

Department for International Trade

Trade with Israel: Call for Input

Introduction

UK Music is the collective voice of the UK's world-leading music industry. UK Music represents all sectors of the music industry – bringing them together to collaborate, campaign and champion music. UK Music promotes the music industry as a key national asset to all levels of Government.

Israel is an important and growing market for the UK music industry and we welcome the invitation from the Government to consult on what the UK should seek to achieve in the forthcoming FTA negotiations. There are troubling developments manifested in a Memorandum in Israel which will hurt Israeli and UK producers, performers, publishers and authors alike.

- Our main concerns relate to the threat of a new exception to copyright which will take away 30% of the music income from public performances in Israel. This exception must not be introduced
- Furthermore, there are unacceptable proposals concerning the role of collective management organisations. The operation of collective management organisations needs to be based on right holders' choice.
- As it currently stands, UK performers' performances on sound recordings are not protected in Israel. This needs to be changed in compliance with international laws.

Summary

Exception for public performances.

The Memorandum proposes to introduce a potentially wide-ranging exceptions to copyright for public performances and limitations to rightsholders' ability to enforce their copyrights all of which infringes international copyright norms. They will cause considerable harm to right holders, not only in Israel and the United Kingdom but to right holders throughout the world.

Collective management organisation.

The Israeli government is planning to force all the music collective management organisations (CMOs) into a single organisation for the licensing and collection of public performance of music. There is no evidence whatsoever of a market failure requiring any such intervention.

CMOs are already tightly controlled by the Israeli Competition Authority – so tightly indeed that they have been forbidden from doing voluntarily what the government wants to mandate - the Competition Authority for example does not allow producers' CMOs to collaborate with authors. The ministerial proposal, a Memorandum of the Collective Management of Copyright and Performer's Rights Corporations Law (the Memorandum) has not yet reached the Knesset.

With this in mind, we would be grateful if standards for collective management, in particular safeguarding right holders' freedom to use CMOs of their choice and to realise the true economic value of their rights, are made a principal ask in the upcoming FTA negotiations. The fastest way to raise standards is for the legal framework to encourage CMOs to compete on the basis of efficiency and quality of service, without being able to shelter behind local law supporting inflexible "take it or leave it, all in or all out" mandates. Monopolies do not deliver efficiency or dynamism in raising standards.

Performances on sound recordings

The Israeli legislator chose to limit the performer's legal protection in Israel and protect only performances recorded within the borders of Israel. This means that sound recordings recorded abroad are not protected by the Israeli Performers' Rights legislation of 1984. Israel has ratified the Rome Convention in December 2002 but used the reservations possible under the Convention, to the effect that the protection extended to performers of other Rome Convention member states covers only live broadcasts and excludes phonograms.

There are two performer collective management organisations in Israel, Elam & Eshkolot, but they are only collecting and licensing for Israeli performances.

We need to see this reservation removed and equal treatment of UK and Israeli performers.

We are aware that the Israeli Ministry of Justice is very sensitive to international attention.

Overview

Copyright is the foundation for the use and remuneration of Israeli and international music in Israel. Copyright legislation safeguards those interests, thereby facilitating commercial investment, both national and international.

Collective management and a competitive landscape of CMOs are an important part of how the music industry licenses approximately 100 million works. The licensing of public performance rights is at the core of our industry and a significant driver of Israeli industry revenue (it amounts to more than 30% of industry revenue).

The changes proposed in the Memorandum put at risk the basis for collecting and distributing royalties from public performance exploitation. It would lead to restrictions in the marketplace, reduce the ability of Israel's industry to administer its intellectual property rights, disincentivise commercial investment and breach international copyright law and treaties on a number of fronts. Several of the proposed provisions in Chapters B-E of the Memorandum would result in Israeli and UK producers, performers, publishers and authors losing rights and royalties despite widescale use of their work. These concerns include, but are not limited to:

- Reduction in choice of public performance licensing and administration entities.
- Limiting rightsholders' rights to enforce their copyrights against infringement.
- Broad exemptions from licensing obligations for general and/or public performance.
- Reduction in the scope of rights and consequently royalties returned to rights owners and music companies for the use of music.

Copyright protection in Israel suffered for many decades from a segmentation and fragmentation in national legislation. However, since amending the Copyright Law in 1999 to comply with TRIPS (particularly Articles 1-6), copyright deficiencies were reduced and Israel has been matching many international industry practices. Current copyright protection and enforcement systems in Israel have been stable and based on fundamental principles of constitutional, market competition, consumer protection and civic norms. However, these new proposals show a disregard for international copyright norms.

Chapter B of the Memorandum, paragraph 2, limits the right to file a claim for copyright infringement in the case of public performance only to the "Sole Corporation". Such a move would only weaken in an unfair and disproportionate way the rights of individual rightsholders – both owners of copyrights and exclusive licensees – provided so far with the universal mechanism established in Article 54 of existing Israeli Copyright Law.

The Memorandum's Chapter C, paragraph 4, narrows rightsholders' freedom to license their works in the marketplace. It is standard and longstanding market practice that licensing can be done directly by a rights owner with a licensee or mandated to a collective management organisation. Chapter C, paragraph 4, states that management of public performance rights shall be done via a Sole Corporation only. Such a proposal disrupts the balance of copyright owners', users' and consumers' benefits of a free market in Israel. It is a norm of Israeli and international practice that rightsholders shall be entitled to freely choose a collective management organisation for the management of their rights.

