

First experience with EU wide online music licensing

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1. ONLINE MUSIC SERVICES

1.1. The Information Society added a variety of innovative services which are either provided electronically at a distance (e.g., webcasting, Internet-based television "IPTV") or on specific request from the consumer (interactive "on-demand" retail services).

1.2. The introduction of new digital transmission platforms such as web-based and other online delivery solutions will lead to more cross-border provision of online music services. These new technologies have also led to the emergence of a new generation of service providers, ranging from "download-to-own" online shops, subscription services and webcasters.

1.3. According to the IFPI Digital Music Report, Europe in 2006 accounted for around 20% of global digital music sales. Screen Digest (2007)² estimates that consumer spending on online music more than doubled the amount recorded in 2005. In 2006, digital retail services created revenue of € 281 million – 90% of which Screen Digest attributes to online retail services. According to IFPI there are currently 320 online music services in Europe.

1.5. Various new business models are emerging. In 2006, advertising-supported services became a new revenue stream for record companies. Internet advertising is forecast by Forrester Research to overtake traditional radio advertising in 2010.

1.6. The online retail market for music downloads in the US still by far exceeds the European market. This development comes in spite of the fact that there are more broadband connections in Europe than in the United States. In the US consumers "downloaded" more than half a billion single tracks in 2006 while the EU figure stood at roughly one fifth of that amount. On the other hand, the EU is leading the US on mobile phone subscriptions.

Global Digital Music Market(m)	US		EU	
	2005	2006	2005	2006
Broadband lines	43	57	68	94
Single tracks downloaded	353	582	62	111
Mobile phone subscriptions	174	194	622	656

¹ Head of the Copyright Unit, DG Internal Market and Services of the European Commission. My thanks to Julie Samnadda for providing the valuable information on the historical background of Directive 2001/29 and a legal analysis of all the relevant "online rights" contained in this Directive. The views expressed here are my own and do not necessarily reflect those of the European Commission.

² Screen Digest, The rise of the online music market, January 2007

3G mobile subscriptions	3	15	6	27
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Source: IFPI, 2007

1.7. Among the major brand names, two distinct business models have emerged in digital music: (i) pay-per-download and (ii) subscription services. Pay-per-download services meet consumer demand to 'own' music, but with greater flexibility than CDs as tracks can be selected and downloaded on the spot. According to Screen Digest (2007) pay-per-download services still dominate the European digital market and, in 2006, accounted for over 90% of online music spending³.

1.8. Subscription services offer a wide choice of music for a monthly fee, allowing users to access all the music they want with the option to purchase selected tracks. Subscription services offer streaming and radio-play access for a monthly fee. Downloads and burns are available for an extra per-track fee. Some subscription services allows 'tethered downloads' which are transferable to portable players for as long as the consumer remains a subscriber. Another subscription-based service is so-called "podcasting", i.e., services that distribute syndicated programmes for consumption on a portable device like an iPod (hence the term "podcasting").

2. ONLINE LICENSING

2.1. In the era of online exploitation of musical works, commercial content providers need a licensing policy that is in line with the ubiquity of an on-line service. In 2004 record companies digitised and made available their repertoire in bulk. Now, they have started to market, promote and sell music, for online applications such as download, hire, subscription, across Europe. These services can be accessed across Europe and, in consequence, legal certainty for users requires copyright to be cleared throughout the EU.

2.2. While the provision of music content in the online environment has become international in scope, the traditional collective rights management structure has remained national and thus territorial in scope. But content providers see the requirement of territory-by-territory management as an impediment to the roll-out of new cross-border online services. Rights-holders state that complications inherent in the territory-by-territory licensing process deprive them of online revenue. Online content providers require copyright cross-border or trans-national clearance in line with their international reach and clearance services. These services cannot be provided effectively or efficiently when copyright clearing services have remained mostly national in scope.

2.3. In light of the new online service offerings, EU copyright policy must shift toward facilitating the EU wide licensing process. Policy should focus more than before on fostering market entry by new service providers and the development of innovative digital services; especially when digital services are supplied across EU borders. Wider dissemination of European works and phonograms on an EU wide basis also is an essential component in fostering cultural diversity and the creation of a European cultural identity.

³ Screen Digest, The rise of the online music market, January 2007, page 13.

2.4. In order to achieve these goals, EU policy tools must also become more flexible. Updating of existing copyright rules should be made more flexible. This is why the Commission tested a new instrument, the Commission recommendation. On 18 October 2005 the Commission adopted a recommendation on collective cross-border management of copyright and related rights for legitimate online music services ("the Recommendation")⁴.

2.5. A recommendation is a non-binding instrument introduced under Article 211. To that extent, it is introduced as part of the Better Regulation agenda. The recommendation opted to interpret Treaty rules that apply to the cross-border management of certain "online" rights. It also recommends measures on transparency and governance. Some would have preferred a binding legal instrument. A recommendation does not exclude recourse to legislation. It is often seen as a first step in preparing a subsequent legislative approach.

2.6. As the Recommendation opted for a "light touch" non-binding approach to the matter of EU-wide online licensing, the Commission intends to monitor commercial developments in regular intervals. In that way, the recommendation is comparable to a sector enquiry. It should allow the Commission to better understand collective licensing of online rights. It allows the Commission to monitor the market and, eventually, either update the recommendation or prepare binding rules.

2.7. In order to increase the Commission's understanding of the online licensing markets, we will ask stakeholders to report, if possible with concrete examples, and comment on a series of relevant questions, such as:

- (1) What are the tenders that are underway which envisage EU-wide licensing arrangements?
- (2) What are the EU-wide licensing arrangements that have been set up?
- (3) Which online service providers benefit from EU-wide licenses for their pan-European retail or other activities?
- (4) What types of online services are most interested in obtaining EU-wide licenses?
- (5) What legislative or other types of obstacles have been encountered in setting up EU-wide licensing arrangements?

