Le Secrétaire Général

By email and by regular mail

February 17, 2010

Mrs Helena Larsson-Haug
Deputy Head of Unit

Mrs Anna Moscibroda
European Commission
DG Competition - Unit C2 Media
Office 1/ 226
Rue Joseph II 70, B-1049 Brussels,
Belgium

Re: Case COMP/C2/38.440 – Universal Music v. BIEM

Dear Mrs Larsson and Mrs Moscibroda

As agreed during our last meeting in Brussels on 21 January 2010, you will find below an update on the main relevant developments in this matter since our last letter dated 26 May 2005.

As we mentioned during our meeting last month BIEM, while considering that there is no reason to revise the total economy of the standard contract, sent on 12 May 2008 to IFPI an official letter (attached herewith) proposing to open formal negotiations on a series of proposals and issues to be discussed in order to reach an agreement on a possible renewal of the standard contract.

Notwithstanding the fact that IFPI has so far not accepted to enter into formal negotiations on such renewal, informal discussions between IFPI and BIEM have never ceased to take place, and still continue.

BIEM remains ready to any negotiation with the representatives of the music industry on the possible renewal of the standard contract as long that they adopt a constructive approach to such negotiations and the fundamental interests of rights holders represented by the BIEM members collecting societies are preserved.

In this perspective, we have to stress that the 9.009% rate not only has been upheld by the German Arbitration Court as already mentioned to the Commission in our letter dated 26 May 2005 (a copy of which is enclosed along with the answer of Mr. Ungerer) but has also been approved on 19 October 2009 by the Swiss Federal Arbitration Commission, which

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considered that such rate was perfectly equitable and in line with the 10%-rule in the Swiss Copyright law Art. 60). It has to be added that the Standard Contract in Germany providing the 9.009% rate on the PPD has been renewed between GEMA, the German collecting society, and the industry (by tacit renewal) and, even though the local IFPI Group did have the right to reopen an arbitral procedure, it did not do so.

As concerns the basis for the calculation of the rate, it has to be underlined that the PPD has also been consistently confirmed as the best calculation basis not only by the two bodies mentioned above, but also already by the UK Copyright Tribunal in its decision of 1992.

The obvious purpose of the Universal complaint being to obtain a decrease of the remuneration to be paid, we confirm that in BIEM's opinion there is no new development in the market that would justify in any respect any kind of decrease of such remuneration, either through the applicable rate or its basis.

Such decrease would seriously be detrimental to the rights owners without any justification and, moreover, without any positive effect on consumers as we have previously argued.

In addition, we respectfully draw your attention that, as already mentioned before, the Commission is not a price-regulator and consequently has not to intervene in the determination of the level of the remuneration paid to creators by the users of their works.

Lastly, BIEM would like to stress that the current situation and the de facto continuation of the standard contract allows for the availability of the whole range of the repertoire for the music industry. This is highly valuable for the clearance of the rights since it allows a one stop-shop mechanism and saves huge transaction costs. Besides Universal confirms in its complaint the usefulness of this system.

Furthermore, the Standard Contract provides for a level playing field between the players of the industry since it puts on an equal footing both big and small producers with respect to the clearance of the rights and the access to repertoire.

For all these reasons, from BIEM's point of view, there is no basis for the Commission to investigate any further in this case and the complaint should therefore be dismissed.

We also confirm, for sake of order, that BIEM maintains all its previous submissions which remain entirely valid.

I remain at your disposal,

Ronald Mooij

Encl. 3

Président

12 May 2008

Mr. Lauri Rechardt
Director, Deputy General Counsel
10 PICADILLY
W1J 0DD London
Grande-Bretagne

Dear Laurie,

As promised in my letter of 3rd April 2008, I am pleased to submit BIEM's position on a possible renewal of the standard contract.

Audio Contract

In general we are of the opinion that there is no reason to revise the total economy of the **contract.**
Headline rate and economic conditions reflect the level that we are able to have approved by our membership.

In a number of countries we have been given to understand, by our local member society or by the local IFPI group that IFPI considers that changes in the marketplace with regards marketing policies and releases strategies may require some revisions in the relevant conditions.

We propose the following:

1. **Carriers covered** [Art II (4)]: The contract will apply to all formats of pre-recorded physical audio carriers put into circulation with a view to their sale to the public for private use through usual practice of retail trade including without limitation vinyl, cassette, CD, CD-R, Mini-Disc, DCC, DVD-Audio, Super Audio CD, DualDisc. We are prepared to discuss with you the conditions to cover preloaded devices in single or album format (such as USB key, memory card, portable player etc.) by separate agreement.

