



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.10.2005
SEC(2005) 1254

COMMISSION STAFF WORKING DOCUMENT

**IMPACT ASSESSMENT REFORMING CROSS-BORDER COLLECTIVE
MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS FOR LEGITIMATE
ONLINE MUSIC SERVICES**

TABLE OF CONTENTS

| | |
|---|----|
| Executive Summary | 4 |
| 1. Problem Definition..... | 5 |
| 1.1. What are the issues that may require action? | 5 |
| 1.2. What are the underlying drivers of the problem?..... | 6 |
| 1.2.1. Classical management of copyright and related rights is not in line with the ubiquity of online music services | 6 |
| 1.2.2. Legitimate online services need to manage a series of harmonised Internet rights | 7 |
| 1.2.3. A variety of bodies manages the harmonised Internet rights..... | 7 |
| 1.2.4. Different management models have developed for management of the rights that legitimate online music service providers need to clear | 8 |
| 1.2.5. Right-holders demand better representation in the bodies that administer their rights | 10 |
| 1.2.6. Right-holders want more control over the management of their rights | 10 |
| 1.2.7. Right-holders demand better distribution of royalties between CRMs..... | 11 |
| 1.3. Who is affected, in what ways, and to what extent? | 12 |
| 1.3.1. Right-holders..... | 12 |
| 1.3.2. Rights managers | 12 |
| 1.3.3. Commercial online music service providers | 12 |
| 1.4. How would the problem evolve, all things being equal? | 13 |
| 1.5. Does the EU have the right to act?..... | 13 |
| 1.5.1. Treaty base | 13 |
| 1.5.2. Subsidiarity test..... | 14 |
| 1.5.3. Necessity test..... | 15 |
| 2. Objectives..... | 15 |
| 3. Policy Options..... | 17 |
| 4. Analysis of Impacts..... | 18 |
| 4.1. Legal Certainty | 18 |
| 4.2. Transparency/Governance..... | 20 |
| 4.3. Culture/Creativity..... | 21 |
| 4.4. Innovation and growth | 24 |

| | | |
|--------|---|----|
| 4.5. | Competition..... | 26 |
| 4.6. | Employment..... | 27 |
| 4.7. | Consumers/prices..... | 28 |
| 4.8. | Impacts outside the EU..... | 29 |
| 4.9. | Consequences for large CRMs..... | 29 |
| 4.10. | Consequences for medium size CRMs..... | 30 |
| 4.11. | Consequences for right-holders..... | 30 |
| 4.12. | Consequences for online music service providers..... | 31 |
| 5. | ASSESSMENT and Evaluation..... | 32 |
| 5.1. | Improved accessibility of creative output especially to online content providers..... | 32 |
| 5.1.1. | A licensing policy of CRMs societies that is in line with the demand of online content providers..... | 32 |
| 5.1.2. | Enhancement of transparency of CRM societies..... | 33 |
| 5.1.3. | Improved clearance of copyright protected works across the EU..... | 33 |
| 5.1.4. | A significant increase in the availability of multi-territorial licences for online content providers..... | 33 |
| 5.2. | Full participation of right-holders in the revenue stream generated by more efficient cross-border exploitation of copyright..... | 34 |
| 5.2.1. | Freedom for right-holders to choose the best placed CRM and to switch between CRMs..... | 34 |
| 5.2.2. | Enhancement of transparency and accountability of CRM societies, equitable royalty distribution and enforcement of rights..... | 34 |
| 5.2.3. | Distribution of royalties collected on behalf of right-holders in territories other than their home territory to right-holders directly and without discrimination on the grounds of residence, nationality, or category of membership..... | 34 |
| 6. | Results of Stakeholder Consultation..... | 35 |
| 7. | Commission Proposal and Justification..... | 36 |
| 7.1. | What is the final policy choice and why was it chosen?..... | 36 |
| 7.2. | How will this policy choice be implemented?..... | 39 |
| 7.3. | Compatibility with international obligations..... | 39 |
| 7.4. | Have any accompanying measures to maximise positive impacts and minimise negative impacts been taken?..... | 40 |
| | Annex 1: Major European performance and mechanical rights societies..... | 41 |

EXECUTIVE SUMMARY

This Impact Assessment (“IA”) examines the present structures for cross-border collective management of copyright and related rights for the provision of legitimate online music services. Although digitisation has had an impact in the other sectors, it is in relation to the cross-border provision of online music services that the absence of a Community-wide collective licensing for copyright and related rights has been most felt.

This IA considers three options: (1) Do nothing; (2) eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements; or (3) give right-holders the additional choice to appoint a collective rights manager for the online use of their musical works across the entire EU (“EU-wide direct licensing”).

Stakeholders were consulted on the three options in July 2005. 85 stakeholders, from right-holders, rights management societies and commercial users, submitted their opinions on the three options. There was broad consensus that Option 1 is not an option. Stakeholders are divided between Options 2 and 3, with commercial users favouring Option 2, the majority of collective rights managers favouring modified versions of Option 2 and the music publisher’s community, the independent record labels and certain collective rights managers favouring Option 3.

In the light of stakeholder comments received, the IA proposes that a reform package for EU-wide licensing of musical works for legitimate online music services requires the parallel deployment of all business models that are available to foster more efficient multi-territorial licensing. The IA therefore proposes to eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements while leaving right-holders who do not wish to make use of reciprocal agreements to manage their repertoire the additional option to tender their repertoire for EU-wide direct licensing.

In addition, the proposed reform includes rules on governance, transparency, dispute settlement and accountability of collective rights managers, whether they manage rights according to Option 2 or Option 3. Governance rules setting out the duties that collective rights managers owe to both right-holders and users would 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.

1. PROBLEM DEFINITION

1.1. What are the issues that may require action?

The development of new broadcasting platforms such as web-based and other online delivery solutions should lead to more cross-border online music services. These new technologies have also led to the emergence of a new generation of internationally active online music service providers, be it online on-demand content providers or webcasters¹.

As any service provided online can be seen and accessed across Europe, online content providers require a licence for more than one territory which gives legal certainty and insurance against infringement suits for all territories (multi-territorial licence). Online exploitation music service providers therefore need a system for managing copyright and related rights and in particular the licensing of these rights that is in line with the ubiquity of their online music services. This is particularly important because music is playing a crucial role in the development of online services, while online services play a particular role in promoting music. Music is at the forefront of online development by virtue of the fact that it is so easily distributable online and that there is such a high demand for music, as evidenced by the popularity of networks and services mainly used to license sharing of music files. Furthermore, it is well documented that, for example, music is a major factor in the take up of broadband entertainment services throughout the EU and music is therefore of utmost value to the business of broadband suppliers².

Online music content providers see the current requirement of territory-by-territory management for most forms of copyright and related rights as an impediment to the roll-out of new legitimate cross-border online music services and consider it an inefficient way to secure multi-repertoire licences. Therefore, online exploitation of music across national borders creates demand for a new generation of cross-border management services:

- Commercial online users require a licence for more than one territory which gives legal certainty for all territories (multi-territorial licence);
- Commercial online users want more choice as to which collective rights manager can grant a multi-territorial licence;
- Holders of copyright and related rights want multi-territorial licenses which maintain the value of their copyright and related rights.

This demand for a multi-territorial licence, that at the same time does not undermine the value of copyright and neighbouring rights cannot be satisfied within the current structure of traditional reciprocal arrangements, so alternative solutions should be sought. In particular, the territorial scope of the licence that a collective rights manager may grant should be determined by the right-holder, the collective rights manager and the user (licensee)³ in the

1 See press release IFPI on webcasting agreement: <http://www.ifpi.org/site-content/press/20041018.html>. Webcasting is already well-established in the US, where there are currently 1250 privately licensed services.

2 Submission by the Music Publishers Association (MPA) of 28 August 2005.

3 In relation to the those rights which are not administered by a collective rights manager, and which remain with the individual right-holder, a licence may be granted under the contract law of choice e.g. the Member States where a rightholder is established or resident for the EU wide exploitation of his

way that is most suitable for their respective online business models whether this includes multi-territorial, multi-repertoire licences or niche repertoire licences.

1.2. What are the underlying drivers of the problem?

1.2.1. *Classical management of copyright and related rights is not in line with the ubiquity of online music services*

Management of copyright and related rights is a system whereby a right-holder authorises a third party to manage commercial use of his protected works and other subject matter. Management of rights entails the following services: (1) the grant of licences to commercial users; (2) the auditing, monitoring of rights and ensuring payment of royalties by pursuing infringers (enforcement); (3) the collection of royalties; (4) and the distribution of royalties to rights-holders. For the purposes of this Impact Assessment, these services and the bodies that provide them to right-holders in a collective manner are referred to respectively as the “collective management of copyright” and “collective rights managers” (“CRM”).

