Working toward the next generation of copyright licenses

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1. INTRODUCTION

The copyright and knowledge-based economy unit is taking its role of promoting growth and employment in the European Union seriously. We are therefore working hard to accompany the digital revolution with good copyright policies.

What we want to achieve is that European consumers can access their favourite works, be it music, films or literature, wherever and whenever they please. This requires us to create a legal framework that allows protected works to be available on all new platforms of distribution – from mobile phones to the Internet. And availability is not enough. These works should be available across all of the European Union as quickly as possible and not after years of licensing contract negotiations.

2. WHY THE NEW FOCUS ON MARKET ENTRY?

The Information Society added a variety of innovative services which are provided electronically at a distance or on specific request from the consumer.

Electronic services are one of the key drivers for economic growth and future prosperity. These innovative electronic services require "new business models" to distribute valuable works digitally across national borders. To cite a few examples of what we observe in the area of new business models: (1) international online music shops; (2) video-on-demand services; (3) making available of scheduled programming at a later stage "on demand" by broadcasting organisations or (4) the new generation of "live" online television services.

EU copyright policy must shift toward fostering market entry and the development of such innovative digital services; especially as digital services are supplied across EU borders.

3. LEGAL HURDLES STAND IN THE WAY OF NEW ONLINE SERVICES

Experience over the past year shows that legal complications, more than technical hurdles, stand in the way of an optimal dissemination 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. When music collecting societies set up their copyright licensing and monitoring systems, did they imagine new business models such as international online music shops, video-on-demand services or "live" online television services such as the one announced just last week by Walt Disney?

Of course they did not. There were no digital services when collectives set up their national systems and the reciprocal arrangements that bind each collective to limit its

activities to its national territory. Reciprocal arrangements tend to oblige the partner collectives to limit their activities to one particular territory and are thus anathema to international business models. But all of the new digital services are potentially international in scope and all of them need to clear music rights in order to operate legally. As a result, it has become necessary to sort out the way that copyright and related rights in musical works are administered in the European Union.

After studying the matter in 2005, we discovered that music rights in the area of public performances are probably the thorniest because they are traditionally licensed on a territorial basis. This is because music is mostly licensed for traditional forms of local exploitation, such music used in discothèques, bars or restaurants and for national television programming.

Releasing or re-releasing music on the Internet on an international scale was simply not covered in the traditional licensing of musical works. That meant 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.

And in this process, arguably, a golden opportunity was missed. Instead of negotiating Internet, online 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.

Take the example of the iTunes music store. This service was launched on 28 April 2003 in the all of the US. There was no single launch date for the European Union in 2003. Instead, the service was introduced over a year later in the United Kingdom, Germany and France on 15 June 2004. Consumers in Belgium, the Netherlands, Luxembourg, Spain, Italy, Portugal, Finland, Austria and Greece had to wait until 26 October 2004. In Denmark, Norway and Sweden the service only became available on 10 May 2005 – over two years after the US launch date.

This time lag is not just a disadvantage for European consumers; it is also involuntary boost for online piracy. Legal and readily available online services are the best tool against piracy and if legal hurdles stand in the way of introducing legal online stores, the technology will be there to swap these songs for free.

In order to clear the legal hurdles that stand in the way of efficient online licensing, we have adopted an ambitious reassessment of traditional policies in the field of copyright and related rights. In order to understand this reassessment, let us first look at EU policy and how it was conducted up to now.

4. THE POLICY SO FAR

In creating an internal market for goods and services based on content protected by intellectual property rights, traditional internal market policy was essentially concerned with substantive aspects of intellectual property, such as the scope of these rights, the introduction of related rights (such as producers' or performers' rights) and the length of

protection for creators and corporate right-holders (record labels and film producers). EU directives focused on substantive copyright and related rights because it was thought that harmonisation eliminates legal barriers that stifled free movement of protected goods or services across the Union.

Therefore, the Commission adopted several directives harmonising the substantive law governing copyright at EU level. At present, copyright is governed by six sector-specific EU directives: 91/250 Computer Programs, 92/100 Rental/Lending Right, 93/83 Satellite and Cable, 93/98 Term of Protection, 96/09 Legal Protection of Databases and 2001/84 Artists Resale Right. Two more recent directives, the Information Society (2001/29) and Enforcement (2004/48) directives are horizontal measures that apply to all categories of copyright.