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2. **Basis of the royalty** [Art V (4)]: For the sake of clarity the definition of PPD to be changed, as follows: *« Published Price to Dealer» or « PPD » shall mean the highest price as published by the Producer (or where appropriate the Producer's distributor) payable by any dealer for the minimum quantity of copies of the relevant Format of the relevant Disc which any dealer can purchase from the Producer (or as appropriate the Producer's distributor) without the benefit of any applicable discounts, incentives, bonuses and other reductions or deductions.*

   Any and all components of manufacture and distribution costs, even if invoiced separately, included but not limited to handling costs, promotion, insurance transport and packaging are to be considered as part of the PPD.

   Dealer is the retailer or the equivalent party, responsible for obtaining sound carriers, for direct sale to the public for private use, according to the usual practise of the retail trade ''.

3. **Exports clause** [Art V (7 to 11)]: We would like to re-introduce the country of destination principle not only for exports outside the EU as currently in force, but also for shipments within the EU.

4. **Returns** [Art V (16 to 18 bis)] and **TV Advertising** [Art V (25)] clauses: We are prepared to discuss retentions for returns on new releases and would like to remove the special TV advertising clause to bring provisions in line with the principles of the German Court decision.

5. **Packaging deduction** [Art V (23)]: We believe that the packaging deduction should be individualized for each product configuration.

6. **Exempt copies** [Art V (24)]: It should be specified in the contract how to calculate copyright for copies used for promotional purposes in quantities greater than the agreed number of exempt copies.

7. **Minimum budget** [Art VI (1bis)]: the current window period for budget line conditions could be reviewed.

8. **Calculation of the over licence for remixes** [Art VI (6)]: We propose to specify that the over-licence should be calculated on the duration of the sound carrier.

9. **Terms of the agreement:** The BIEM/IFPI Standard Contract for audio-carriers and its seven amendments dated 30 June 1998 ("the Contract") expired on 30 June 2000 but shall be deemed to continue to apply until a new agreement enters into force. This means, in particular, that all parties affected by the contract shall treat one another as if the contract had remained in full force and effect up until such time.

   It would be our intention for the new agreement to enter into force on 1 January 2009 (provided that the terms of the new agreement are agreed upon in time for BIEM and its member societies to obtain the necessary approvals and make the requisite adaptations), for a period of five years to expire on 31 December 2013.

Pending Complaints

The following Complaints shall be withdrawn and no new complaints on the same or similar basis shall be made during the term of the deal:

- The UMI complaint to the European Commission concerning the Standard Contract.
- The UMI complaint to the European Commission concerning online music rights licensing.
- Any other complaints to the European Commission or national competition authorities filed by IFPI or one or more of its members covering the same or similar subject.

In the event that the European Commission or a national authority responsible for the application of competition law makes rulings which would adversely affect the remuneration to Authors, Composers and Publishers, BIEM reserves the right to cancel or renegotiate the agreement.

Audio visual Contract

We propose to agree heads of terms for a separate standard contract governing licences for the manufacture and distribution of music audio-visual carriers which will include the following terms:

1. The royalty rate for mechanical reproduction of musical works included in the audio-visual carriers will be a net rate of 7,5% of PPD or 6,15% on the fixed or suggested retail price, with no further deductions.

2. Reasonable returns provisions should be agreed.

3. Formats: all audio-visual carriers put into circulation with a view to their sale to the public for private use, through normal retail trade practice including without limitation VHS, Video DVD, Blu-Ray disc, whether in single, or album format.

4. Territory: Equal to standard audio contract.

5. Minima and maximum track provisions to be defined.

6. Rules to split the PPD/retail price in case of hybrid products (including bundles) to be defined.

7. No pro-rating except in regard to public domain music or non-member music repertoire.

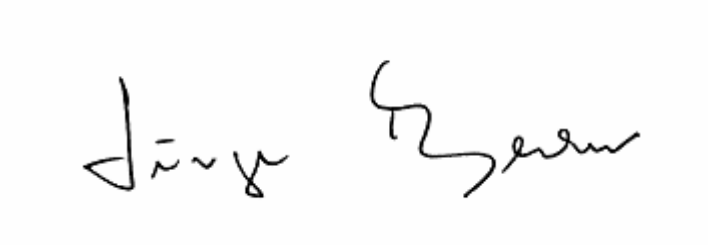
8. Term: 5 years

9. Agreement: we would like to replace the heads of terms by a long form agreement before the end of the year.

You have mentioned that there are specific issues in some countries regarding music video licensing. We are interested to obtain further details.