In the traditional system of managing copyright and related rights, if copyright works are accessible in another territory, the society active in that territory (the “affiliated society”) normally enters into reciprocal representation agreement⁴ with the CRM that holds the repertoire on behalf of the right-holder (the “management society”). 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 the cross-licensed repertoire in its national territory and no other. Most – but not all – CRMs have developed networks of bilateral agreements cross-licensing their respective repertoire between societies for territorial exploitation. But the affiliate’s authority to commercially exploit the management society’s repertoire is limited to its own territory only⁵.

With classical management of copyright and related rights CRMs licensing authority is contractually limited to its home territory. The limited territorial licensing authority of a CRM is due to the fact that he obtains the repertoire to be licensed (except his own) not through a direct relationship with the relevant right-holder but through so-called reciprocal representation agreements with other CRMs.

rights. In so doing, the licence, although granted for contractual purposes under the law of a particular Member State is exploited by the licensee under the copyright law of each one of the 15 jurisdictions of the Member States. There might be limitations in the law of any of the Member States which might prevent certain matters granted under the individual contract from being upheld in a particular jurisdiction.

4 The term “reciprocal” in the context of these private agreements means “in return for 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.

5 The Court of Justice has considered whether certain provision in reciprocal representation agreements were anti-competitive 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. There is no jurisprudence on whether such provisions would also be allowed for online licensing.

1.2.2. *Legitimate online services need to manage a series of harmonised Internet rights*

In 2001, the European Union adopted the EU Directive on the harmonisation of certain aspect of copyright and related rights in the information society (the “Copyright Directive”)⁶. The Copyright Directive harmonises a series of new exclusive rights that cover online distribution of musical works and other subject matter. The following exclusive rights are implicated in the provision of legitimate online music services:

- The exclusive right of reproduction as defined in Article 2 of the Copyright 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. 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 Copyright Directive covers all communications of authors’ works to members of the public not present at the place where the communication originates.
- 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 (which includes Internet radio, simulcasting, and “near-on-demand” services⁷) whether musical works are communicated via personal computers or to mobile telephones⁸.

- The exclusive right of making available that covers “on-demand” services⁹ which is accorded to authors, performers and record producers.

1.2.3. *A variety of bodies manages the harmonised Internet rights*

Rights of authors are administered collectively by authors’ societies on behalf of the author and music publishers. Authors hold the rights in the composition of the lyrics/music. In the online environment authors’ rights comprise:

6 Directive 2001/29/EEC, OJ L 167, p. 10.

7 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.

8 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.

9 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.

- 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 CRM administers the reproduction, public performance and making available rights (cf. list in Annex 1).

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 streaming and webcasting. The rights include the following:

- The right of performers to reproduce the fixation of a performance; communicate to the public¹⁰ including the right to make the work available. These rights in their performances (not related to the composition) are administered collectively by CRMs 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 administered by separate CRMs representing record producers that hold the rights in the sound recordings themselves.

As the above demonstrates, there are many right-holders and rights that could be involved in a single transaction in the music industry. A licence granted by a CRM for one form of exploitation does not mean that any other form of exploitation is authorised and so 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. Management of online exploitation of musical works is complicated by the fact that a multitude of rights (e.g., communication to the public, reproduction and making available) belonging to a multitude of right-holders (e.g., authors, composers, publishers, record producers and performers) need to be cleared.

1.2.4. Different management models have developed for management of the rights that legitimate online music service providers need to clear

Record producers, as holders of related rights, manage their “making available” right for online on-demand services on an individual basis¹¹.

10 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.

11 Individual management of copyright and related rights is not covered by the scope of this IA. 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

Record producers and performers, as holders of related rights, manage their right to communicate to the public¹² collectively¹³. In this framework, record producers have set up a scheme for multi-territorial licensing for communication to the public that occurs via “simulcasting”¹⁴ and “webcasting”¹⁵.

Authors manage their exclusive right to communicate to the public collectively, but there is currently no effective multi-territorial licensing system in place for the authors’ right of online communication to the public¹⁶. The relevant agreement (the Santiago agreement) expired at the end of 2004 and has not been renewed. The principal reason for this is that authors’ societies are reluctant to abolish the clause that a content provider can only obtain a multi-territorial license with the society of the country where the content provider has its actual or economic location. Authors’ societies argue 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 technology¹⁷. Record labels do not share this concern – the Simulcasting and Webcasting agreements have no economic residence clause -- and claim that digital technology is available to provide enforcement and collection services at a distance. But the failure to renew the Santiago agreement and strike the economic residence clause means that authors’ rights for online use currently need to be cleared on a territory-by-territory basis.

With respect to author’s online reproduction rights, which covers webcasting, on demand transmission by acts of streaming and downloading, the relevant agreement (the BIEM/Barcelona agreement) expired at the end of 2004 and has not been renewed for the same reasons that the Santiago agreement has not been renewed. Again, this means that the authors’ reproduction rights have to be cleared on a territory-by-territory basis.

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.

12 This right was not introduced by the Copyright Directive but is contained in Article 8(2) of the Rental Directive (Directive 92/100/EEC, OJ No L 346, p. 61).

13 The main function of these CRMs 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.

14 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.

15 It should be noted that the notified IFPI Simulcasting Agreement does not cover performers' rights in phonograms.

16 The relevant Santiago 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). But the Agreement expired on 31 December and was not renewed.

17 See GESAC submission of 28 August 2005. According to GESAC the signatory societies to the Santiago and Barcelona Agreements chose not to extend them further in 2005, because although never having been the subject of an official Commission decision, they were aware that the Commission was highly critical of the so-called “economic residence” clause in them, which was in GESAC’s opinion, necessary to prevent the risk of “forum shopping” by commercial users. As a result, GESAC acknowledges, authors’ societies are only able to give copyright exploiters clearance for the use of their own repertoire worldwide, and the world repertoire within the territory in which they carry on their own activity.

1.2.5. Right-holders demand better representation in the bodies that administer their rights

Certain categories of rights-holders, e.g. music publishers complain that they are denied membership in certain CRMs, although between 70-80% of works they represent are non-domestic¹⁸. Such denial of membership precludes publishers that represent works of right-holders from other Member States from having any say in how the works they represent are licensed (e.g., on a territorial or EU-wide basis) and how royalties collected on their behalf are distributed.

1.2.6. Right-holders want more control over the management of their rights

Digital transmission of musical work and the introduction of digital technologies in the management of copyright and related rights empower individual right-holders in two relevant respects:

- First, it allows right-holders to contractually define the territorial scope of the licensing authority they grant to a rights manager¹⁹;
- Second, digital remote monitoring of use in the online environment will also enable right holders to exercise a choice as to which collecting society to join and to give mandate to for the multi-territorial online management of their rights.

The fundamental review of rights management that the introduction of digital technologies in rights management has brought about is not merely the result of demand side drivers but also the development of new digital rights management technologies (DRMs²⁰). By facilitating identification and tracking of the use of works, in principle, DRMs have empowered right-holders to control the licensing and transformed the collection and distribution of royalties into a process of individual electronic payment. DRMs also allow remote monitoring of a myriad of online uses made of copyright protected works.

While collective management of copyright and related rights provided a solution that was effective for the offline environment as right-holders could not control the myriad of offline uses made of their music, DRM technology has the potential to empower right-holders or their designated rights managers to monitor all commercially relevant instances in which use was made of their works online.

The development of digital technologies (whether or not via the use of DRMs) will empower all right-holders, big or small, to increasingly scrutinise the cost and efficiency of collective rights management services. As right-holders' works are increasingly exploited in online music services across the EU, right-holders will become aware of the multiple deductions they suffer to cover the costs of the affiliate CRMs and the management CRM. EU-wide licensing through one rights manager would reduce the deductions inherent in reciprocal

18 Certain CRMs dealing with musical works, such as AEPI (not contested in AEPI's response to the follow up consultation 25 July 2005) in Greece, ZAIKS in Poland, SPA in Portugal and SACD (as far as music is concerned) in France do not admit music publishers as members (cf. submission by ICMP/CIEM, p. 5, footnote 23).

19 There is no legal requirement that rights should be licensed on a national territorial basis only: Right-holders may choose how many territories in which to license their rights. The principle of territoriality merely determines which law applies to the act of use or exploitation: this is typically the law of the place of exploitation. There is no requirement that copyright licensing should be limited to a particular national territory: it is a choice for right-holders.

arrangements and in so doing increase the authors' revenues²⁰. Digital technologies thus provide an opportunity to streamline the rights management process by allowing for significant reductions in management costs and an improved accuracy in royalty distribution.

Naturally, the scope of the benefits that CRMs derive from digital technologies for the collective management of online music rights depend on which path the music industry takes and to what extent consumers embrace online services. But it is fair to assume that collective management of online music rights on a national basis is economically difficult to justify: if collective rights management for online rights continues to be provided at a national level the historic transaction cost advantages of collective management of copyright will decline as digital technology continues. In order to preserve these advantages, collective management needs to take on a European-wide scope.