3. WHAT ARE THE RELEVANT "ONLINE" RIGHTS COVERED BY THE RECOMMENDATION?

3.1. At Community level, the legal framework for copyright in the digital environment is the Information Society Directive 2001/29/EC⁵ (the "Directive"). The aim of this Directive is twofold: to implement the Community's obligations under the WIPO WCT

⁴ Recommendation 2005/737/EC, OJ L 276 of 21 October 2005.

⁵ OJ L 167 of 22 June 2001, p. 10.

Treaty and the WIPO WPPT Treaty adopted in 1996⁶ which update copyright for the digital environment and to harmonise certain aspects of copyright and related rights,⁷ including the exceptions to those rights.

3.2. The Community's international obligations in the area of copyright and related rights flow principally from the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement'). The other relevant conventions are the Berne Convention, the Rome Convention, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Although the Community is not a party to the Berne Convention (and indeed could not be, since membership of the Berne Union is confined to States), it is required to comply with Article 1-21 of the Berne Convention by virtue of Article 9 of the TRIPS agreement.⁸

3.3. In order to comply with the obligations introduced under the WCT and the WPPT, the Directive harmonises:

- the exclusive right of reproduction which fully applies in the digital environment (Article 2 of the Directive and Article 1(4) WCT; Article 7, 11 and 16 WPPT and Agreed Statements);
- The exclusive right of communication to the public and the right of making available (Article 3 of the Directive and Article 8 WCT; Article 10, 14 WPPT and Agreed Statements).

3.4. In the Recommendation, these three rights are referred to as the relevant "online" rights because they are harmonised at Community level with a view of facilitating cross-border exploitation of copyright protected works or phonograms. Therefore, the term "online rights" does not intend to create new categories of rights not already present in the relevant body of Community directives.

3.5. It is, in particular, the introduction of the right to "make available" works or other subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them that has introduced the "digital agenda" to

⁶ Recital 15 of the Directive states that the those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so called "digital agenda" and improve the means to fight piracy worldwide.

⁷ It is clear that the Copyright Directive is intended to be a harmonising directive, designed above all to 'help to implement the four freedoms of the internal market' and 'provid[e] for a high level of protection of intellectual property', cf. opinion of Advocate General Sharpston in Case C-306/05 SGAE v Rafael Hoteles SL at point 43. The Opinion was rendered on 13 July 2006. The Court of Justice meanwhile confirmed this conclusion in Case 306/05 SGAE v Rafael Hoteles at point 36.

⁸ That Agreement is found in Annex 1C to the Agreement establishing the World Trade Organisation, (10) to which the Community is a party. Articles 9–13 of Section 1 of Part II of the TRIPS Agreement entitled "Copyright and Related Rights" deal with the substantive standards of copyright protection. Article 9 (1) of the TRIPS Agreement obliges WTO Members to comply with Articles 1–21 of the Berne Convention (1971). Through their incorporation, the substantive rules of the Berne Convention (1971) have become part of the TRIPS Agreement and provisions of that Agreement have to be read as applying to WTO Members.

copyright policy. The “making available” right, as it is known, is a right formulated with the Internet and cross-border exploitation of copyright in mind and thus most closely reflects the potential of the online environment and on-demand services available online⁹.

3.6. In the realm of Internet services, the making available right was tailored to cover permanent "downloads" (which are potential substitutes for retail sales). The legislative history of the EU Directive on the harmonisation of certain aspect of copyright and related rights in the information society (the “Information Society Directive”)¹⁰ is very clear on this point. In the Explanatory Memorandum for the Original Proposal for Directive 2001/29 (COM (97) 628), the Commission states:

"A range of such on-demand services has already emerged in the European market, starting in 1995 and 1996, particularly in the United Kingdom, France and Germany, although still at a prototype or trial stage. Interactive "on demand" services are characterised by the fact that a work or other subject matter stored in digital format is made permanently available to third parties interactively, i.e., in such a way that users may order from a database the music or films that they want; this is then relayed to their computer as digital signals over the Internet or other high speed networks for display or for downloading depending on the applicable licence."¹¹

3.7. Interestingly enough this remains a valid description of the online market for music or film "downloads". Downloads are still the predominant way in which consumers access music online¹². It also shows that the Commission, as far back as 1997, had in mind to deal specifically with online delivery of music or films – activities which were well known by then.

3.8. According to the Recommendation the following exclusive rights are implicated in the provision of protected works or other subject matter electronically at a distance:

3.1. The exclusive right of reproduction

This right is defined in Article 2 of the Directive and covers all reproductions made in the process of online distribution. The right of reproduction is the right to reproduce the work by making intangible copies. Intangible copies include those made by digital means, e.g. upload, download, transmission in a network or storage on hard disk.¹³ Certain temporary

⁹ See, for further details, the opinion of Advocate General Sharpston in Case C-306/05 SGAE v Rafael Hoteles SL at point 37.

¹⁰ Directive 2001/29/EC, OJ L 167, p. 10.

¹¹ Explanatory Memorandum, p. 5.

¹² The rise of online music in Europe, Screen Digest, January 2007, p. 13: "Music is being consumed in increasingly diverse ways, ranging from ring-tones to free-to-listen and podcasts. However, the digital retail model continues to dominate as it has since ... 2004."

¹³ The EC Follow-Up Paper to the Green Paper stated that the aim was to update the right of reproduction from all right-holders –authors and related right-holders - as follows: "*define the exact scope of the acts protected by the reproduction right...to clarify that the digitisation of works and other protected matter, as well as other acts such as scanning, or uploading and downloading of digitised material*

copies are, however, exempted from the reproduction right by virtue of Article 5(1) of the Copyright Directive.

3.2. The exclusive right of communication to the public

This right is set out in Article 3 of the Directive and covers all communications of authors' works to members of the public not present at the place where the communication originates¹⁴. This right covers communication to a public not present at the place where such communication originates, such as broadcasting, cable and online transmissions. As evidenced by recital 23 of the Directive, this right does not cover local communication to the public such as public performances, recitations or the like¹⁵.