In addition to the above points concerning the Standard Agreement and the audio visual agreement, there may be further items concerning the general relationship between the BIEM and CISAC members on the one hand and the IFPI members, on the other hand that we could usefully discuss. In this respect we refer to such issues as implementation of DDEX standards, exchanges of databases, quality of ISRC codes, ISPs responsibility, etc.

Best regards



Jürgen Becker
President of BIEM

BIEM No. 0840biemifpi

Le Secrétaire Général

By e-mail, fax (00.32.2.295.01.28) and express mail

May 26, 2005

Mr. Herbert Ungerer
Head of Unit – Media
Directorate General for Competition
European Commission
Rue de Genève / Genévestraat, 1
1140 Brussels
Belgium

Re: Case COMP/C2/38.440 – Universal Music v. BIEM

Dear Mr. Ungerer,

I am writing to you in answer to the letter you sent me last May 18 enquiring about the "*state of play*" of the issues we discussed during our March 11 meeting, for which we must thank you once more.

As indicated at the end of such meeting, the concerns you shared with us required careful attention in order to carry on in a constructive manner our valuable dialogue. An internal reflection was therefore launched within BIEM.

After a brief presentation of the status of the on-going negotiations with IFPI (**a**), please find hereafter the results of the reflection reached at this stage concerning the minima / maxima provisions contained in the BIEM-IFPI Standard Contract (**b**) and the vertical effect you deemed to exist with regard to the BIEM-IFPI Standard Contract (**c**).

a) The on-going negotiations with IFPI

During their last meeting which took place on April 7, 2005, the BIEM and the IFPI representatives were not able to reach an agreement on the outstanding issues which were discussed with you at the March 11 meeting. Therefore it was decided to resume discussions at the end of the summer period.

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However, as the President of BIEM stressed in his letter to the Chairman and CEO of IFPI in a letter dated May 18, 2005, the decision adopted on April 12 by the *Schiedsstelle beim Deutschen Patent- und Markenamt* (the Arbitration Board at the German Patents and Trademarks Office; hereafter the "*Schiedsstelle*")) in the dispute between GEMA and the *Deutschen Landesgruppe der Internationalen Vereiningung der Phonographischen Industrie e.V.* (the German Group of IFPI) "*has created a new situation for the present period*" (see Enclosure 1).

As you may recall, application was made by the German Group of IFPI to the *Schiedsstelle* to settle a dispute with GEMA concerning equitable remuneration for audio carrier licenses. In its April 12 decision, a copy of which was sent to you by BIEM's outside counsel, Hugues Calvet last April 29 in its original German version (a copy of the decision in the language of the case is enclosed – see Enclosure 2), the *Schiedsstelle* fully confirmed GEMA's views and legal positions in all respects and rejected all of IFPI's arguments. The *Schiedsstelle* thus considered that a royalty of 9.009% of the Published Price to Dealers (PPD) is equitable and emphasized the need for a minimum royalty.

According to the German regulation on arbitration procedures, the *Schiedsstelle*'s decision was in fact a proposal on a way to solve the dispute between GEMA and the German Group of IFPI which would become final, failing a challenge by one of the parties within a four week deadline. Due to the absence of any appeal by the German Group of IFPI within the set deadline before the Munich Court of Appeals, the *Schiedsstelle*'s proposal constitutes the agreement between the German Group of IFPI and GEMA containing reasonable terms and conditions for the use of musical works on sound carriers. As a result, the 9.009% royalty rate provided by the BIEM-IFPI Standard Contract as well as all the other provisions of the BIEM-IFPI Standard Contract, *inter alia* the minima / maxima provisions, are applicable from July 1, 2000 to December 31, 2005 in Germany, the most important market of the European Union.

Therefore, such decision from the national regulator obviously creates a new environment for the BIEM-IFPI negotiations which must be taken into account in the negotiations with IFPI, whose arguments against the minima / maxima provisions and the equitable character of a 9.009% royalty rate were rejected.

b) The minima / maxima provisions

As has just been mentioned, the decision reached last April 12 by the *Schiedsstelle* stresses the importance of the minima / maxima provisions contained in the BIEM-IFPI Standard Contract for the protection of the right-holders' interests and entirely confirms BIEM's position on this point.

Indeed, it should be emphasized that under the Standard Contract, authors grant users a blanket license which enables the subsequent exploitation of their works, generally without any further authorization. Thus authors renounce the right to refuse at a later stage, for reasons of insufficient remuneration, their authorization. Authors abandon their fundamental prerogative, in other words their exclusive right to authorize or to refuse the exploitation of his work.