In addition, digital technologies allow CRMs to outsource some of their management services when this is more efficient than providing these services themselves. This could lead to cost savings as outsourcing specialists achieve economies of scope by combining certain operational "backroom" management functions (such as the maintenance of databases comprising the different right-holders that contributed to a musical work) on behalf of several CRMs.

Moreover, in time, DRMs will also empower right-holders to manage their rights individually should they wish to do so. Progress continues to be made in the development of DRM technologies, standards, interoperability, metadata, catalogue databases and other appropriate tools required for secure and comprehensive individual rights management in the online environment. This will present an alternative to collective rights management especially for those right-holders that may not be satisfied with the cost or efficiency of collective rights management services.

1.2.7. Right-holders demand better distribution of royalties between CRMs

Performers and record producers state that they have difficulties in being paid for use of their works across borders as the distribution rules do not properly account for actual exploitation of works²¹.

Moreover, with respect to cross-border distribution of royalties, existing arrangements between CRMs for related rights such as performance rights do not always, if works are transmitted across the EU, include the transfer of royalties back to the CRM in which the right-holder is domiciled. Under these so-called Type B agreements, there is no direct payment made across borders between the CRMs or to individual right owners whose works are exploited abroad. The CRMs agree that the revenue arising in a territory due to artists resident in the territory of the other party should remain in the country of collection and be used in accordance with the rules of the CRM in the country of collection.

20 CRMs are but one means to an end - the granting of licences from right-holders to users. They can perform a useful service if they are able to offer a wider repertoire of works to the user, but this is at the cost of introducing the CRM as an intermediary, whose operating costs have to be borne by the right-holder. But it is clear that the right-holder always retains the right to exploit his works on an individual basis.

21 In the case of one record producer CRM (the PPL), it has set up an overseas collection service for both performers and record companies which relies on bilateral agreements with other EU collecting societies.

1.3. Who is affected, in what ways, and to what extent?

A royalty is payable on almost every occasion that a piece of music is played by new media and the new forms of exploitation such as digital transmissions including downloading, webcasting or streaming. In the online music sector, there are two main players: (1) right-holders that make up the membership of the CRMs; (2) rights managers (CRMs) and (3) commercial online music service providers.

1.3.1. Right-holders

In the music industry there are two groups of right-holders: authors, composers and editors/publishers²² who hold “copyright” and performers, producers of phonograms (record labels) and broadcasting organizations that hold “related rights” with respect to their performances, phonograms and broadcasts respectively.

1.3.2. Rights managers

When a right-holder joins a CRM, his relationship is governed by the contract that he enters into with that CRM and the CRMs statutory provision on membership. The right-holders works form part of the repertoire of that CRM. Right-holders and others who own the copyright (although they may not have been involved in the creation or production of a copyright work²³) make up the membership of collecting societies. CRMs manage the commercial exploitation of copyright and related rights and deduct a fee for the provision of these management services. But most CRMs in Europe also provide other services that are not linked to the management of copyright, such as social and cultural, promotional and funding activities²⁴.

1.3.3. Commercial online music service providers

The digital music market was worth US\$330 million in 2004 - up on 2003 and set to double in 2005 (Jupiter research). This represents about 1.5% of record company revenues. Analysts and record companies predict digital sales could reach 25% of revenues in five years. It is estimated that 50 million portable players were sold in 2004 (IDC), of which 10 million were iPods (Apple).

The introduction of new broadcasting platforms such as web-based and other online delivery solutions will lead to different business models involved in the cross-border provision of online music services. Among the major brand names, two distinct business models have emerged in digital music: pay-per-download and subscription services:

22 Music publishers generally pay “writers” advances against royalties following the signature of a publishing agreement in return for the rights being assigned or licensed (in whole or in part) to them. Music publishers are principally concerned with licensing reproductions of musical works for example for securing releases, for the performance of music (both live and recorded), for online use, in synchronization with visual images in films, television programmes and commercials and for use as telephone ring tones.

23 This last category includes those persons, corporate or individuals who under the law of certain Member States own the work either because it was created in the course of employment or they have taken an assignment of the relevant rights.

24 The copyright system ensures that right-holders may benefit from property rights entitling them to a share in the revenue for the use of their work. It is central to their success and rests on a simple premise that creative effort which results in a work of value to those who experience or consume it, should be paid for or remunerated.

- **Pay-per-download services** meet consumer demand to for greater accessibility of music, but with greater flexibility than CDs as tracks can be selected and downloaded on the spot. Services such as iTunes, MSN Music, Wal-Mart (US) and Tesco (UK) sell downloads from US\$ 0.80 per track.
- **Subscription services** offer a very wide choice of music for a monthly fee, allowing users to access all the music they want with the option to purchase selected tracks. Services like Napster, Rhapsody and Virgin Digital offer streaming and radio-play access for a monthly fee – typically from US\$ 9.99. Downloads and burns are available for an extra per-track fee from US\$ 0.79. Some subscription services such as Napster now allows ‘tethered downloads’ which are transferable to portable players for as long as the consumer remains a subscriber.

1.4. How would the problem evolve, all things being equal?

In 2004 record companies digitised and made available their repertoire in bulk. For 2005, they envisage 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 (irrespective of the territorial scope of the service) requires copyright to be cleared throughout the EU.

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 and related rights, especially authors’ communication to the public, making available and reproduction rights, have to be cleared on a territory-by-territory basis across the EU.

If left entirely to the market, cross-border collective management of legitimate online music services would have to emerge in circumstances of considerable legal uncertainty. As the evidence presented above demonstrates, multi-territorial licensing for new online music services would develop differently according to the different rights and right-holders involved with multi-territorial licenses being available for some rights and right-holders and not for others.

Moreover, with respect to cross-border distribution of royalties, if left to the market, arrangements between CRMs for related rights such as performance rights would continue to exclude the transfer of royalties to the CRM in which the right-holder is domiciled.

1.5. Does the EU have the right to act?

1.5.1. Treaty base

The proposed EU action is based on Article 211 EC. According to this provision the Commission may formulate recommendations on matters dealt with in the Treaty if the Commission considers it necessary.

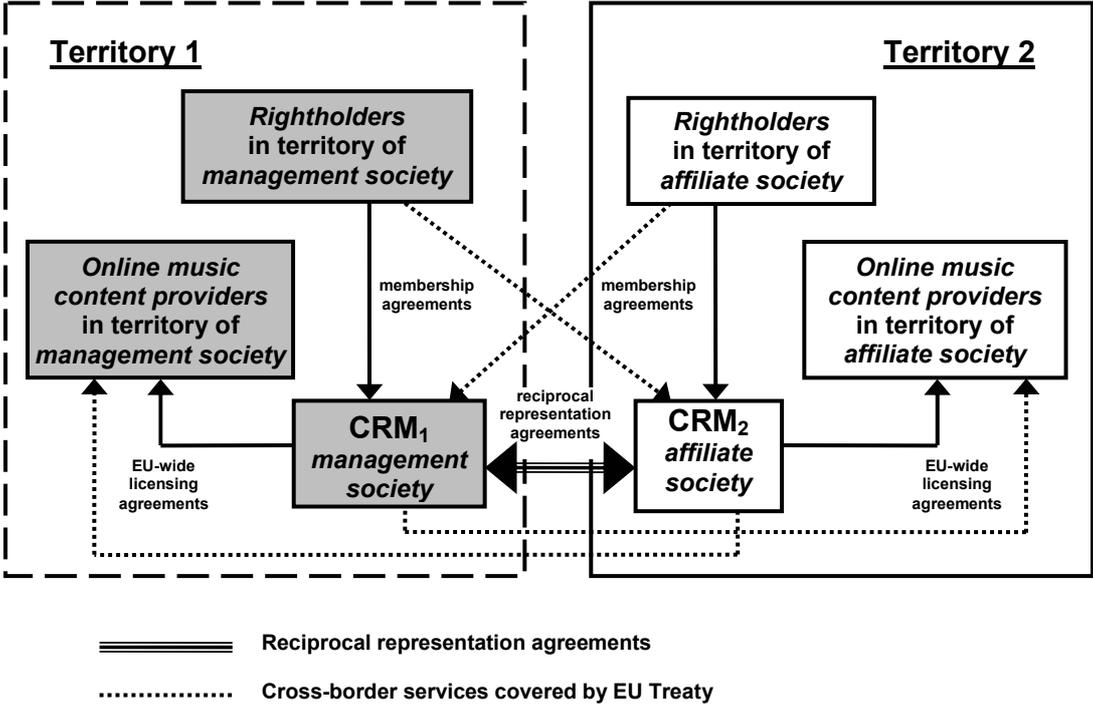
The Commission considers it necessary to issue recommendations on the proper functioning of cross-border management of copyright and related rights for the provision of legitimate online music services. The proper functioning of cross-border management of these online rights requires that Member States should screen their applicable national rules and regulations in order to avoid any provisions that would hinder EU-wide licences being granted

by any rights management entity for copyright and related rights for legitimate online music services, irrespective of the domicile of both the selected rights manager and the right-holder.