The Information Society Directive (2001/29) introduced 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.[2] The introduction of this EU-wide right of "making available" has brought this development to the fore.

It is thus the Information Society Directive which, more than any other piece of EU legislation, that is in tune with the rapid technological change that allows the electronic delivery of protected works to anyone anywhere in the European Union.

4.1. The "making available" right

The policy of the Community and its Member States with respect to electronic delivery of protected works was first developed in the Green Paper on Copyright and Related Rights in the Information Society[3] and the Follow Up to the Green Paper[4]. From the outset, the Commission stated that:

> *"... in the information society works will increasingly be circulated in non-material form. This means that the rules which apply will very often be those on freedom to provide services*[5]."
>
> *"The class of existing rights was felt to be adequate, both to permit new exploitation and to maintain satisfactory protection for the right-holders. However, it was underlined that certain concepts were going to move in new realms and that it would be necessary to "adjust" them as a result. The rights of reproduction, communication to the public and rental were all suggested to be likely to take on new characteristics. The participants were also interested in the question of*

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2 Article 3 of Directive 2001/29/EC, OJ L 167, p. 10.

3 COM(95) 382 final.

4 COM(96) 568 final.

5 Green Paper, COM (95) 382 final, p. 10

exhaustion of rights, and deemed in particular that this principle does not apply for the services which will be distributed in the information society.[6]"

The "making available" right, as it is known, is the first EU right formulated with Internet services in mind. And in the realm of Internet services, the making available right was tailored to cover not just "streaming" type services but also 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")[7] 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"[8]

This remains a valid description of the online music market as it functions today and 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. With respect to protecting "on demand transmissions", the Commission's Explanatory Memorandum further stated:

"*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."*[9]

It was proposed to protect digital "on demand transmissions on the basis of a communication to the public right which would include the right of making available. This would be based on an adaptation of the traditional notion of communication to the public.

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6 Green Paper, COM (95) 382 final, p. 17

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

8 Explanatory Memorandum, p. 5.

9 Explanatory Memorandum, p. 16.

4.2. The other relevant "online" rights

But the 2001 Information Society Directive harmonises a whole series of new exclusive rights that need to be respected in supplying musical works online. The following exclusive rights are implicated in the provision of protected works or other subject matter electronically at a distance:

– The exclusive right of reproduction as defined in Article 2 of the Information Society Directive 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.[10] Certain temporary copies are, however, exempted from the reproduction right by virtue of Article 5(1) of the Copyright Directive.

– The exclusive right of communication to the public set out in Article 3 of the Information Society Directive covers all communications of authors' works to members of the public not present at the place where the communication originates.[11]

– The right of equitable remuneration for certain other categories of right-holder as set out in Article 8 of Directive 92/100 on rental right and lending right and on certain rights related to copyright. The exclusive right of communication to the public and the right of equitable remuneration cover the communication to the public of musical works and other subject matter by: (1) webcasting[12] (which includes Internet radio,

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[10] 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 an* ***downloading*** *of digitised material are, in principle, covered by the reproduction right. It would also cover for the same reasons, transient or other ephemeral acts of reproduction*"

[11] 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*."

[12] A **webcast** is similar to a broadcast television program but designed for internet transmission. A s**imulcast** is a "**simul**taneous

simulcasting, and "near-on-demand" services) whether musical works are communicated via personal computers or to mobile telephones[13].

– The exclusive right of making available that covers "on-demand" services[14] which is accorded to authors, performers and record producers.

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

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. But doe we have optimal conditions for the proper management of the "making available" right and all the other rights associated with online delivery?

5. CURRENT LICENSING CONDITIONS ARE NOT OPTIMAL

Take the example of online music licensing. A potential provider of a new online service will face the following situation:

– There are many right-holders and rights 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.

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broad**cast**", 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.

13 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.

14 The Copyright Directive grants 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. This includes music included in video on demand online services whereby films, televisions programs are downloaded on demand against or without payment.

– 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;

– The above implies that management of online exploitation of musical works is complicated by the fact that: (1) a multitude of rights (e.g., communication to the public, reproduction and making available) that (2) belong to a multitude of right-holders (e.g., authors, composers, publishers, record producers and performers) need to be cleared.