It should be specified that the Standard Contract does not however give authors or the collecting societies any control over the basis of the royalty, in other words the prices applied by the producers.

Under these conditions, the minimum remuneration, as well as the maximum number of works or tracks to be included on the same carrier[1], is only the indispensable compensation for the abandonment by authors of their right to refuse the reproduction of their works for reasons of insufficient remuneration.

The assurance given to the users of an unconditional access to musical works would seriously affect the very existence of copyright should authors, having abandoned their right to refuse their authorization, be moreover deprived of the inherent guarantee necessary to the abandonment of this prerogative, the minimum royalty. The latter is obtained through the provisions concerning the minimum royalty and the maximum number of works or tracks to be included on the same carrier.

The minima / maxima provisions are in fact nothing else than the recognition of a minimum wage for authors for the exploitation of their work by the industry. These provisions have the same function as that of a right to a minimum wage for wage earners. Numerous elements of cost – national insurance contributions, social security benefits and modalities of remuneration – are of the same nature as that of the minimum royalty.

The importance of such provisions can be illustrated by the following example, which is far from being hypothetical. Should a producer choose, in order to promote a given carrier, to give away other carriers, what would the remuneration of the author whose works are being given away be? Nothing because an author's remuneration is calculated on a sales price.

It should be added that agreements containing such provisions guaranteeing remuneration are standard in the musical industry. For instance, contracts between record producers and performing artists very often provide for minimum royalties (non-refundable advances), as the Commission could easily establish. Agreements by which a producer grants a license to another producer in fact also contain minimum royalties in the form of non refundable advances, for instance where the license is granted for compilation purposes.

The minima / maxima provisions are clearly necessary, as the *Schiedsstelle* recalled, for the protection of the right-holders' interests and more generally of copyright. In this respect, BIEM fails to see how they can be contrary to competition law all the more as they affect all the producers in the exact same way and thus create absolutely no distortion of competition.

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[1] It should be recalled that the provision concerning the maximum number of works or tracks that can be included in a single sound carrier in no way prevents the inclusion of a greater number of works or tracks on a given carrier. It only means that should a producer wish to add more works or tracks on a given carrier, he will pay a higher royalty, calculated proportionally to the number of works used. The maximum in no way increases the royalty due to the author. Its sole purpose, on the contrary, is to maintain this remuneration for the exploitation of a given work since the price of a carrier, basis of the royalty, does not increase with the number of works or tracks included. In the absence of such maximum provision, the more works a carrier would include, the lower the authors' remuneration would be for the exploitation of each work.

c) The vertical effect of the BIEM-IFPI Standard Contract

During our March 11 meeting, you expressed some concern regarding the vertical nature of the BIEM-IFPI Standard Contract, especially if this was accompanied by elements of foreclosure. I am happy to point out to you that such foreclosure does not exist. Indeed, alternative licensing schemes can and indeed do exist in addition to the BIEM-IFPI Standard Contract.

First of all, it is already possible for users to obtain a license on a work by work basis. In this scheme, payment is made upon manufacture of the sound carrier and there is no administrative burden linked to the reporting of sales.

Moreover, in at least two countries, France and Germany, alternative agreements to the BIEM-IFPI Standard Contract have been signed with associations of independent producers.

In France, the agreements signed with the independent producers differ from the agreements concluded on the basis of the BIEM-IFPI Standard Contract and are particularly suited to the needs of independent producers. In particular, they provide specific terms for returns and TV advertisements (see Enclosure 3 for the model contract entered into by SDRM with independent producers, which only exists in French).

In Germany, apart from the BIEM-IFPI and the work-by-work licensing schemes, GEMA proposes two contracts:

- A contract for small labels

  For small labels, *i.e.* labels whose payments to GEMA are lower than 2.500,00 € per quarter, GEMA proposes a simplified framework contract which differs from the BIEM-IFPI Standard Contract where returns and advance payments are concerned (see Enclosure 4).

  Such framework contract was concluded with the *Verband Unabhängiger Tonträgerunternehmen, Musikverlage une Musikproduzenten e.V.* (hereafter, "VUT") as well as with the *Verband Deutscher Musikschaffender* (hereafter, "VDM") and the *Deutscher Rock und Pop Musiker Verband e.V.* (Association of German Rock musicians).

  To this date, 755 members of VUT and 31 members of VDM have concluded contracts on this basis.

- A contract for bigger labels

  For bigger labels, *i.e.* labels whose payments to GEMA exceed 2.500,00 € per quarter, GEMA and VUT have agreed on the content of the full BIEM-IFPI Standard Contract (see Enclosure 5).