In particular, national rules and regulations should not contain restrictions on who can provide multi-repertoire and multi-territorial licenses, such as the requirement that the CRMs licensing authority with respect to legitimate online music services is limited to customers having their “economic residence” in the same territory as the CRM.

Moreover, applicable national rules and regulations should be screened as to whether right-holders are free, even after the exercise of their initial choice, to withdraw their rights and choose another collective rights manager in another Member State best suited for the exploitation of their works. Applicable national rules and regulations should not preclude CRMs from accepting right-holder from other Member States and other CRMs as their members and have the authority to grant EU-wide licenses on their behalf. Applicable national rules and regulations should also not preclude right-holders from withdrawing part of their rights (“unbundling”) and transfer these rights to a suitable manager in another Member State. In addition, national rules and regulations should not preclude the distribution of royalties to rights-holders in other Member States.

Table 1: Overview of the cross-border services involved in collective management of copyright and related rights for legitimate online music services



1.5.2. Subsidiarity test

The provision of cross-border services falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

1.5.3. Necessity test

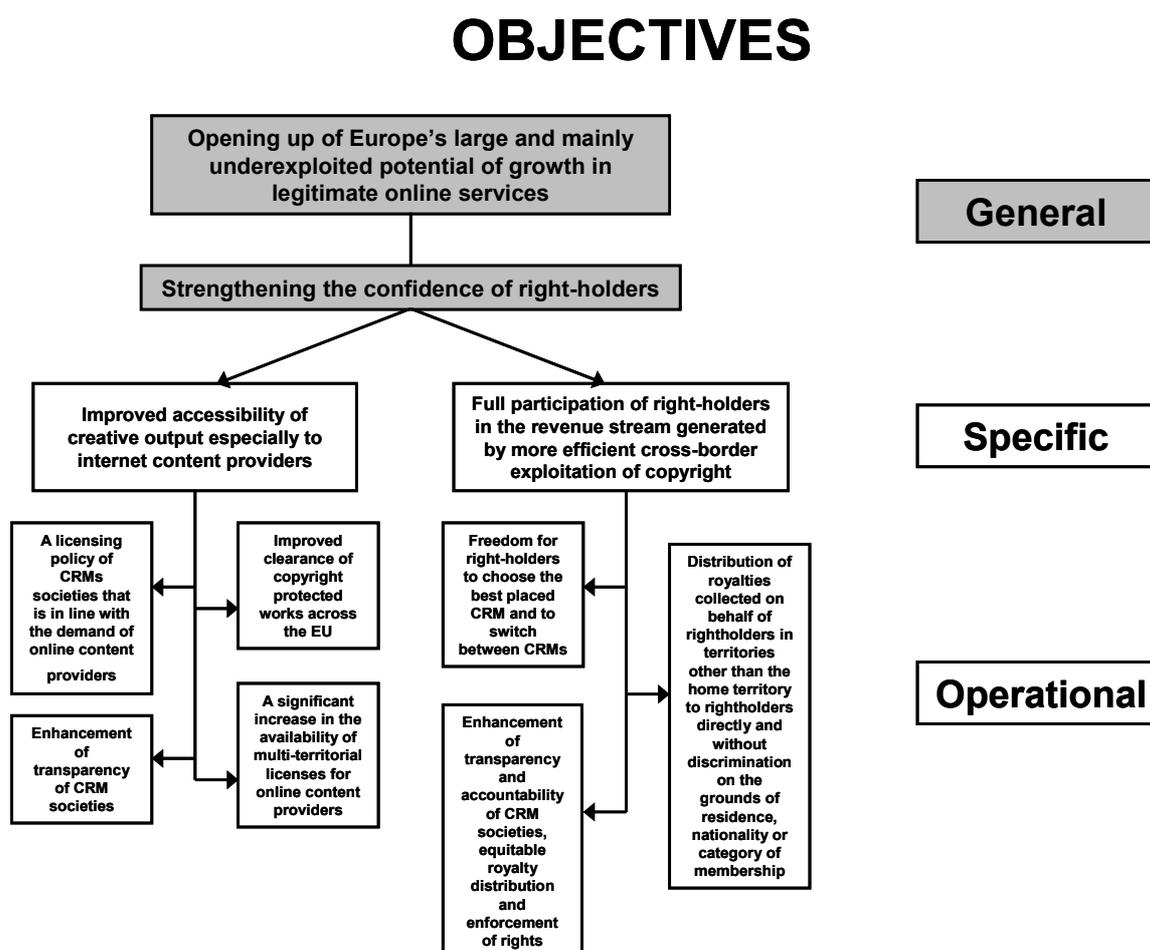
Issuing a Commission Recommendation based on Article 211 EC would be in line with the necessity test and better regulation principles. A recommendation would comply with the necessity test because the form and intensity of EU policy would be tailored to the severity and urgency of the problems to be addressed.

In particular, recommending that all Member States should screen their applicable national rules in order to avoid any provisions that would hinder EU-wide licences for legitimate online music services being granted by any rights management entity, irrespective of the domicile of both the selected rights manager and the right-holder, would limit EU policy to the strict minimum necessary to ensure that fundamental Treaty principles are ensured with respect to the cross-border management of copyright and related rights. In addition, this screening of national rules that may hamper the proper functioning of cross-border management of online rights can only be efficiently undertaken at EU level.

2. OBJECTIVES

The following graph gives an overview of the general policy objectives, the specific objectives and the operational objectives.

Table 2: General objectives, specific objectives and operational objectives



General objectives

Opening up of Europe's large and mainly underexploited potential of growth in legitimate online services

The general objective of EU policy in the field of copyright should be to harness the potential that European music has in stimulating growth of the EU online sector. European policy must therefore create a vibrant market for online exploitation of copyright across the Community. This policy goal clearly falls within the framework of the Lisbon strategy and more specifically of the i2010 strategy²⁵.

Strengthening the confidence of right-holders that the pan European use of their creative works will be financially rewarded irrespective of where their musical works are exploited or where the right-holders are located

European policy must therefore create a vibrant market for online exploitation of copyright across the Community in which the revenue stream is transferred back to creators in the most efficient and direct manner possible.

Specific objectives

Improved accessibility of creative output especially to online content providers

In order to drive the growth of the online music sector, accessibility of copy-right protected works needs to be enhanced. This implies that the way in which copyright-protected works are cleared across the European Union needs to be improved.

Full participation of right-holders in the revenue stream generated by more efficient cross-border exploitation of copyright

Right-holders must be able to enjoy copyright and neighbouring right protection wherever such rights are established, independent of national borders, modes of use during the whole term of their validity. Therefore, any EU initiative on the collective cross-border management of copyright must strengthen the confidence of artists, including writers, musicians and filmmakers, that the pan-European use of their creative works will be financially rewarded²⁶.

Operational objectives

– With regard to accessibility:

Improved clearance of copyright protected works across the EU

New technologies have also led to the emergence of a new generation of service providers, including online interactive content providers or webcasters, operating via computers or mobile telephony networks. In the era of online exploitation of musical works, commercial content providers need a licensing policy that is in line with the ubiquity of this online environment.

25 The i2010 strategy notably aims at developing “a Single European Information Space offering affordable and secure high bandwidth communications, rich and diverse content and digital services.”

26 Report by the EP on a Community framework for collecting societies for authors' rights, 15 January 2004, recital 29.

A significant increase in the availability of multi-territorial licences for online content providers

The overall number of multi-territorial licences awarded for the online exploitation of musical works needs to increase in line with the number of service providers engaged in cross-border content service provision.

Enhancement of transparency of CRM societies

The freedom to choose the CRM which provides the best service would lead to a society being chosen on the basis of the right-holders' best cost-benefit analysis with respect to quality of service provided and provisions charged by the CRM. Right-holders choice will enhance transparency, accountability, royalty distribution and the quality of enforcement.

- With regard to efficient cross-border exploitation and royalty payments:

Freedom for right-holders to choose the best placed CRM and to switch between CRMs

A core aim in fostering effective structures for cross-border collective management must entail giving right-holders the possibility to freely choose and move among CRMs. If their services were either inefficient or too expensive, right-holders would move to another rights manager. This level of competitive discipline would counteract any tendency toward monopoly at the Community level.

Enhancement of transparency and accountability of CRM societies, equitable royalty distribution and enforcement of rights

This implies that all right-holders, authors, composers, publishers, performers or others, should be treated equally, irrespective of their domicile, by the putting in place of effective structures to enhance transparency, and accountability.