Apart from authors, only performers have an exclusive right of communication to the public, but the performers right is limited to live performances only. Performances that have already been broadcast or broadcasts from earlier fixations are specifically excluded¹⁶.

Most commentators appear to assume that the authors' exclusive right of communication to the public covers situations where the transmitter determines the timing of the communication. This would include: (1) webcasting,¹⁷ simulcasting, Internet radio, IPTV and “near-on-demand” services. Communication to the public would occur whether musical works are communicated via personal computers, a television set or to mobile telephones¹⁸. Also multi-channel services that allow the user to choose between specialised programs have been considered as a communication to the public¹⁹.

are, in principle, covered by the reproduction right. It would also cover for the same reasons, transient or other ephemeral acts of reproduction."

¹⁴ The Court of Justice had interpreted the notion of public as an indeterminate number of potential spectators, cf. Case C-306/05, SGAE vs. Rafael Hoteles, at point 37.

¹⁵ *Bechthold*, in Dreier/Hugenholtz, *Concise Copyright*, Information Society Directive art. 3, note 2.

¹⁶ Article 8(1) of the Rental and Lending Right Directive aims at harmonising certain exclusive rights for performers, phonogram producers and broadcasting organisations with regard to broadcasting and other forms of communication to the public. According to Recital 20 of the Directive Member States are, however, free to provide performers broader protection.

¹⁷ A **webcast** is similar to a broadcast television program but designed for internet transmission. A **simulcast** is a “**simultaneous broadcast**”, and refers to programs or events broadcast across more than one medium at the same time. **Streaming** allows data to be transferred in a stream of packets that are interpreted as they arrive for “just-in-time” delivery of multimedia information. A person/computer receiving information via a computer refers to it as a **download**. Online music provided **on demand** is a downloading service of musical works on demand against or without payment.

¹⁸ For German law, cf. Schricker/v.Ungern-Sternberg, vor §§ 20ff. note 7 and § 20 note 45. There are estimates that 50% of mobile content revenues will be from music. Source: IFPI Digital Music Report 2005. Music services provided to mobile telephones also includes the market for ring-tones and real-tones.

¹⁹ OLG München, ZUM 200, 591.

3.3. The exclusive right of making available

This right covers “on-demand” services²⁰, such as making a work available by allowing for its downloading²¹. The making available right also seems to apply to downloading on a portable device (“podcasting”)²². As opposed to the exclusive right of communication to the public which is only granted to authors, the making available right is accorded to authors, performers and record producers.

3.9. The Recommendation defines “online” rights by reference to the harmonised terminology used in the Directive. In line with the Directive, the Recommendation defines the types of rights in terms of the legal nature of the right, using the terminology of the relevant directives. The Recommendation does not address the potential necessity for collective rights managers to further define the categories of “online rights” by (1) type of use (e.g., the right to reproduce, produce, diffuse or transmit protected works or phonograms) or (2) form of exploitation (e.g., public performance, broadcasting, satellite or cable transmission, webcasting, IPTV, mobile transmissions, mobile television, video-on-demand, etc.). Further monitoring must determine whether it was correct that the Recommendation used the term “online rights” in a way that refrained from creating new categories of rights not already present in the relevant body of Community directives.

3.10. It might become necessary, e.g., when rights are assigned to a rights manager, to further delineate “online” rights according to forms of exploitation. For example, rightholders may well wish to be able to assign some forms of exploitation to a collecting society while retaining other forms of exploitation without assigning them to a collective rights manager. This might become relevant for users of Creative Commons licenses according to which only some forms of use may be reserved while other forms of exploitation are allowed. This *Some Rights Reserved* approach makes it difficult for collecting societies to manage Creative Commons licensed works. Collecting societies

²⁰ The EU Directives grant neighbouring rights holders no exclusive right with respect to not fully interactive services such as webcasting or simulcasting. These rights are covered by national rules on neighbouring rights. In most countries phonogram producers and performers only enjoy a right to receive equitable remuneration for the secondary use of phonograms, which may, under national laws, include webcasting. With respect to broadcasting by wireless means (but not cable-casting, simulcasting or webcasting) Directive 92/100 requires Member States to provide at least a right to ensure that equitable remuneration is paid for the secondary use of a phonogram by a broadcaster (cf. Article 8(2) of Council Directive 92/100 of 19 November 1992, OJ No L 346).

²¹ The EC Follow-Up Paper to the Green Paper stated a preference by Member States “to cover on-demand transmission –without prejudice to any acts of reproduction which are covered by a separate right – by a widely interpreted form of a right of communication to the public.” Electronic delivery would therefore form part of the family of “communication to the public” rights and not part of the family of other rights, such as the distribution right. The aim was to grant this right of communication to the same beneficiaries who enjoy the exclusive right of reproduction in the same digital environment. The stated objective was therefore that both the right of reproduction and the right of communication to the public would coexist alongside each other. With respect to protecting “on demand transmissions”, the Commission Explanatory Memorandum, states: “In economic terms, the interactive on demand transmission is a new form of exploitation of intellectual property. In legal terms, it is generally accepted that the distribution right, which only applies to the distribution of physical copies does not cover the act of transmission.”

²² Schricker/v.Ungerns-Sternberg, § 20, note 46.

generally hold exclusive mandates to collect royalties for all forms of exploitation. Therefore, artists who are members of collecting societies are generally unable to use a Creative Commons license.

3.11. The same might be true for the purposes of the withdrawal of rights. Right-holders may wish to withdraw only certain uses or form of exploitation while leaving others to be managed collectively.