  Such contract is available since October 2004 and so far, two members of VUT have signed such agreement and GEMA is negotiating with approximately 20 more members.

These examples show that the BIEM-IFPI Standard Contract as it now stands allows BIEM members to enter into agreements with other groups of users than IFPI and that flexibility exists in the BIEM-IFPI system.

In any case, I would like to stress that the application of the BIEM-IFPI Standard Contract by the BIEM societies stems from Article 7 of the BIEM statutes which were notified to the European Commission on February 24, 1998. It should be added in this respect that the Standard Contract as such was at the heart of the notification of the BIEM Statutes: its importance as well as its rationale were explained at length. The BIEM Statutes were granted clearance by way of a comfort letter in the following terms: "*It* [the examination of the case] *showed no reason for the Commission to intervene on the basis of the provisions of Article 81.1 as regards the notified agreement as this agreement does not restrict competition in a sensitive manner within the meaning of this provision*" (Free translation of the letter dated December 4, 2000 – See enclosure 6).

As underlined in the notification of the BIEM Statutes, which provide for the BIEM-IFPI Standard Contract, this Standard Contract does not prevent the development of centralization agreements which the Commission has considered as having created competition between collecting societies.

Such Standard Contract in fact is pro-competitive insofar as it leverages the playing field between the users. Indeed it guarantees that **all** producers have access to the whole range of repertoires managed by the BIEM member societies in rigorously non-discriminatory conditions. The big producers, *e.g.* the four majors, which hold approximately 80% of the worldwide record market and the small and medium record producers alike have access to the repertoires managed by the BIEM member societies. And the access to the repertoires is guaranteed on a non-exclusive basis.

Furthermore, alternative solutions, such as individual negotiations taking place within each collecting society, inevitably raise the question of transaction costs which prove prohibitive both for the right holders and the users and result in a decline in the right holders' protection.

The advantages of a standard contract in terms of transaction costs are undeniable and have been underlined by the US Supreme Court, in the following terms:

> "*This substantial lowering of costs, which is of course beneficial to both sellers and buyers, differentiates the blanket license from individual licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the* (…) *sum of its parts; it is, to some extent,* a *different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of the marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. Thus, to the extent the blanket license is a* different product, A*SCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual*

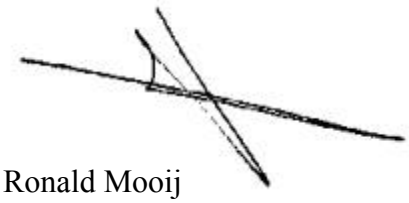
> *compositions are raw material*. A*SCAP*, (…) *in short*, *made a market in which individual composers are inherently unable to compete fully effectively*" (*Broadcasting Music Inc. v. Columbia Broadcasting System*, 441 US 1 (1979)).

Finally, I wish to add that in the absence of any collective agreement concluded with users, the majority of users would inevitably refuse the terms and conditions set by the collecting societies for the exploitation of the works they manage and try to pay the least possible. As a consequence, right holders will not be receiving the royalties due for the exploitation of their works and the collecting societies will be forced to go to court and litigate to protect their interests, which will obviously prove detrimental both time-wise en cost-wise for right-holders.

I hope the above answers your queries. I can assure you that I am open to any comment or any observation you may have that would enable us to continue our constructive exchanges and welcome any opportunity to carry on our dialogue.

I remain at your disposal.

Yours sincerely,



Ronald Mooij

Encl. (due to their size, the six above-mentioned enclosures will not be faxed but only sent by e-mail and express mail)

BIEM N° 0517

Cc: Messrs. Torben Toft and Alain Andriès

EUROPEAN COMMISSION
Competition DG
Information, communication and multimedia

Media

18.05.05 D 002515

Brussels,
COMP/C2/AA/LVP
D/**263**/2005

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BIEM
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Subject: Case COMP/C-2/ 38440 Universal v BIEM

Dear M. Mooij,

During our meeting of 11 March 2005 we expressed our respective views concerning the BIEM-IFPI standard contract for the phonographic industry and the market evolution in that sector. Especially, I raised two of our major concerns: the vertical effect of this standard contract and the price fixing system it establishes.

In conclusion of our meeting, you agreed to give us by the end of April some news concerning your on-going discussions among your members and between BIEM and the IFPI representatives.

May I therefore ask you to indicate the state of play on the above issues. It is indeed now very important for DG COMP to decide the appropriate follow-up for the case.

Yours sincerely,

Reçu Le
19 MAI 2005
N° 6381

Dr. Herbert Ungerer
Head of Unit

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