In these conditions, clearance is not easy. For example, rights of authors are administered collectively by authors' societies on behalf of the authors, composers and publishers of musical works. Authors, composers and editors hold the rights in the composition of the lyrics/music. In the online environment authors' rights comprise:

– The right of reproduction i.e. 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;

– The right to communicate the work to the public including "making available" to the public i.e. transmission of the work by playing recorded music via a simulcast or a webcast or making the work available by allowing for its downloading.

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.

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. Such use includes making physical and intangible copies, broadcasting, but now also includes the use related to Internet activity such as subscription-based "streaming" or "webcasting". The rights include the following:

– The right of performers to reproduce the fixation of a performance; communicate to the public[15] including the right to make the work available. These rights in their performances (not related to the composition) are administered collectively by collective rights management societies representing performers;

– The right of record producers to reproduce; communicate to the public including the right to make available the sound recordings. These rights of record producers are

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[15] Record producers have a right to equitable remuneration only. See 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.

administered by separate societies representing record producers that hold the rights in the sound recordings themselves.

Therefore, the way in which copyright and related rights are commercially exploited across Europe remains very heterogeneous and licensing has mostly been undertaken on a territory-by-territory basis.

With the advent of the Internet, this state of affairs has revealed itself to be a barrier to the introduction of many innovative interactive and on demand services across the EU. Digital technology is fast rendering the old territorial system of managing intellectual property obsolete. We are all aware that 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 25 times through 25 different national authorities. For online operators this constitutes a considerable administrative burden and in some Member States online licences are not even available. This is evidenced by the timeline of how the Apple iTunes music store was introduced in Europe, see description above.

6. BETTER MANAGEMENT OF ONLINE RIGHTS IS NECESSARY

Improvements are necessary because of the increasing demand for efficient multi-territorial rights clearance. But improvements are also necessary because the current system of territorial licensing entails a considerable administrative burden that eats into the right-holders revenue.

6.1. Demand side considerations: New online services require better management of rights

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.

Better management of existing intellectual property rights on a Europe-wide level is therefore essential for fostering market entry, that is to say promoting new goods and services that are based on intellectual property rights.

For example, harmonisation at the rule-making level and even the recent introduction of the "making available" right governing interactive electronic transmission cannot overcome the fact that intellectual property rights are still is administered on a national basis. In principle, the digital transmission of a copyright work across borders creates demand for a new set of cross-border management services:

- Commercial online services require a licence for more than one territory which gives legal certainty and insurance against infringement suits for all territories (multi-territorial licence);

- This demand for a multi-territorial licence cannot be satisfied within the current structure of traditional reciprocal arrangements, so alternative solutions should be sought. The territorial scope of the licence that a collective rights manager may grant should be determined by the collective rights manager (licensor), the right-holder and the commercial user (licensee);

- Right holders should benefit from digital transmission technologies by having a choice as to which collecting society to join and to give mandate to for the multi-territorial online management of their rights.

On the demand side, commercial users would like to be in a position to have better access to works and simpler, more efficient management of rights, especially the terms on which the repertoire is licensed. Further down the chain, another challenge is how the payment of royalties can be secured, collected, and where necessary licence terms enforced.

6.2. Supply side considerations: Multi-territorial licensing has to become more efficient

Within the framework of reciprocal representation agreements, cross-border collective management entails management services that one collective rights manager provides on behalf of another collective rights manager. As right-holders 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").

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 it to commercially exploit the latter'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 in its national territory, both its own repertoire and the repertoire of the collective with which has entered into a bilateral reciprocal agreement. In this way, the world music repertoire can be licensed globally as most collecting societies have developed networks of interlocking agreements by which rights are cross-licensed between societies in different Member States and outside the EU.

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 collectives 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, collectives have concluded bilateral reciprocal representation agreements. 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 national borders without restriction based on nationality, residence, place of establishment.[16]

The current practice of collective management of copyright on a national territorial basis requires that each collective rights manager cooperates with others in the other territories, if a commercial user's service is accessible in another territory. In practice, this means that a 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. Cooperation among collectives across borders for the exploitation of non-domestic repertoire is conducted via "reciprocal representation agreements."[17]