3.12. The principle of a more granular delineation of rights for the purposes of withdrawal and entrustment of these rights to collecting societies has been studied recently in the "*rapport Levy-Jouyet*" on "*l'économie de l'immatériel*".²³ The report contains recommendations on collective rights management which advocate that right-holders have the choice to withdraw all of their rights or only certain categories or forms of exploitation from collective managers²⁴. The third principle of the French recommendations goes even further in advocating that also a commercial user be given the choice to license only certain repertoire or "types of music" that he finds interesting (as opposed to a "blanket license")²⁵. It is interesting to note that the report therefore seems to favour granular choice both at right-holders' and at users' level.

4. THE STATUS OF BROADCASTING

4.1. One form of exploitation that is not included in the Recommendation is broadcasting, including transmissions or retransmission by cable or satellite. This is because broadcasting and satellite or cable transmissions are not considered "online" forms of exploitation. The reason for this is as follows: As opposed to an online music store, broadcasters are often active only in one national territory. They also do not "sell" music online. They use music as background to scheduled programming. For broadcasters, music has a function (and value) that may be different from the value of music for an online retail store.

4.2. By excluding broadcasting and satellite or cable transmissions the Recommendation acknowledges that different licensing models are suitable for these forms of (often national) exploitation. Indeed, first experience with the Recommendation shows that there are marked differences between online retail of commercial phonograms

²³ http://www.minefi.gouv.fr/directions_services/sircom/technologies_info/immatériel/immatériel.pdf

²⁴ **Premier principe, le créateur doit rester maître de ses droits.** Comme c'est déjà le cas dans certaines sociétés telle la SACD, libre droit pour les créateurs de sortir des sociétés au bout d'un délai qui ne saurait dépasser deux ans ; aucune autre formalité ou condition n'est opposable à la demande, la sortie pouvant porter sur l'ensemble des droits ou sur certains d'entre eux seulement.

²⁵ **Troisième principe, l'utilisateur doit pouvoir choisir la fraction du répertoire pour laquelle il souhaite obtenir une licence.** L'utilisateur pourrait ainsi n'obtenir une licence que sur une partie du catalogue géré par la SPRD. Pour éviter une gestion trop fine de ces licences partielles, une « partie » pourrait ne s'appliquer qu'à un type de musique ou à un ayant droit plutôt que titre par titre et il reviendrait à l'utilisateur de mettre en place les outils de vérification nécessaires à la SPRD. Dans tous les cas, le prix de la licence partielle ne saurait dépasser le montant d'une licence complète.

and the secondary use of commercial phonograms as an integral part of a TV programme or radio production.

4.3. As broadcasting or cable and satellite transmissions or cable retransmissions are not covered by the Recommendation debate has arisen on how broadcasters or satellite operators should license when they make broadcasts available "on demand" for later viewing.

4.4. Some broadcasters indicate that the "on demand" delivery of scheduled programming is a form of "time shifting" that should be covered by the (often national) broadcast license. Others believe that the Recommendation should apply to "on demand" services that are licensed under the "making available" right as this is the only right that has a true pan-European vocation. On demand versions are usually destined for an audience that is wider than the original broadcast.

4.5. A literal interpretation of the online Recommendation would not exclude a licensing model in which "time-shifted" online exploitation is covered as an integral part of the broadcast license. But integrating a "time-shifted" on demand service into the broadcasting licence would entail that this "on demand" service can only be made available in the territory of the original broadcast. This is why several broadcasters seem to favour moving to a separate but EU-wide or multi-territorial license for online "on demand" reuse of scheduled programming. EU licenses would be granted using the new "making available" right.

4.6. This latter view may reflect an emerging trend to interpret the "making available" right broadly. A German court recently ruled that an act of making available phonograms did not even require that a copy of the phonogram be downloaded. The court qualified an act of on-demand streaming as covered by the making available right.²⁶ In another case, the Court of Appeal in Cologne ruled that an Internet service provider's offer to save selected digitised television programmes for the user's deferred viewing constituted an act of making available.²⁷ This may reflect the fact that the making available right is the only right formulated specifically for Internet-based services.

4.7. This jurisprudence is significant. Internet radio services that would traditionally be considered as webcasting or streaming-type services are increasingly competing with interactive services or "electronic retail" services, as envisaged by the "making available" right. For example, filtering software might well enable listeners of digital radio to screen the broadcast so as to retain recordings of, for example, the top 20 hits which they can then digitally store on their mobile listening devices (like the Ipod). The digital storage of selected songs, like the digital download of the top 20 hits, would then fall under the "making available" right.

²⁶ OLG Hamburg, judgment of 7 July 2005, 5 U 176/04.

²⁷ OLG Köln, judgment of 9 October 2005, 6 U 90/05.

5. WHO OWNS THESE "ONLINE" RIGHTS?

5.1. There are many right-holders (e.g., authors, composers, publishers, record producers and performers) and rights (e.g., communication to the public, reproduction and making available) that are involved in a single transaction in the electronic provision of music. A separate licence has to be sought from a different collective rights manager i.e. an authors' society, record producer's society and performing rights society for any single transaction. It should also be noted that a licence granted by a collecting society for one form of exploitation does not mean that any other form of exploitation is authorised and so a separate licence has to be negotiated for each form of exploitation.

5.2. Rights of authors, composers and publishers of musical works are administered collectively by authors' societies. Authors, composers and publishers own the rights in the composition of the lyrics and/or the music. In the online environment authors' rights comprise the right of reproduction, the right to communicate musical works to the public including the "making available" of these works to the public. In most Member States, a single society administers the reproduction, public performance and making available rights on a territorial basis. In some Member States, the right of reproduction and the rights of communication to the public are administered by separate societies – again, on a territorial basis.

5.3. Rights of performers, and record producers (record labels) are related rights and remunerate the producers' and the performing artists for use of a sound recording. Performers have the exclusive right to allow: (1) the reproduction of fixations of their performances; (2) the right to receive equitable remuneration if a commercial phonogram is broadcast or communicated to the public²⁸; and (3) the right to make the phonogram available. In most Member States, the performers' right to receive equitable remuneration is administered by a collecting society. Record producers have the right to authorise reproduction and the right to make available sound recordings. Record producers manage their "making available" right for online on-demand services on an individual basis²⁹.

