests of the whole industry, to restore confidence by ensuring the most transparent and fair distribution possible of all revenues generated by the digital usage of musical works.**

5.1.- Common interests of the parties. Contracts between producers of phonograms with artists/performers provide for the assignment of the latter's exclusive rights. Producers of phonograms undertake to perform these contracts in the common interests of the parties, particularly those of artists/performers.

5.2.- Basis of artist remuneration<sup>2</sup>. Producers of phonograms undertake to share with artists all revenues and remuneration they receive from digital music broadcasting and distribution services when monetising their recordings. "Revenues and remuneration" means monetary and non-monetary

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<sup>2</sup> For equity investments, please see point 5.3.

benefits directly linked to the monetisation of recordings, including where those benefits cannot be specifically attributed to a rights-holder. As an illustration, the basis for remuneration must include all the unrecouped part of advances and minimum revenue guarantees obtained from online music service providers ("breakage").

5.3.- Equity investments. The signatories to this Memorandum are aware of the questions raised by artists about equity investments, through options or otherwise, held by producers of phonograms in online music service providers. The signatories acknowledge that this question<sup>3</sup> has an international dimension, which must be taken into account.

The public authorities and artist representatives call for negotiations dealing with this issue of equity investments to take place and to be rapidly concluded.

Producers of phonograms agree that questions that could be raised by liquidity-generating transactions involving the share capital of online music service providers in which producers of phonograms own an interest acquired as consideration for a digital catalogue distribution agreement should be addressed within an appropriate international framework, to be defined by the relevant parties.

The stakeholders will familiarise themselves with and debate, within the context of the music industry steering committee<sup>4</sup>, the results of these discussions and any consequences they may have for artists that have a contract with a French producer of phonograms.

5.4.- Contractual reduction. The application of contractual reductions will comply with the following principles: (i) discounts set at a reasonable level and based on justifiable reasons connected with digital operations, through the implementation of specific actions; (ii) no structural discounts (not justified by a specific action) related to digital usage; (iii) account being taken, when calculating discounts, of all net expenditure actually made by producers of phonograms (e.g. advertising campaigns).

5.5.- Minimum revenue guarantee. Producers of phonograms undertake, in individual and collective negotiations regarding the remuneration of artists and performers, to give them a minimum revenue guarantee in consideration for the digital usage of their recordings. That guarantee may take various forms, such as proportional minimum revenue or a minimum advance. The arrangements and level of the minimum revenue guarantee will be set by collective agreement, which must take into account the diverse circumstances facing companies in the sector.

5.6.- Transparency of artist revenues. Producers of phonograms and rights collection and distribution societies undertake to report to artists on their revenues in a form that is transparent, understandable and can easily be used by artists and their managers. The format of statements will be examined by a working party featuring representatives of artists, managers and rights collection and distribution societies, in order to adjust the format to the expectations of artists and to adopt a common standard.

As regards royalty statements, producers of phonograms hereby undertake (i) to show an overall summary of reductions, explicitly showing their cumulative effect on the artist's revenue as a value and/or percentage; (ii) to make statements available to view in electronic form; (iii) to show royalties by main distributor, type of sale and territory; and (iv) to designate, for companies with more than ten employees, a representative to handle all questions relating to these statements.

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<sup>3</sup> Provided that it can validly be dealt with at the industry level in view of competition law.

<sup>4</sup> The creation of which is provided for by Objective 7 of this Memorandum.

5.7.- Right to audit. Artists and performers have a contractual right to audit accounts relating to their recordings.

5.8.- Data use. The rights collection and distribution societies of artists and performers and the producers of phonograms undertake to take part in a working party on metadata led by France's department for media and cultural industries, with the aim of ensuring improved identification of rights. They also undertake to raise their members' awareness about best practice in terms of entering metadata and copyrighting recordings.

#### 5.9.- Implementation of Objective 5.

The provisions contained in Objective 5 are applicable to all featured performers, regardless of their status and the way in which they practise their art.

As regards provisions intended to form part of France's national collective agreement on music publishing (CCNEP), social partners undertake to initiate discussions that will lead, within one year, to a new wording of the collective agreement. The aims of this include reviewing the implementation of the CCNEP, taking into account clauses resulting from undertakings 5.1. to 5.7., and determining the arrangements and level of the minimum revenue guarantee provided for in undertaking 5.5.

The provisions of Objective 5 apply as of right to any new contract and any contract renewal from the date on which this Memorandum was signed, and as and when collective agreements signed in application of this Memorandum are implemented.

### **OBJECTIVE 6: USE AVAILABLE RESOURCES TO FACILITATE DIGITAL TRANSITION**

New models in the digital era are creating development opportunities for artists and producers, and challenges related to the changes they allow, such as increased self-production. Support should be given for this transition.

6.1.- Further streamlining and modernisation of general-interest organisations serving the music industry. The public authorities have begun a process of streamlining and modernising general-interest organisations within the music industry, in which the stakeholders are involved. Together, they undertake to continue this work based on shared objectives, efforts to devise a simplified, streamlined organisation and the implementation of common resources. As part of that work, the public authorities undertake significantly to increase the resources of Bureau Export (French music export office).

6.2.- Proposal by producers to create a direct-employment support fund. This support fund should provide musicians with some of their revenue, particularly those employed by very small record companies. The fund would be managed jointly by social partners. The stakeholders will aim to determine the implementation arrangements and the resources allocated to the fund within six months of signing this Memorandum.

6.3.- Mobilisation of artistic and cultural activity in pursuit of priority initiatives. The intellectual property code states that rights collection and distribution societies must devote some of their resources to supporting creativity, promoting the performing arts and training artists. Rights collection and distribution societies that are signatories to this Memorandum undertake to use some of these resources, in a co-ordinated manner, to address issues acknowledged to be important by and for the music industry.

Actions include: support for the direct employment of artists and performers in independent phonographic production carried out by very small companies, where those artists are employed on lawful wage terms and in compliance with their intellectual property rights; support for the export of music in all its forms (live and recorded); and support for the development of music online.

#### **OBJECTIVE 7: ENSURE EFFECTIVE AND SUSTAINED IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING**

7.1.- This memorandum of understanding, which is renewable, applies for a period of 3 years from the date of its signature.

7.2.- A music industry steering committee, chaired by France's Minister of Culture and Communication and consisting of all signatories to this Memorandum, shall meet at least once per year to monitor the achievement of the Objectives and to take the measures needed to ensure that they are operational and sustained. The head of France's Department for Media and Cultural Industries shall be the secretary of the steering committee and shall prepare its meetings. That person shall have the task of monitoring the implementation of this Memorandum.

7.3.- The first meeting of the music industry steering committee will take place no more than six months after the signature of this Memorandum to monitor its implementation, particularly as regards undertakings made in relation to that timeframe.

7.4.- Any question or dispute relating to the implementation of this Memorandum may be referred to the music mediator, whose appointment is provided for by the future bill on artistic freedom, architecture and heritage.

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Paris, October 2, 2015.