In order for these reciprocal representation agreements to cover at least the aggregate repertoire of all European collectives for one particular form of exploitation of one particular right (e.g. the "making available right that has to be cleared to provide musical works online) in all European territories, by way of example, it is necessary that European collectives conclude among themselves a minimum of 300 bilateral reciprocal representation agreements. This is based on the hypothesis that there would be a minimum of 25 collectives per category of right in each Member State, each collective society has to have a reciprocal representation agreement with the 24 other societies. In order to determine the total number of bilateral combinations necessary among 25 European collectives, you need to look at the number of combinations of k (=2) out of n (=25). This can be determined according to the following formula:

$$\frac{n!}{k!(n-k)!} = \left(\frac{n}{k}\right) = \frac{25!}{2!\cdot 23!} = \frac{24 \cdot 25}{2} = 12 \cdot 25 = 300$$

As you may imagine, maintaining this network of reciprocal arrangements among 25 societies comes at a considerable management cost. Moreover, not all European collectives have concluded bilateral representation agreements among themselves with

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16 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.

17 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.

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.

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

In 2005 we reviewed how copyright and related rights are being commercially exploited across the EU. We especially looked at how the new "making available" right was licensed. This new emphasis on economic efficiency requires, to a certain extent, a shift in our thinking. We need to think less about harmonising substantive provisions of laws and more about how intellectual property rights are exploited commercially across the Internal Market.

We went to stakeholders for their opinions in July 2005.[18] This exercise revealed that the current management of intellectual property – within defined territories that usually are national borders – is a source of considerable inefficiency. And it also hinders the entry of new Internet-based services that rely on IP-protected content.

Stakeholders told us that for most forms of exploitation – in particular the new online rights – the Internal Market has become the appropriate economic environment. 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.

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.

But before issuing a Recommendation, we looked whether there were alternatives. In particular, we examined attempts to amend traditional reciprocal agreements to make them a suitable basis for supplying multi-territorial copyright licences for the online environment:

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

– Multi-territorial licensing has been introduced for the right of record producers[19] to *communicate to the public* via simulcasting and webcasting (IFPI/Simulcasting[20] and Webcasting);

– 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);[21]

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

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 local collective. Customer allocation would mean that multi-territorial licences could only be given for online exploitation and by the collective rights manager in the territory where the licensee has its "economic residence". This would be an undue hindrance to the provision of a cross-border commercial rights management service to users resident in other territories.

We also found that the current arrangements were unsatisfactory because for the distribution of the same song on a digital platform there were two different types of licensing practices in place, one for authors' societies and another for record producers' societies.

The main divergence between the record producers and the authors' societies' respective models is that authors' societies (BIEM Barcelona, Santiago) limit the single point of entry for the grant of a multi-territorial licence 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 -- while record producer societies (IFPI Simulcasting, Webcasting) have no "customer allocation" clause.

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19 The main function of these societies active on behalf of record producers is the administration of the rights of their record producer members for the purposes of broadcasting and public performance.

20 See Press Release IP/02/1436 of 08 October 2002, case COMP/C2/38.014 IFPI *Simulcasting*, decision of 8 October 2002, OJ L107 (30.04.2003) p. 58.

21 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).

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-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

This is why the European Commission, on 18 October 2005, adopted a Recommendation on the management of online rights (the "Recommendation").[22] The Recommendation puts forward recommended approaches for improving the EU-wide licensing of copyright for a variety of innovative online services. Improvements are necessary because innovative Internet-based services such as "on-demand" music downloads need a license that covers their activities throughout the EU. The absence of EU-wide copyright licenses has been one factor that made market entry for new online service providers difficult.

8.1. What is the method chosen by the online Recommendation to create EU licenses?

The obvious way forward in achieving EU-coverage is that rights are aggregated into attractive packages (repertory) and then licensed to online music shops by one collecting society on an EU-wide basis in one single transaction.[23] Instead of 25 local licenses the Recommendation seeks to foster a single package comprising access to attractive repertoire at little overhead.

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 across the entire EU. Right-holders' choice should offer the most effective model for cross border management because free choice

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

23 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.

gives right-holders an incentive to entrust their repertoire to the best EU-wide licensing platform available.

In a first phase, existing societies or new platform would compete amongst themselves to be the publishers/authors online licensing platform of choice. They can to that by offering an efficient service, little deductions and by offering negotiating skill and even clout vis-à-vis commercial users.