²⁸ Record producers and performers have a right to equitable remuneration if commercial phonograms are communicated to the public, cf. Article 8(2) of Council Directive 92/100/EEC on rental and lending right and on certain rights related to copyright in the field of intellectual property.

²⁹ Individual management of copyright and related rights is not covered by the scope of the 2005 Commission Recommendations on online licensing. With regard to the making available right necessary to be cleared for the provision of on demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, Recital 29 of the Copyright Directive states that collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned. On this basis, the European Broadcasting Union (EBU) advocates mandatory collective management of making available rights of producers and performers in commercial phonograms, in so far as such commercial phonograms are an integral part of TV or radio productions.

6. HOW ARE "ONLINE" RIGHTS LICENSED IN DIFFERENT TERRITORIES?

6.1. Cooperation among collective societies across borders for the exploitation of non-domestic works is conducted via “reciprocal representation agreements.”³⁰ As the above groups of right-holders (authors, composers, publishers, performers and, for “secondary uses”³¹ also the record companies) tend to entrust their rights to collective rights management societies established in their home territory, these right-holder’s works becomes part of the repertoire of the collecting society in the territory where he is domiciled (the “management society”).

6.2. If copyright works are accessible in another territory, the management society active in that territory (the “affiliated society”) will enter into reciprocal agreements with the management society, allowing the affiliated society to commercially exploit the management society’s repertoire in its own territory. In effect, this means along with its own national repertoire, an affiliate also obtains the right to the repertoire of the management society with which it has a bilateral arrangement. Via a network of bilateral reciprocal agreements, each local collective rights manager represents both its own repertoire and the repertoire of the collective with which has entered into a bilateral reciprocal agreement. But the representation mandate of the affiliated society is always limited to its national territory.

6.3. In order to facilitate the creation of a network of the above bilateral reciprocal agreements, collective societies have formed alliances (e.g. CISAC for authors’ rights in musical works, BIEM for authors’ rights in mechanical reproduction, SCAPR and IMAE for performers’ rights in musical works). Most collective societies belong to one of the principal umbrella organisations mentioned above. These alliances have led to model agreements which cover cross-border licensing, collecting and distribution of royalties. On the basis of these model agreements, collective societies have concluded bilateral reciprocal representation agreements.

6.4. Cross-border collective management of the rights thus entails management services that one collective rights manager, the affiliate society, provides on behalf of another collective rights manager, the management society. However, the model agreements and the bilateral reciprocal representation agreements concluded pursuant to them apply a series of restrictions which are contrary to the fundamental EU principle that services, including collective management of copyright or individual services associated with the collective management of copyright, should be provided across

³⁰ The term “reciprocal” in the context of these private agreements means “in return for of an identical grant”. It does not connote “**reciprocity**” for which there is a specific meaning in international law especially in the international copyright conventions i.e. where rights are granted by one country to its nationals, the nationals of another country can only have the benefit of those rights where there is commensurate recognition of these rights by the other country.

³¹ The right to equitable remuneration if commercial phonograms are broadcast by wireless means or communicated to the public as contained in Article 8(2) of Council Directive 92/100/EEC on rental and lending right and on certain rights related to copyright in the field of intellectual property is a secondary use of a commercial phonogram.

national borders without restriction based on nationality, residence, place of establishment.³²

6.5. The current practice of collective management of copyright on a national territorial basis requires that each commercial user requires a licence from each and every relevant collective rights manager in each territory of the EU in which the work is accessible.

6.6. In order for these reciprocal representation agreements to cover at least the aggregate repertoire of all European collective societies for one particular form of exploitation of one particular right in all European territories (e.g. the "making available" right that has to be cleared to sell musical works online), it is necessary that European collective societies conclude among themselves a minimum of 351 bilateral reciprocal representation agreements. This figure is based on the hypothesis that there would be a minimum of one collecting society per Member State that is responsible for the "making available right". This society would have to have a reciprocal representation agreement with the 26 other societies that administer this right in the other Member States. Of course, in reality there is more than one collecting society in each Member State as often each category of rightholder is administered by a separate society and sometimes a particular right (reproduction) is administered by a society distinct from that which administers the right to communicate to the public.

6.7. In order to determine the total number of bilateral combinations necessary among 27 European collecting societies, one needs to look at the number of combinations of k (=2) out of n (=27). This can be determined according to the following formula:

$$\frac{n!}{k!(n-k)!} = \binom{n}{k} = \frac{27!}{2!25!} = \frac{26 \cdot 27}{2} = 13 \cdot 27 = 351$$

6.8. Maintaining this network of reciprocal arrangements among 27 societies comes at a considerable management cost. Moreover, not all European collective societies have concluded bilateral representation agreements among themselves with the effect that there is no seamless system that covers the aggregate EU repertoire for any type of right or any form of exploitation. Gaps in the network of reciprocal representation remain.

6.9. The description above shows that legal complications, more than technical hurdles, stand in the way of an efficient and seamless online licensing of protected works. That is because the arrangements in which copyright and related rights are managed never contemplated the plethora of new platforms of distribution that have emerged in the digital era. Indeed, there were no digital services when reciprocal arrangements that bind each collecting society to limit its activities to its national territory were set up. As reciprocal arrangements tend to oblige the partner collectives to limit their activities to one particular territory, they do not accommodate international business models. But

³² The Court of Justice has dealt with reciprocal representation agreements in the context of licensing of physical premises e.g. *discothèques Ministère Public v Tournier* Case 395/87 1989 ECR 2521; *Lucazeau v Sacem* Joined Cases 110/88, 241/88 and 242/88 1989 ECR 2811.

most of the above-mentioned new digital services are potentially international in scope and therefore need to clear music rights in order to operate legally.