Distribution of royalties collected on behalf of right-holders in territories other than their home territory to right-holders directly and without discrimination on the grounds of residence, nationality, or category of membership

EU policy must aim to ensure that royalties collected on behalf of right-holders in territories other than their home territory should be distributed to right-holders as directly as possible. Distribution of royalties must be fair and equitable and there should be no difference in treatment on the basis of where a right-holder is resident; on the grounds of his nationality; or his category of membership in the collective rights management society.

3. POLICY OPTIONS

In order to create efficient structures for cross-border rights management for legitimate online music services, three policy options are considered:

- **Do nothing** (Option 1);
- **Eliminate territorial restrictions and customer allocation provisions in reciprocal representation agreements concluded between CRMs** (Option 2): Option 2 would attempt to create a multi-territorial licence for legitimate online music services by

eliminating certain restrictions in relation to territory and potential commercial users/licensees in reciprocal representation agreements concluded between CRMs. As far as the territory is concerned, this option would provide that restrictions that hinder the affiliate society from licensing the management society's repertoire beyond its own home territory (the "territorial restriction clause") are removed from all reciprocal representation agreements. As far as potential commercial users/licensees are concerned, reciprocal representation agreements governing multi-territorial licensing (like Santiago and BIEM/Barcelona) should no longer provide that the affiliate society is restricted to granting a multi-territorial licence to content providers whose economic residence is located in its "home" territory (the "customer allocation clause");

- **Give right-holders the additional choice to appoint a rights manager for the online use of their works across the entire EU (Option 3).** Option 3 would attempt to create a multi-territorial license for legitimate online music services by giving right-holders across the EU the additional possibility to appoint any rights manager of their choice for the EU-wide exploitation of their online music rights. By choice of this right-holder, the rights manager receives an EU-wide mandate to manage this right-holder's copyright protected works without any recourse to an intermediary (the affiliated society). But it should be left to right-holders themselves whether they want to avail themselves of this option. Other right-holders should still have the option of being indirectly represented by reciprocal representation agreements and the societies that have been elected as EU-wide licensors would remain in the network of reciprocal agreements in order to be able to offer the traditional aggregate EU musical repertoire next to the specific repertoire they have been entrusted with.

4. ANALYSIS OF IMPACTS

4.1. Legal Certainty

Stakeholder comments

If nothing is done with respect to multi-territorial licensing of legitimate online music services, the current system of reciprocal representation agreements may not be sustainable once each participant in the network of reciprocal representation agreements is granted a licensing authority that spans all other CRMs repertoire and the entire EU territory. The MCPS-PRS submits that it was more than likely that something like the model promulgated under the Commission's Option 3 will develop organically even if the Commission elects to do nothing, i.e. Option 1²⁷. The MCPS-PRS states that this prognosis is based on what appears to be increasing pressure from certain rights owners for more direct control over CRMs and the terms and conditions on which they are appointed to represent those right holders. The MCPS-PRS also believes that it the Option 3 model will also become a long-term result of any imposition of the Option 2 model; given that under the Option 2 model the likely ultimate result will be a downward price pressure, then in order to provide a floor against such pressure, right holders will withdraw rights from that model and at best will require the control over administration for their rights as envisaged under the Option 3 model, or even more drastically withdraw from the collective licensing model to create scarcity and exclusivity in order to preserve the value of their copyright or related rights.

27 Submission by the MCPS/PRS alliance, 28 July 2005.

This view is echoed by IMPA, the international music publishers association²⁸. According to IMPA, Option 2 may encourage right holders to consider licensing their online rights individually as it only benefits those commercial users who do not wish to reward creative efforts fairly, but are only interested in pan-European licensing at the cheapest possible price. Consumers certainly will lose out as devaluing copyright has an inevitable roll on effect on future investments and creativity. So, in the long run option 2 delivers cheap deals and less attractive and less diverse content, thus violating the ambitions of the Lisbon strategy for further innovation, jobs and competitiveness in Europe.

EDIMA is of the opinion that CRMs under Option 2 will withdraw or threaten to withdraw from reciprocal agreements with other societies that offer more competitive terms to content distributors. This would quickly unravel the cross-border licensing scheme which relies on these agreements or render the scheme ineffective raising legal uncertainty²⁹.

VODAFONE argues that there is a danger to legal certainty if individual rights holders could move collective rights managers at any time (i.e. part way through the licence period). VODAFONE proposes that in this scenario it should be avoided that the licence obtained by the commercial user may no longer cover all repertoires that it was intended to. In order to solve this issue there would need to be provision that any licence entered into would continue to be valid until the end of the licence period.

Evaluation

The Commission is aware of the risk that MCPS-PRS describes. The MCPS-PRS was echoed by other parties the Commission consulted, who wished to remain anonymous. From the extensive stakeholder consultation it emerges that it would be especially big and commercially successful right-holders or a CRM with a “must-carry” repertoire that is prone to leave the network of reciprocal representation agreements because its members think that the value of their rights is endangered if left for other CRMs to license. This reality of this risk is further evidenced by the emergence of DRM technologies described in Section 1.2.3. of this IA. A large CRM with an attractive repertoire will leave the network of reciprocal representation agreements, especially if he has the DRM technology to effectively manage its repertoire across the EU and its right-holder members decide that this is a better alternative to maximise the value of their copyright or their related rights.

Option 3 is an efficient tool to stem this erosion of solidarity. Giving those groups that are most likely to leave the network of reciprocal representation agreements the opportunity of appointing a rights manager of their choice for the EU-wide management of their online rights gives these players an important tool to preserve the value of their copyright. But awareness of this option will also help preserve the system of reciprocal representation as the consequences of a downward price spiral will be made clear to all societies represented in the reciprocal agreements.

28 Submission by the International Music Publishers Association, 28 July 2005. The International Music Publishers' Association (IMPA) is a trade association open to international music publishing groups and which currently represents the five major music publishing companies namely, BMG, EMI, Sony, Universal and Warner/Chappell Music.

29 EDIMA submission, 29 July 2005.

4.2. Transparency/Governance

Stakeholder comments

The UK Music Publishers Association (MPA) points out that UK music publishers have been concerned over the years about the level of deductions from their income by overseas societies on account of local distribution rules which have tended to favour the members of the local collecting society and which have accordingly enabled cross-subsidisation. Such monies have been applied towards local cultural and social funds and distributions have often been weighted in favour of local members. The MPA believes that Option 3 will address the issue of discriminatory distribution rules in the most effective manner possible. By removing the restrictions on direct membership of collecting societies, music publishers will be able to choose to entrust their rights to collecting societies which are able to meet their expectations. According to the MPA, Option 3 would foster governance by (1) allowing direct membership by publishers; (2) allowing music publishers to be appointed to their Boards and so to have a say in the distribution rules and in the application of any deductions from their income; (3) applying non-discriminatory distribution rules; (4) allowing for the withdrawal of their rights within reasonable timescales; (5) creating accountability of the right-managers to their members obliging them to operate transparently, efficiently and cost-effectively.

According to the MPA, Option 3 will encourage CRMs to offer improved services in order to attract members, including: (a) direct distribution on a line-by-line basis which will result in faster and more cost-effective distributions due to the fact that the monies will not go through an intermediate collecting society but instead will be straight-lined to right-holders; (b) flexibility for right-holders to withdraw some or all of their rights and to choose to place them elsewhere, and (c) better administration and better services.

Also the ICMP/CIEM³⁰ agrees with the Commission's analysis that individual membership contracts should create a fiduciary duty between the society and its members, and that this duty incorporates an obligation to treat fairly and equitably all rights holders and categories of rights holders, whether representing domestic or non-domestic rights; this being also subject to the EU treaty principles as outlined in the Study.

IMPA, the International Music Publishers Association, submits that Option 3 is the best solution for establishing governance and transparency. IMPA welcomes the fact that Option 3 not only lifts territorial restrictions and allows for cross border services, but it also guarantees that discrimination on the basis of nationality will no longer be allowed. Thus option 3, unlike option 2, is fully in line with internal market rules. By allowing for direct membership of right holders, option 3 creates a competitive dynamic among collecting societies thus pushing them to deliver the best possible service to their members. Collecting societies will be naturally encouraged to be transparent and accountable to their members, they will enjoy a less unequal bargaining position vis-à-vis users, will not have to engage in complicated re-distribution of royalties via their affiliate societies nor depend on their reciprocal agreements with other societies. Royalties due to members will no longer be subject to a number of deductions related to commissions due in the various territories.

Additionally, IMPA submits that Option 3 delivers legal certainty to right holders and users and clear mandates to collecting societies thanks to their direct relationship with members.

30 Submission by the International Confederation of Music Publishers, 28 July 2005.

Monitoring and enforcement functions by collecting societies will also greatly benefit from this model, an important consideration at a time when launching and fostering legitimate on line services needs to go together with fighting illegal ones by establishing and pursuing illegality more swiftly and forcefully than before.