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 and once they are awarded the licensing contract, they enjoy a certain exclusivity vis-à-vis the commercial users. But there is nothing wrong with that, because the award of the licensing contract is the result of a competitive process and the authors or their publishers are free to re-tender their repertoire in regular intervals.

In a second phase, as good quality service is measurable and a reputation for good services travels quickly, we expect that an efficient licensing platform will quickly assemble an attractive repertoire for EU-wide online licensing.

What we could therefore expect in practice is that most authors/publishers will have an incentive to pool their repertoire into between one to three big licensing platforms. 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 (see "first experiences", below).

So in the end, even if the competitive tendering process described above will yield a situation of maybe three central online EU licensors, we would have achieved a respectable result because three central EU licenses are easier to negotiate than 25 territorial ones.

8.2. What are the efficiency gains of the method chosen in the online Recommendation?

But some commentators are even saying that the new EU online platforms could conclude "second tier" reciprocity arrangements among themselves in order to create a "single entry point" for 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 25 collective societies.

The reasons are as follows: as stated above, the total number of bilateral combinations necessary to create a single entry among 25 European collectives would be 300, as explained in the formula below:

$$\frac{n!}{k!(n-k)!} = \binom{n}{k} = \frac{25!}{2!\cdot 23!} = \frac{24\cdot 25}{2} = 12\cdot 25 = 300$$

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

$$2 \times 3 / 2 = 1 \times 3 = 3$$

Therefore, what is most important with the proposed new licensing platforms is that these platforms will be the result of a competitive process and will be good for 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, creates a competitive environment for cross-border management of copyright and considerably enhances right-holders' earning potential.

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 the cost 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. As Commissioner Charlie McCreevy said on adoption of the Recommendation on EU-wide online licensing:

> "*I want to foster a climate where EU-wide licenses are more readily available for legitimate online music service providers. These licenses will make it easier for new European-based online services to take off. I believe that this Recommendation strikes the right balance between ease of licensing and maintaining the value of copyright protected works so that content is not available on the cheap*."

8.3. What are the accompanying measures?

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.

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 – a contribution in the fight against online piracy.

9. FIRST EXPERIENCE WITH THE RECOMMENDATION

First experience with the Recommendation shows that EU-wide online licensing can actually work. While we expected that existing societies were going to compete to be elected by right-holders as their EU-wide licensor of choice, it now appears that EU-licensing will be offered by newly created platforms that pool several publishers' or societies' repertoire.

9.1. Emerging EU licensing platforms

Three EU-wide licensing schemes have already been announced and a variety of right-holders are enthusiastic about the business opportunities offered by the online Recommendation. Many expect that, as predicted in the impact study, there will be three to four central online licensing platforms within a short period of time, all of them operating on an EU-wide basis.

- On January 23, 2006, EMI Music Publishing announced having entered into a Heads of Agreement with the MCPS-PRS Alliance (the UK Collection Society) and GEMA (the German Collection Society), with the aim of offering to license the rights in EMI MP's Anglo-American songs under a single license across Europe for Mobile and On Line Digital uses.

- On January 20, 2006 the MCPS-PRS Alliance has formed a joint venture with the Spanish society (SGAE) that creates a platform for future joint EU-wide licensing of the Anglo-Hispanic repertoire (which includes all Latin American repertoire held by SGAE).

- Arvato mobile, a Bertelsmann company active in mobile content services has a pan-EU mobile license agreement with EMI Music Publishing. The license covers the use of EMI repertoire for mobile subscription services.

- Other major music publishers expect to announce their partner for EU-wide licensing for online music throughout 2006.

- 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.

In general our contacts with music users (online music shops, record companies and private broadcasters) reveal that collectives 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 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.

Of course, the emergence of major online platform will require effective dispute resolution and the Recommendation deals with this issue. In the absence of an EU arbitration panel, Member States are invited to deal with the issue. We must remain open to further strengthening the Recommendation in this respect.

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

In light of these development, we consider the Recommendation as a suitably “light touch” instrument that accompanied but did not "force" a favourable market development. We will now monitor the phasing in of greater right holder choice alongside existing arrangements that are currently operated by collecting societies. We are currently monitoring the success of our Recommendation. In particular, we will see by the end of this year how many EU-wide licensing platforms have been established and whether it has become easier to obtain these licenses within a reasonable time and at reasonable cost.