6.10. Releasing or re-releasing music on the Internet on an international scale is not covered in the traditional licensing of musical works. This means that online music stores or broadcasters who wanted to offer services on the Internet needed to return to the authors' societies and the record companies to renegotiate licensing contracts or conclude new ones for the new digital platforms. Instead of negotiating Internet or mobile use on an EU-wide basis, the clearance of rights was again done territory by territory. But territorial rights management has an effect on the timeline of the launching of online services.

6.11. Due to the technical accessibility of an online service throughout the European territories, providers of online services require multi-territorial licenses for all of the "online" rights mentioned above.

6.12. But the market segment in which this appears most important is the growing market in interactive and on demand services with an array of options for the users which are provided electronically at a distance. Ensuring that optimal conditions exist for the proper management of the new "making available" right will ensure its smooth transition into the market place.

6.13. Digital technology is fast rendering the old territorial system of managing intellectual property obsolete. New digital services mean easier delivery than in the analogue era. This includes easier delivery of services across the EU. However, under the current system, content destined for the entire continent's consumption may be subjected to clearance 27 times through 27 different national authorities. For online operators this constitutes a considerable administrative burden and in some Member States online licences are not even available.

6.14. Due to the technical accessibility of an online service throughout the European territories, innovative content providers require multi-territorial licenses as a way of insurance against copyright infringement action in the different jurisdictions in which the services may be accessed. Ensuring that optimal conditions exist for the proper management of the "making available" right will ensure its smooth transition into the market place. The market segment in which this right will operate is the growing market in interactive and on demand services with an array of options for the users which are provided electronically at a distance.

7. HOW WOULD THE MARKET HAVE EVOLVED WITHOUT THE ONLINE RECOMMENDATION?

7.1. In 2005 the Commission reviewed how copyright and related rights are being commercially exploited across the EU. This review focused on how the new "making available" right was licensed. Stakeholders were consulted in July 2005.³³ This exercise

³³ Commission Recommendation 2005/737 *on collective cross-border management of copyright and related rights for legitimate online music services*, OJ L 276, 21.10.2005, p. 54–57. available at: http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm#20051012

revealed that the current management of copyright in musical works and phonograms – within defined territories that usually are national borders – was a source of considerable inefficiency. And it also hinders the entry of new Internet-based services that rely on protected works and phonograms.

7.2. Stakeholders stated that for most forms of exploitation – in particular the new making available right – the Internal Market has become the appropriate reference point. The effect of digitisation which allows a protected work to be transmitted cross-border has been felt across all the copyright industries. This implies that, in the emerging multi-territorial environment of online exploitation of copyright-protected works, access to these works needs to be as efficient and simple as possible, while maximising the revenue that is transferred to right-holders.

7.3. Stakeholders also stated that the ubiquity brought about by the Internet, as well as the digital format of products such as music files, are difficult to reconcile with traditional reciprocal agreements. The traditional reciprocal agreements among collecting societies did not foresee the possibility that the affiliated society would grant a licence beyond its home territory. As a consequence, the traditional reciprocal agreements require a commercial user wishing to offer e.g. a musical work, online or offline to its clients to obtain a copyright licence from every single relevant national society.

7.4. Before issuing a Recommendation, the Commission looked whether there were alternatives. In particular, previous attempts to amend traditional reciprocal agreements to make them a suitable basis for supplying multi-territorial copyright licences were assessed.

7.5. Multi-territorial licensing has been introduced for the authors' right of online *communication to the public* including making available for the provision of music downloading or streaming use of authors' rights (Santiago).³⁴

7.6. Multi-territorial licensing has been introduced for *online reproduction*, which covers webcasting, on demand transmission by acts of streaming and downloading (BIEM/Barcelona).

7.7. But the structure put in place by the parties to the Santiago and BIEM/Barcelona Agreements results in commercial users being restricted in their choice to the collecting society established in their own Member State for the grant of the multi-territorial licence. This restriction is described in the Agreements as the so called “authority to licence” and has the effect of allocating customers to the collective rights manager in which the content provider has its economic residence or URL, a “customer allocation clause” -- contrary to the fundamental freedom to seek cross-border services.

7.8. In addition, the Santiago agreement expired at the end of 2004 and has not been renewed. This means that authors' rights currently need to be cleared on a territory-by-

³⁴ The Agreement was notified to the Commission in April 2001 by the collecting societies of the UK (PRS), France (SACEM), Germany (GEMA) and the Netherlands (BUMA), which were subsequently joined by all societies in the European Economic Area (except for the Portuguese society SPA) as well as by the Swiss society (SUISA).

territory basis. Furthermore, authors' societies remained reluctant to adopt a EU-wide licensing model and argued that authors are best served by a collective rights manager with physical proximity to the user in the provision of each of the service elements involved in the collective management of copyright but especially the enforcement, collection aspects which they argue cannot properly be provided by a distance even with the use of digital technology.

8. THE ONLINE RECOMMENDATION

8.1. This is why the European Commission, on 18 October 2005, adopted a Recommendation on the management of online rights (the "Recommendation").³⁵ The Recommendation implies that one way forward toward achieving EU-coverage is that rights are aggregated into attractive packages (repertory). This repertory can then be licensed to online music shops by one collecting society on an EU-wide basis in one single transaction.³⁶ Instead of 27 local licenses the Recommendation seeks to foster a single package comprising access to attractive repertoire at little overhead.

8.2. In order to achieve this goal, the Recommendation stipulates that right-holders should have the choice to authorise any existing collecting society or even a newly created licensing platform with managing their works directly across the entire EU. Right-holders' choice should offer the most effective model for cross border management because free choice gives right-holders an incentive to entrust their repertoire to the best EU-wide licensing platform available.