The Trade Marks Patents and Designs Federation, (TMPDF) representing the intellectual property interests of many British-based industrial companies, both large and small, states that Option 3 might, at least to some extent, improve transparency in the mode of operations of the CRMs³¹.

Evaluation

The Commission agrees with this analysis and believes that Option 3 can create a higher level of good governance and transparency for right-holders because the collective rights manager of their choice is accountable for all use made of works across the Community and for the redistribution of royalties in exact proportion to this use. If the right-holder is not satisfied with the functioning of the relationship he has the choice to seek Community-wide clearance services elsewhere, a strong incentive to carry out optimal and transparent clearance and royalty payment services. In these circumstances, in order to retain or attract business, CRMs will have to adapt their business practices and become more efficient in relation to their management of services. Right-holders will most likely take into account the DRM solutions applied or imposed by the CRMs to protect and monitor their rights in the most efficient way, which should have an impact on the development of DRM.

Empowering right-holders to choose their collective rights manager and award this rights manager an EU-wide management mandate would lead the latter, in order to attract or retain business, to adapt their business practices and become more efficient in relation to their management services. This will ultimately benefit the commercial user community as well, as only efficiently managed services are able to provide the transparency as to the scope of repertoire represented, territorial scope of licenses awarded and applicable tariffs.

4.3. Culture/Creativity

Stakeholder comments

According to GESAC, Option 2, by putting collective management societies into competition with one another vis-à-vis users, would lead users to seek to benefit from the least robust copyright, the society that is weakest, least effective or least demanding in negotiating and enforcing the licensing requirements to secure the best conditions for a Europe-wide licence for the world repertoire in a market whose specific characteristic is that the most “appealing” “supplier” for the customer is actually the least effective. For GESAC this “forum shopping” is unacceptable to right-holders, European and non-European alike.

Option 2, in GESAC’s view only strengthens the position of commercial users, in particular the big international media, compared to that of right-holders, at the expense of the necessary balance between the different parties, and that it entails the risk of leading to a real reduction in right-holders’ incomes.

31 TMPDF submission, 28 July 2005.

But GESAC is also against Option 3 because it would lead to a weakening of local authors' CRMs and, in consequence, undermine cultural diversity³². According to GESAC, only local authors' CRMs are in a position to know and develop the local music repertoire. This is a particularly important activity in the countries with small language areas. According to GESAC, the emerging EU-wide licensor CRMs would be dominated by multinational publishers, a development that could lead to a decreased interest of these CRMs in supporting works that are commercially less attractive than their own repertoire. According to GESAC, such a development would be at odds with the position taken by the Commission during UNESCO's work on the draft convention on cultural diversity, articles 5 and 6 of which enable and encourage the Member States to establish cultural policies.

As a small society representing smaller right holders' works, often in language understood only by 5 million people Teosto, the Finnish Composers' Copyright Society, is concerned with the impact of both Options 2 and 3 on cultural diversity and the European identity. If small CRMs were eliminated, the small right holders' music would not easily be accessible. Teosto believes that big CRMs competing with each other for the successful right holders might not be able to cater for all their right holders equally. For Teosto, the outcome of Option 3 could be undesirable from the perspective of cultural diversity and the European identity.

Dutch CRM BUMA/STEMRA considers that a full scale implementation of Option 3 will be beneficial for American owned repertoire only, rather than creating a huge potential for growth and prosperity of European repertoire. The effects will be damaging for the majority of right holders, will endanger their professional well-being and could be very harmful to the survival of a European variety of music cultures.

In contrast, the UK Music Publishers Association (MPA), which represents over 90% of music publishers in the UK, 97% of which are SMEs, argues that Option 3 will enable the value of the music to be realised and will provide for much more direct and efficient distribution of royalties with the maximum amount possible being passed on directly to right-holders. Music publishers have already sought to limit the deductions made by collecting societies where monies are distributed via more than one collecting society through the Cannes Agreements. Such contractual arrangements would no longer be necessary if there was provision for direct distribution as a consequence of direct membership³³. The MPA also believes that Option 3 will encourage cultural diversity with each society promoting the distinctive repertoire that it manages. There will also be the opportunity for societies to promote cultural activity in relation to their respective repertoires throughout the EU which will enhance consumer choice.

Evaluation

Culture and cultural diversity are a fundamental concern for the EU, but the threat to cultural diversity that GESAC describes does not result from Option 3 – which would preserve a role for smaller CMRs – but from maintaining the status quo that carries the inherent risk of a breakdown of the system of reciprocal representation agreements once big right-holders or big CMRs withdraw their repertoire from the system of reciprocal representation (See Section 4.1. above).

32 GESAC submission of 28 July 2005.

33 MPA submission, 28 July 2005.

As described in Section 4.1., big right-holders or collective rights managers have every economic incentive to withdraw their repertoire, once they come to the conclusion that traditional reciprocal representation does not safeguard the economic value of their protected repertoire. In addition, with respect to the licensing of legitimate online music services, legitimate online service providers would not suffer immediate and negative repercussions if big right-holders or big CMRs would do so. This is because the “must-carry” content for cross-border online music services is more concentrated and thus more easily available than the current system of collective management suggests:

- In a 1996 report on the supply in the UK of the services of administering performing rights and film synchronisation rights the Monopolies and Mergers Commission (MMC) found that in 1993 the highest earning 1.3% of the Performing Rights Society (PRS) writer members received nearly 41% of royalty distributions and the highest earning 19.5% accounted for some 92%³⁴.
- According to the MMC the imbalance of earning power would appear even greater if set in the context of the entire PRS membership as there were a further 7,900 PRS writer members who did not have works performed in the UK that gave rise to distributions during the period analysed.
- GESAC itself points out that if all attractive repertoire was available with a few large-scale rights management bodies this could lead the latter, out of profitability considerations, to make their repertoire as appealing as possible by cutting their management costs and dropping internationally lesser-known works and authors whose administration entails costs but generates no revenues to cover them. GESAC further points out that a commercial user would simply acquire licences for the biggest repertoires, and ignore most of the remaining authors³⁵.

Thus, the picture that a legitimate online music service would, in the absence of collective management of copyright, have to negotiate with thousands of songwriters or music composers is untrue. As the above MMC figures demonstrate, the fact that there are thousands of songwriters does not imply that an online music service needs to individually negotiate with such a large number of them. The withdrawing big right-holders and big CMRs would be in a position to license the necessary “must-carry” repertoire to any cross-border online music service.

In addition, as the bulk of the smaller CRMs business consists in licensing the larger ones repertoire, an Option 2 approach with increased transparency would require smaller CRMs to remit a high percentage of their income back to the large ones and the authors attached to them. Thus Option 2 and not Option 3 would leave small CRMs with little means to support “works that are commercially less attractive”.

Option 3, on the other hand, would organise right-holders choice to opt for direct and EU-wide licensing of their repertoire for legitimate online music services and ensure that this choice does not have a negative impact on smaller CRMs and cultural diversity:

- EU-wide licensing as envisaged by Option 3 would ensure that there is a continued role for the smaller CRMs. The non-mandatory character of Option 3 acknowledges that many

34 1996 MMC Report at point 5.33.

35 GESAC submission of 28 July 2005.

small right holders will remain loyal to their national CRM and this will put those societies in a strong position when negotiating representation of local repertoire with the larger EU-wide licensor societies. Option 3 would allow smaller societies to play a considerable role in the administration of the online rights in their territory as local representative for the society chosen by the right holders to administer the online rights;

- To a large extent smaller CRMs already play the role of a local representative for their repertoire while transferring most of the royalties collected domestically to right-holders abroad. According to the GESAC submission Swedish society STIM in 2004 transferred 69% of royalties collected to foreign right-holders and Danish society KODA distributed more than 60% of its total collected revenue to foreign right-holders in the same year;
- In addition, Option 3 permits the EU-wide licensors and the local representative from pursuing initiatives on cultural diversity or the use of cultural deductions, if these are approved by a representative board of right-holder members and provided that deductions are made in a clear and transparent manner. According to Option 3, it is the decision of the right-holder members of the collecting societies, i.e., authors, composers or music publishers how to support cultural diversity. If consensus among right-holders reveals that revenues obtained from online licensing should be used for these purposes, Option 3 would not exclude this use;
- The decision on how to support cultural diversity will be one that will influence right holders' choice as to which CRM they select for licensing legitimate online music services. Option 3 should thus increase societies' transparency towards their members. Additionally, Option 3 requires that clear rules on the governance of CRM and royalty distribution are in place which will enable their members to agree collectively the best way to promote culture and cultural diversity.