The Commission will now monitor the success of the online Recommendation on a yearly basis. Soon, we will be sending out monitoring questionnaire which need to be filled in by the end of 2006. The main issue of monitoring are:

1. How many online licensing platforms have been created?

2. How many online customers have they attracted?

3. Does EU-licensing lead to online service growth and help overcome the time lag with which new online services are introduced in the EU vs. the US?

4. Do we need legally binding rules on transparency and dispute resolution or is the Recommendation enough?

9.2. How does the online Recommendation affect broadcasting?

Broadcasters expressed some concern in how their services were going to be affected by the online music Recommendation. Broadcasters' main interest is to have a "blanket" licences for traditional broadcasts. They do not wish the online Recommendation to endanger this business model.

As opposed to an online music store, broadcasters do not "sell" music online. They view music as "content" – mostly to be used as background to scheduled programming. For them, music has a lesser value than for an online music store. This is why broadcasters told us that licensing should be done by preference collectively and search costs for obtaining a license should be kept as low as possible.

Taking into account the current state of the law, the online Recommendation indeed focuses on how an EU-license can be created that covers all the relevant territories in which protected works are either received or made available "on demand". Therefore, the online Recommendation indeed favours EU-licenses for specific repertoire (i.e., those most needed to run successful online music shops).

But the Recommendation does not exclude EU-wide blanket licenses for all other types of online use. Indeed, a trend is emerging to grant online licenses not via any of the

existing collecting societies but via new platforms in which societies pool their repertoire for online licensing.

There are indications that these new platforms are conceived as "open platforms" which can also take up other music publishers' repertoire or the entire repertoire of existing societies for online use. Many societies could thus pool their repertoire for online use. While distribution and membership would remain local, only the licensing function would be centralised.

Therefore, the emergence of central EU online licensing platforms need not be detrimental to the indirect use of music for online services ("webcasting") or the making available of scheduled program content as part of an "on demand" service (see below). It may even become a model for terrestrial broadcasting.

The music publishing industry and collecting societies themselves expect that there will be three to four central online licensing platforms within a short period of time, a development which would make online licensing across the EU comparable to the US. As the iTunes example cited above demonstrates, the US system seems to have its merits in fostering the speedy introduction of new digital services. In addition, should the new EU online platforms indeed conclude "second tier" reciprocity arrangements among themselves, broadcasters would gain a "single entry point", but this time at much lower cost. .

There is also some debate on how broadcasters should license their new online services[24]. While some broadcasters indicate that the "on demand" delivery of scheduled programming at a time and place chosen by viewers as "time shifting" that is covered by the broadcast license, others state that this form of exploitation should be licensed separately with a specific "on demand" or "making available" licence. While the broadcast license would be outside the scope of the online Recommendation the "on demand" service license would be covered.

A literal interpretation of the online Recommendation would not exclude a licensing model in which the online exploitation is covered as an integral part of the broadcast license. But this broadcasting licence would, however, still only cover the territory of the original broadcast. This is why other broadcasters seem to favour moving to a separate but EU-wide or multi-territorial license for online reuse of scheduled programming.

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[24] Should it be necessary to clear the "making available" when providing radio or television productions incorporating music from commercial phonograms "on demand", 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, broadcasters advocate 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.

10. CONCLUSION

The 2005 Recommendation on EU-wide online licensing and the cross-border collective management of copyright across the EU is one of the main examples of the above-mention paradigm shift away from harmonising rights toward improving the way how these rights are exploited commercially across Europe. This approach should reduce the cost of having access to content that is protected under IP rules without reducing income for Europe's creators.

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 and not hinder the development and dissemination of new interactive and on demand services.

It is therefore essential that obtaining works that are protected by these intellectual property rights are affordable and easy to obtain for new market entrants and innovative service providers, while at the same time giving creators an economic incentive to make their work available online.

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.

The Recommendation on the management of online rights represent our first attempt to refocus Internal market policy more strongly toward facilitating market entry and fostering service innovation. Let me draw the first, and necessarily preliminary, conclusions from this exercise:

– The current body of substantive EU level rules on intellectual property appear sufficiently flexible and open to models for licensing Community-wide “on demand” and interactive transmission of material protected by copyright and related rights.

– A new policy based on impact studies, evaluation reports and "soft law" policy Recommendations appears, at this stage, to be the most promising tool for fostering new business models specifically designed for the digital environment.