8.3. In a first phase, existing societies or new platforms would compete amongst themselves to be the authors, composers or publishers online licensing platform of choice. They can do that by offering an efficient service, adopting a transparent policy on deductions and governance and by offering negotiating skill and even clout vis-à-vis commercial users.

8.4. This first phase can be described as the "tender phase": Existing or new societies compete vigorously to be selected as the EU-wide music licensor of choice. Authors, composers and publishers have the choice of either mandating one society with the EU-wide management of their works or to give a mandate to several societies who again compete among each other to license the entrusted repertoire to commercial users. In the "tender phase" competition therefore takes place "upstream" when societies compete for attractive repertoire. Naturally, authors or their publishers are free to re-tender their repertoire in regular intervals.

8.5. In a second phase, as good quality service is measurable and a reputation for good service travels quickly, it should be expected that an efficient licensing platform will

³⁵ http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm#20051012

³⁶ This solution is inspired by Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, in *Journal of Competition Law and Economics* 2005 1(3) pp. 541-593, who describes the formation of "cleared parcels" which greatly overcome fragmentation of copyright in a single song and thus render licensing much more efficient.

quickly assemble an attractive repertoire for EU-wide online licensing. In this second phase, competition will shift "downstream" because societies, on the basis of representing attractive repertoire, attempt to attract the business of commercial users.

8.6. This might well provide most authors, composers and publishers with an incentive to pool their repertoire into a major online licensing platform. To be commercially attractive, these platforms could well be structured as "open platforms" which means that smaller publishers or smaller collective societies can pool their repertoire into the platform as well. If necessary, there could be an obligation for major platforms to also include so-called difficult or "niche" repertoire into the platform.

8.7. Some commentators are even suggesting that the new EU online platforms could conclude "second tier" reciprocity arrangements among themselves in order to create one "single entry point" for EU-wide commercial users. This development would have an added efficiency benefit because a single entry point among three EU licensing platform will come at a lower cost than a single entry point that has to be organised among 27 collective societies.

8.8. The reasons are as follows: as stated above, the total number of bilateral combinations necessary to create a single entry point among 27 European collective societies would be 351, as evidenced in the formula below:

$$\frac{n!}{k!(n-k)!} = \binom{n}{k} = \frac{27!}{2!25!} = \frac{26 \cdot 27}{2} = 13 \cdot 27 = 351$$

8.9. Now, if you apply the formula to "second tier" reciprocity you will see that the single entry point only requires only three bilateral combinations:

$$\frac{n!}{k!(n-k)!} = \binom{n}{k} = \frac{3!}{2!1!} = \frac{3 \cdot 2 \cdot 1}{2 \cdot 1} = 3$$

8.10 What is, however, most important with the proposed new licensing platforms is that the emergence of these platforms will be the result of a competitive tendering process. This will be good for enhancing or maintaining the value of copyright and related rights in musical works. Allowing right-holders to choose a collecting society outside their national territories for the EU-wide licensing of the use made of his works considerably enhances right-holders' earning potential.

8.11 In this way the Recommendation focuses on striking the right balance between rewarding creators and fostering new digital platforms for the delivery of music. In lowering transaction costs of access to protected content, it will not compromise right-holders' income. Better management of rights across the EU does not therefore need to lead to a "race to the bottom" with respect to the value of musical works and IP protection for creators.

9. GOVERNANCE AND TRANSPARENCY

9.1. The Recommendation also includes rules on governance, transparency, dispute settlement and accountability of collective rights managers, whether they manage rights directly or by virtue of reciprocal arrangements.

9.2. Governance is not an end in itself. The Recommendation is based on the premise that governance rules setting out the duties that collective rights managers owe to both right-holders and users will introduce a culture of transparency and good governance enabling all relevant stakeholders to make an informed decision as to the licensing model best suited to their needs. This should stimulate EU-wide licensing and promote the growth of legitimate online music services.

9.3. Certain collective rights managers have begun to implement certain of the provisions linked to governance (points 10-15 of the Recommendation). In some cases, music publishers are being offered greater representation on the board. In other instances, payments to rightholders including music publishers switched from a yearly to a quarterly basis. There appears to be an increased willingness to acknowledge or discuss deductions made by the rights manager for purposes other than the management services provided. The "*rapport Levy-Jouyet*" on "*l'économie de l'immatériel*"³⁷ also stresses the link between more competition and better governance³⁸.

9.4. Closely linked to the issue of governance is the effectiveness of dispute resolution. The Recommendation invites Member States to provide for effective dispute resolution mechanisms at national level. Effective dispute resolution should be available in relation to (1) tariffs; (2) licensing conditions; (3) entrustment and (4) withdrawal of online rights. The applicable rules and principles in relation to dispute resolution might need to be strengthened in the future.

9.5. In the future, the Commission will need to assess whether the Recommendation brought about sufficient changes in relation to transparency of rights management and whether it increased the effectiveness of dispute resolution. It is also necessary to assess whether the Recommendation brought about sufficient safeguards for individual rightholders with respect to (1) tariffs; (2) licensing conditions; (3) entrustment and (4) withdrawal of online rights. Further analysis will be necessary to see whether the Recommendation should further address rightholders participation in setting deductions for purposes other than for the management services provided and whether it provides sufficient safeguards for commercial users.

10. FIRST EXPERIENCE WITH THE RECOMMENDATION

10.1. First experience with the Recommendation shows that EU-wide online licensing could actually work. It appears that EU-licensing will be offered by newly created platforms that are jointly operated by existing collecting societies. These platforms have the vocation to pool several publishers' or societies' repertoire and license it in one transaction across the EU. Recent platforms include one for Anglo American and German

³⁷ http://www.minefi.gouv.fr/directions_services/sircom/technologies_info/immatériel/immatériel.pdf

³⁸ **Deuxième principe, les coûts de la gestion collective doivent être transparents.** La qualité des informations financières transmises aux créateurs doit être améliorée, notamment sur les frais de gestion bruts, le coût des différentes activités de collecte et les flux financiers entre sociétés. De même, à l'égard des utilisateurs, les critères de calcul des droits à payer pour l'usage des œuvres gérées par la SPRD devraient être affichés sur le site des SPRD.

repertoire and another one for the French and Spanish repertoire³⁹. A further announcement involves small and medium sized publishers mandating a collecting society to set up an EU online licensing platform for them⁴⁰.