4.4. Innovation and growth

Stakeholder comments

Teosto, the Composers' Copyright Society, states that itself and its sister societies are constantly working on new business models to encounter the challenges of the cross-border online and mobile use of the musical works³⁶. Teosto states to be in everyday dialogue with different new media stakeholders to ensure our products correspondent both right holder and user needs. Teosto believes that solutions are best found between the players in the market, i.e. the right holders, their CRMs, and the music users. According to Teosto, bilateral agreements between the CRM's safeguarding a blanket licence to the users could be the best solution even in the online world. Teosto claims that users would welcome a re-launch of the Santiago/Barcelona Agreements in a revised format, to suite the DG Competition views.

IFPI believes that Option 2 provides the right direction for a solution for effective and fair cross-border collective licensing. It enables the collecting societies to grant multi-territory, multi-repertoire licenses to users, while at the same time ensuring adequate remuneration for

36 Teosto submission of 28 July 2005. Teosto is a copyright organization that administers the rights of composers, lyricists, arrangers and music publishers in Finland. It represents more than 16,000 Finnish music authors and publishers. Teosto also promotes Finnish music through the Finnish Music Information Centre (www.fimic.fi). Fimic actively promotes all Finnish creators but is especially strong in promoting marginal music.

the use of the rights across Europe. The one-stop multi-territory, multi-repertoire license as provided by virtue of the *Simulcasting Agreement* “is quite simply a superior product to the multi-territory, *mono-repertoire* license that would be the result of the Option 3.”

In addition IFPI submits that a major obstacle to successful online licensing is the CRMs decision – in marked contrast to the practice in the US – to only license the online retailers at the exclusion of the societies’ traditional commercial partners, the record companies, even if the retailers would prefer to reduce the transactions costs and obtain all the rights through the record companies.

The AER, the Association of European Radios, argues that there is no “one-size-fits-all” licensing model and that different rights and different forms of exploitation of these rights require tailor made licensing policies. In particular, the AER points out that internet simulcasting as carried out by commercial radio may require a different licensing policy as that applicable to online music content providers that provide “on demand” type services.

Bertelsmann states that Option 3 is most suited for the EU-wide licensing for authors’ rights, while record labels should continue to license their neighbouring rights in line with the IFPI/Simulcasting model.

Evaluation

The Commission agrees that licensing models for the digital music market should be left to right-holders and users themselves. This is particularly true as digital music only represents about 1.5% of record company revenues at this stage. But as the introduction of new broadcasting platforms such as web-based and other online delivery solutions will lead to different business models involved in the online music services, the Commission would consider it premature to state that Option 2 is in all circumstances “the superior product to the multi-territory, *mono-repertoire* license that would be the result of the Option 3”.

In particular, Option 3 which gives the right-holder more power to define the exact scope of the mandate he awards for the EU-wide management of his rights appears more suitable to address IFPI’s concrete concerns on the CRMs lack of responsiveness in licensing to a variety of commercial partners. With Option 3 the right-holder could mandate his chosen rights manager to license to any person that might require a licence in order to provide: (1) online services via the Internet or (2) other networks such as mobile telecommunications networks³⁷. This would include:

- the service provider, i.e., the entity providing the technical assistance for making the content accessible;
- any other intermediary that packages or aggregates content for online use;
- the content provider, i.e., the entity responsible for transmitting the service which includes the musical works to the public and which is typically the last in the chain of transmission to the end-user (the “last window”); and
- any other entity that markets the rights in musical works.

37 E.g. Short Messaging Services (SMS) or other mobile entertainment platforms.

Moreover, with the greater deployment of DRMs, whether or not the mode of rights management is collective or individual, the technology based industries would benefit as there would be an incentive to develop and deploy technological solutions in the marketplace, in each situation described above.

4.5. Competition

Stakeholder comments

The Trade Marks Patents and Designs Federation, (TMPDF) representing the intellectual property interests of many British-based industrial companies, both large and small, states that Option 3 might also lead to increases in efficiency, but it is at least as plausible that all it would do is encourage CRMs to seek to surpass one another in the size royalties they pass on to right-holders by charging more to users. That is a consequence of the fact that the arrangement as proposed would be likely to lack the most important feature of a competitive market, namely competition between suppliers in the offer of services to users. According to the TMPDF, in order to obtain the full advantages that competition can offer in driving out inefficiencies and reducing costs, there should be competition between CRMs in the supply of licences for individual works. That is also important to right-holders who choose to offer their works through CRMs. They must be able to enter into non-exclusive agreements with more than one CRM. In this way they can foster competition between the different CRMs.

On the other hand, for GESAC contest that the freedom to go shopping around Europe for the “best” licensing agent is an elementary condition for the emergence of the European online music market.

IFPI is concerned that Option 3 actions would do little to solve the current problems related to cross border licensing because this Option is “aiming at the wrong target”³⁸. IFPI believes that as far as sound recordings are concerned content is widely available and the current problems relate only to the authors’ societies’ licensing practices. Rather than strengthening the authors societies’ position the Commission should seek ways to ensure that societies become more open and responsive to the markets, and this way ensure that content is accessible on fair market based terms.

Evaluation

The Commission is aware that the basic difference between options 2 and 3 is that option 3 would introduce competition in the relationship between right-holder and collective rights manager while option 2 would introduce competition at the level of commercial users.

In Option 3, CRMs would have to compete among themselves to attract right-holders, while in Option 2 reciprocal representation agreements would allow any CRM, whether he attracted right-holder business or not, to compete to provide multi-territorial and multi-repertoire rights management services to commercial users. Option 3 can therefore be referred to as the “right-holders option” while Option 2, where 25 CRMs compete in offering the exact same repertoire to commercial users across the EU, is more favourable to commercial users.

With option 2, the elimination of the two forms of territorial restrictions that govern the current reciprocal agreements appears at first sight to introduce more competition. But

38 IFPI submission, 28 July 2005.

dismantling the two forms of territorial restrictions, while leaving in place a system that does not foresee right-holder' choice to license their repertoire directly across the EU introduces a "static" multi-repertoire service. Removing the territorial restriction and customer allocation clauses would give all 25 potential entry points the unlimited ability to grant multi-repertoire licences that, in addition, covers all 25 national territories. But there would be no variation as to the multi-repertoire and multi-territory service offered by the 25 competing management organisations. All 25 societies would offer an identical product.

Option 3, by giving right-holders the possibility to freely choose a rights manager for the EU-wide licensing of their online music services would create the competitive discipline that forces rights managers to compete among themselves for right-holders and offer optimal EU-wide management services, e.g. by competing on the technological solutions they are offering to protect and monitor copyright. If their services were either inefficient or too expensive, right-holders would move to another rights manager. This level of competitive threat would counteract any tendency toward monopoly at the Community level.

4.6. Employment

Stakeholder comments

None of the stakeholder comments dealt with employment impacts or the consequences of outsourcing.

Evaluation

Preserving the status quo forfeits the business opportunities that would be provided by the more efficient cross-border provision of legitimate online services. This would leave untapped the potential to create employment in online service provision and the copyright-dependent electronic infrastructure industries.

Both Options 2 and 3 have the potential to foster new and attractive forms of cross-border copyright licensing. This has the potential to create employment opportunities with service providers/equipment manufacturers that supply the technological infrastructure to exploit copyright across borders.

If CRMs would have to compete for right-holders (Option 3) they would have to restructure their businesses and become more efficient. The increased availability of digital technologies would allow CRMs to compete by outsourcing some of their management services when this is more efficient than providing these services themselves. This could lead to cost savings as outsourcing specialists achieve economies of scope by combining certain operational "backroom" management functions (such as the maintenance of databases comprising the different right-holders that contributed to a musical work) on behalf of several CRMs.

This process of streamlining existing business models may lead to transition effects whereby employment opportunities in classical territory-based collective rights management will be reduced and shifted toward new employment opportunities, either in-house with the emerging successful online licensors or through outsourcing. This is to be welcomed because employment will shift to higher skill future-oriented forms of employment, in line with the Lisbon process. Outsourcing of certain collective management tasks would also be a net benefit for the information technology and accounting industries.

4.7. Consumers/prices

Stakeholder comments

According to GESAC, Option 2 would unduly strengthen the position of commercial users, in particular the big international media, compared to right-holders. Option 2 would thus upset the necessary balance between the different parties, and entails the risk of leading to a real reduction in right-holders' incomes.

IMPA, the international music publishers association, believes that Option 2 encourages right holders to consider licensing their online rights individually as it only benefits those commercial users who do not wish to reward creative efforts fairly, but are only interested in EU-wide licensing at the cheapest possible price. Thus, under Option 2 consumers certainly will lose out as devaluing copyright has an inevitable roll on effect on future investments and creativity. According to IMPA, Option 2, in the long run, delivers cheap and less attractive and less diverse content.

British Music Rights (BMR), representing British composers, music publishers and their collecting societies reiterates that collecting societies owe a fiduciary duty to their members and Option 2, by introducing competition between societies for users by allowing "forum-shopping", would totally undermine that duty³⁹. BMR therefore welcomes in particular Option 3, which would ensure that right holders have the ability to authorise the collecting society of their choice to manage their online rights for the entire EU.