As such, the proposed amendments to the Copyright Law breach the fundamental rights guaranteed by the Basic Laws of Israel, specifically Art. 3 (freedom of association and protection of property, in extenso including intellectual property rights) and Art. 8 (infringement of rights). It is also contrary to the individual's right to file a claim. Establishing a Sole Corporation would also be contrary to the prohibition of discrimination stipulated by Israel's antitrust regulations.

By limiting the right to file a claim by a copyright owner or exclusive licensee and by reducing CMO options for collective management of the public performance market, the proposed Memorandum would disrupt market growth in the medium and long term as well as entail significant losses to a key industry within the Israeli economy.

Proposal 12 of the Memorandum in Chapter E suggests amending Section 13 of the Copyright Law as follows:

"Hearing or broadcasting directly or through a device will not constitute public performance if done in:

- a joint permanent residence (e.g., sheltered housing, residential complexes in academic institutions) or*
- any business establishment or waiting room which does not contain more than six clients at the same time."*

Amending the Copyright Act as proposed by Chapter E of the Memorandum, would contravene a large number of international norms, including:

- The Berne Convention for the Protection of Literary and Artistic Works.
- The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).
- The WIPO Copyright Treaty (WCT).
- The WIPO Performances and Phonograms Treaty (WPPT).

Israel is a signatory to each of these Treaties.

It is a fundamental principle of Israeli and international copyright law that copyright owners have exclusive rights to authorise the exploitation of their works. Any limitations or exceptions to these rights must follow the 'three steps' criteria:

1. Stay limited to certain special cases.
2. Cannot limit rightsholders with a real or any potentially substantive source of income as part of the normal exploitation of their works).
3. Cannot unreasonably prejudice the legitimate interests of the author.

The proposed amendments to Section 13 of the Copyright Law violate each of these.

Given that Israel acceded to the Berne Convention in 1949 - one of the first international agreements in the country's history, enacting the Memorandum would not only amount to a breach of the Treaties but also constitute a seriously damaging global precedent.

This Proposal 12 profoundly reduces essential income streams for international right holders. This is similar to the bars and grills exception introduced in the United States in the Fairness in Music Licensing Act 1998 which the WTO ruled infringes the Three Step test (in 2000).

In addition to the IP framework it is worth noting that international touring is an important revenue stream for the music industry. This will increasingly become the case again as we return to concerts and festivals following the pandemic. Musicians and crew engaged with touring require reciprocal access and whilst we are unaware of specific problematic barriers or impediments regarding the mobility of UK performers and industry professionals to Israel we nonetheless seek the commitment of both governments that through FTA negotiations they will continue to seek to eliminate any rules or financial impediments that present obstacles to cultural exchange between the two countries.

Conclusion

We would ask that the UK Government, in the context of the forthcoming FTA negotiations, ask the Israeli government:

- To avoid the pitfalls of legal and commercial harm which would be caused by enacting the Memorandum as an amendment to the Copyright Act.
- Not to limit the fundamental right of copyright owners or exclusive licensees to file a claim for copyright infringement and annul paragraph 2 of the Memorandum, for the reasons explained above.

- To ensure rightsholders' freedom to entrust rights in terms of collective management through a deletion of Chapter C of the Memorandum (which establishes a monopoly of the Sole Corporation).
- To eliminate the risk of an extraordinary violation of international copyright treaties and the basic Three-Step Test provision by elimination of Chapter E of the Memorandum.
- To ensure equal treatment of UK and Israeli performers

And in doing so to ensure that the Copyright Act of Israel observes constitutional and international norms, does not harm the post-Covid recovery of public performance of music in Israel and avoids possible violation complaints which can be requested by any WTO member state or the European Commission under Article 6 of the Dispute Settlement Understanding and Article 64.1 of the TRIPS Agreement.

We thank you for your support and are at your disposal for any further information you may require.

Annex

UK Music's membership comprises: -

- AIM – The Association of Independent Music – AIM – The Association of Independent Music – the trade body for the independent music community, representing 1000+ independent record labels and associated businesses, from globally recognised brands to the next generation of British music entrepreneurs.
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 400 independent record labels.
- FAC – The Featured Artists Coalition is the UK trade body representing the specific rights and interests of music artists. A not-for-profit organisation, they represent a diverse, global membership of creators at all stages of their careers and provide a strong, collective voice for artists.
- The Ivors Academy - The Ivors Academy is an independent association representing professional songwriters and composers. As champions of music creators for over 70 years, the organisation works to support, protect and celebrate music creators including its internationally respected Ivors Awards.
- MMF – Music Managers Forum - representing over 1000 UK managers of artists, songwriters and producers across the music industry with global businesses.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including music studios, producers, engineers, mixers, remixers, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union - Representing over 32,000 musicians from all genres, both featured and non-featured.

- PPL is the music licensing company which works on behalf of over 110,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK. PPL also collects royalties for members when their recorded music is played around the world through a network of international agreements with other collective management organisations (CMOs).
- PRS for Music is responsible for the collective licensing of rights in the musical works of 150,000 composers, songwriters and publishers and an international repertoire of 28 million songs.
- UK Music also has an informal association with LIVE (Live music Industry Venues & Entertainment), the voice of the UK's live music and entertainment business. LIVE members are a federation of 13 live music industry associations representing 3,150 businesses, over 4,000 artists and 2,000 backstage workers.