10.2. In spite of these developments, there is some criticism. One argument states that the Recommendation's prime beneficiaries are major, international music publishers that control the repertoire that is essential for successful online licensing. The Recommendation is seen as an instrument favouring large repertoire and allowing music majors to better exploit the Internet. According to this view right-holders should indeed have the possibility to entrust their repertoire for EU licensing to one or several societies of their choice, but this choice should not be to the detriment of solidarity and equal treatment of all right-holders. This leads to the argument that major music publishers should not be free to exercise this choice in an unfettered manner. Smaller right-holder who had no publishing contract would be left behind. In this view the Recommendation did not strike the right balance between big and successful right-holder and their smaller peers.

10.3. Others criticise that Commission policy with respect to online licensing is too much directed to facilitate licensing for big right-holders and big international users. This is seen as detrimental to "cultural diversity".

10.4. Still others state that the "tendering principle" espoused in the Recommendation does not go far enough. These critics argue that all national monopolies in collective management of rights should be broken up for all forms of exploitation - not just the Internet. The best way to achieve this would be an obligation for all right-holders to tender their repertoire in regular intervals.

10.5. A tentative answer to these critical remarks would consist in pointing out that emerging EU licensing platforms do not appear to be limited to the repertoire of international music publishers. Despite all fears in this respect, EU direct licensing is also not developing into the exclusive domain of Anglo-American music publishers. As mentioned above, platforms for the repertoire of small and medium sized repertoire are emerging alongside those of the big music publishers. In addition, other platforms comprise the entire repertoire of existing collecting societies – big and small. That means that big and small repertoire will be available online at equal terms. The two examples above show that EU licensing, far from being a threat, can actually be a motor for cultural diversity.

10.6. In light of this it is sometimes difficult to understand why direct licensing or tendering of repertoire for such a purpose would be perceived as a threat for cultural

³⁹ On January 20, 2007, EMI Music Publishing and CELAS (a new online licensing joint venture set up by GEMA and MCPS/PRS) have signed the EU-wide licensing arrangements. On January 20, 2007, the French society SACEM and the Spanish society SGAE announced setting up a joint venture for the EU-wide licensing of their respective repertoires.

⁴⁰ On January 19, 2007, the UK Music Publishers Association (MPA), representing small and medium sized music publishers, announced that their repertoire would be available for EU wide online licensing through "Alliance digital", run by the UK society MCPS/PRS.

diversity or the value of music. If a right-holder wants, for certain forms of exploitation, license his repertoire directly by means of an intermediary of his choice, this should be a commercial option available in a market economy. His choice will be motivated by the attempt to safeguard the value of his music in the online space. Experience shows that direct licensing can nowadays be exercised by small and big publishers alike. Direct licensing is also an option that can be exercised by Anglo American publishers and Continental collecting societies (SACEM/SGAE). Cultural diversity does not appear in danger.

10.7. On the other hand, the Recommendation forces no right-holders to engage in direct licensing - in a functioning internal market one should respect the freedom of those who chose this option. It is certainly one way to safeguard the value of music but it is not the only one.

10.8. Finally, it appears prudent to wait how the tendering of repertoire for direct online licensing will develop in the future before extending this principle to other forms of exploitation. As the Recommendation is not a binding act, the national legislator is however free to act in this respect, if he wished to do so.

10.9. The Recommendation is less controversial on the governance front. On this front, the international confederation of music publishers is working with GESAC, the EU umbrella of collectives, towards developing online EU-wide licensing activities within the framework of the Recommendation. The Recommendation has also triggered dialogue on improving governance principles with respect to all collective management of copyright.

10.10. Collecting societies have also embraced some of the governance elements of the Recommendation. In some cases, music publishers are being offered more seats on the board (in line with Point 13 of the Recommendation and the "economic weight" criteria) and accounting vis-à-vis publishers is being switched from a yearly to a quarterly basis (this goes beyond the Recommendation). There is also an increased willingness to be more transparent about deductions made by the collectives for purposes other than the management services provided.

10.11. Of course, the emergence of major online platform will require effective dispute resolution. Point 15 of the Recommendation addresses this issue. In the absence of an EU arbitration panel, Member States are invited to provide for adequate and effective means for resolving disputes, especially those that arise with respect to online tariffs. We must remain open to further strengthening the Recommendation in this respect.

10.12. As stated above, EU-wide online licensing can be an opportunity toward promoting the value of music and thus also promoting the different cultures and their repertoires across the EU.

11. CONCLUSION

11.1. The 2005 Recommendation on EU-wide online licensing and the cross-border collective management of copyright across the EU is one of an examples of the paradigm shift away from harmonising rights toward improving the way how these (harmonised)

rights are exploited commercially across Europe. This approach should reduce the cost of music licensing without reducing income for Europe's creators.

11.2. The focus on fostering market entry for interactive and on demand services will influence the way in which the Commission approaches copyright policy in the future. In order to foster innovation and market entry, policy makers must create a framework in which entrepreneurship, new business models and risk-taking are rewarded. Policy regarding intellectual property should facilitate the development and dissemination of new interactive and on demand services.

11.3. It is therefore essential that obtaining works that are protected by these intellectual property rights is organised as efficiently as possible. Licenses, as a default option, should comprise a territorial scope that is in line with their emerging business strategies. But it is equally important that efficient online licensing gives creators an economic incentive to make their work available online.

11.4. In order to achieve efficiency and market entry the Commission will focus on the management of intellectual property rights and engage in regular evaluation of the existing harmonised rights, especially the "making available" right.