Buma/Stemra, the Dutch CRM, believes that CRMs, by the very nature of their mission, cannot be expected to contribute to systems wherein tariffs would be spiralling down, resulting in gradually diminishing revenues for their members⁴⁰. Option 2, described as a new version of the Santiago and Barcelona Agreements that should not contain a customer allocation clause is the way forward. However, Buma/Stemra believes that the new Santiago Agreement should contain the principle of the application of the tariff of the country of purchase and/or of consumption, as already provided for in the Barcelona Agreement as well as in the Simulcasting Agreement. In order to establish a certain level of price competition between societies, Buma/Stemra would accept that societies should be allowed to use part of their commissions to grant rebates or incentives to their online or mobile licensees.

EDiMA fears that the fewer, larger CRMs expected ultimately to result from Option 3 will not be subject to any operational efficiency-enhancing competitive pressures except on the right-holders side. The emerging CRMs will not be subject to any competitive discipline in terms of rates which will worsen the already existing asymmetry of bargaining power. According to EDiMA creating a few large EU CRMs would reduce price competition at the music user level. In allowing for premium content to be priced higher because it gives the collective rights manager who has attracted such content a very strong bargaining position vis-à-vis commercial users, Option 3 would lead to upward price pressure. According to EDiMA higher prices for music content would hinder the development of the online music market in the EU even more than under the present state of play.

Evaluation

39 Comments by British Music Rights, 29 July 2005.

40 Buma/Stemra submission of 4 August 2005.

The Commission is aware that the basic difference between options 2 and 3 is that option 3 would introduce competition in the relationship between right-holder and collective rights manager while option 2 would introduce competition at the level of commercial users.

But the Commission does not agree with the assertion that Option 3 would automatically lead to upward price pressure. Competitive pressures on the right-holders will result from the continued availability of classical “Option 2” licenses. This competitive threat – that an attractive repertoire is still available in parallel as part of the bundle that is offered as the aggregate EU repertoire in Option 2 will ensure the emerging CRMs do not “out-price” the repertoire from the market which would be doing a disservice to their members.

In addition, those right-holders who spoke out in favour of more choice to award EU-wide licenses did so not to price their specific repertoire out of the market but they believe that Option 3 will encourage rights managers to offer improved services in order to attract members, streamline the process of royalty distribution (direct distribution on a line-by-line basis) and result in faster and more cost-effective distributions due to the fact that the monies will not go through an intermediate CRM (cf. submissions by the MPA, the ICMP/CIEM and IMPA quoted above).

Finally, the licence agreement between commercial users and rights managers concluded according to Option 3 should expressly stipulate that users are entitled to contest tariffs and licensing conditions before the competent national authorities and courts. To this end, the Commission will invite Member States to provide for effective dispute resolution mechanisms.

4.8. Impacts outside the EU

Doing nothing will have no impact outside the EU.

Introducing enhanced royalty flow across national borders and introducing better multi-territorial licensing might lead to right-holders from third countries, especially under Option 3, electing to have their rights or repertoire managed centrally by EU-based CRMs. Option 3 would thus enhance business opportunities for EU CRMs provided there are no obstacles in place which would prevent non-EU right-holders from exercising the choice.

4.9. Consequences for large CRMs

Doing nothing will not entail financial expenditure on CRMs, but will lessen attractiveness of their business model and give rise to their substitution by other forms of cross-border management (e.g., individual clearance by means of DRMs). If new forms of online exploitation will not be collectively licensed, there will ultimately be less revenue to be generated through collective management of copyright.

Option 2 might entail initial one-off costs (software, audit function) to better ensure the non-discriminatory distribution of royalties. While the removal of representation agreements that exclude the exchange of royalties (B-type agreements) may lead initially to less revenue retained by the affiliated society, but this loss should be compensated by the additional revenue to be earned if society can become licensor of choice for increasing set of online licences. But maintaining a web of 300 bilateral reciprocal representation agreements will incur cost to CRMs who operate in this network.

Option 3 is expected to lead to significant cost savings for right-holders as repertoire specialisation will streamline the online licensing process and create a license category where royalties are distributed directly to the right-holder who has elected to grant an EU-wide license for his repertoire. This is because rights-holders having opted for this license will all be direct contract partners of the rights managers and the money will be channelled back to right-holders without intermediaries and in a financial circuit separate from the Option 2 licenses.

4.10. Consequences for medium size CRMs

Doing nothing will not entail financial expenditure on CRMs.

As reciprocal agreements ensure that any CRM could be the access point of choice, Option 2 can provide new business opportunities for smaller but efficient collective rights managers in smaller Member States. But Option 2 will not resolve the issue that most of these smaller CRMs are entirely dependent on reciprocal agreements in order to offer the aggregate EU repertoire, unless right holders are free to appoint the CRMs of their choice.

Option 3 will indeed remedy the smaller CRMs' extreme dependency on the attractive repertoire of their larger peers because small societies can compete directly to attract right-holders' EU-wide licensing mandates. This is because option 3 would give all CRMs a chance to compete for members irrespective of their nationality or domicile. This would empower CRMs that do not have a strong domestic repertoire but, on account of their efficiency, can attract right-holders from other jurisdictions. This would be consistent with a recent trend that some of the smaller CRMs have managed to attract major record labels mandating them to administer Community-wide licensing arrangements. In addition, smaller CRMS which do not attract the membership for the provision of online exploitation might find new roles in providing services on behalf of the CRMs to which a right-holder has entrusted his online rights. These CRMs could act as contractual partners in relation to each of the service elements that comprise the collective management of copyright.

4.11. Consequences for right-holders

As mentioned above, Option 2 might lead to pressure to deflate online royalty rates for particular national markets. Removing the customer allocation clause introduces competition among 25 CRMs to provide an identical product (aggregate EU repertoire assembled under reciprocity) which may only be distinguished in the level of the service provided i.e. the administrative fees for the elements of the management service provided namely licensing, monitoring, collection and distribution of royalties for their aggregate repertoire. This form of competition would leave 25 CRMs, some of them very small societies, competing for the pan-European licensing business across Europe.

Smaller societies may have less bargaining power vis-à-vis large commercial users and commercial users will exploit this to obtain lower tariffs at the cheapest entry point for the aggregate repertoire.

In the short term, in such circumstances, it would be commercial users that benefit from lower tariffs and right-holders that would lose out. But diminishing royalties would lessen the incentive to create new musical works within an industry that already faces other threats such as from piracy and declining sales in the offline environment.

Option 3 would enhance cross-border distribution in a more effective manner by the simple fact that every collective rights manager owes royalties to all the members it has managed to attract, independent of where these members are resident. Direct licensing on an EU-wide basis creates a fiduciary duty as between the collective rights manager and its direct members.

Successful CRMs will therefore transfer a considerable amount of the royalties collected across the Community to right-holders domiciled across the entire Community. In addition, option 3 is more effective than option 2 because it eliminates all administrative costs inherent in channelling non-domestic right-holders royalties through the affiliate society. In this respect, option 3 is the option that relies most on the fundamental freedom to provide licensing services across the Community to right-holders across the Community.

According to Option 3 right-holders will have the option of having to deal with only one collective rights manager who is directly accountable to them for the online exploitation of their musical works across the Community. This is the best option to increase right-holders trust in the functioning of collective rights management because this option avoids the “middleman” in the cross-border clearance of copyright and thus there is no more distinction between domestic and non-domestic right-holders. Direct EU-wide licensing would avoid that authors’ royalties are subject to multiple deductions to cover the costs of other CRMs in various jurisdictions. Direct licensing would reduce the deductions inherent in reciprocal arrangements and in so doing increase the authors’ net revenues. But the reduced administrative cost should also enable rights managers the opportunity to offer repertoire-specific licenses at rates below those that need to be paid for the bundle of rights available under Option 2.

In Option 3, societies could also compete on parameters such as the speed on which royalties are remitted to right-holders or the level of detail in which a right-holder is informed of the different uses made of his protected works. These features are particularly relevant for smaller right-holders. CRMs will also have to compete among themselves on the basis of the technological solutions they are offering to protect and monitor copyright and societies will have an incentive to make innovative use of DRM technologies in this respect. Option 3 may also stimulate CRMs to compete for right-holders in being more innovative as to the methods in which copyright fees are determined (flat fees as opposed to usage-specific fees or fees based on user’s revenue). Option 3 would thus be best suited to reflect the increasing importance of the value and pricing that musical copyright has for all right-holders in musical works. With Option 3 right-holders could choose on the basis of several parameters between these different models in line with their individual needs.

4.12. Consequences for online music service providers

Maintaining the status quo comes at a considerable cost to online music providers. EDiMA, the organisation representing online music providers, estimates that the direct cost of negotiating one single licence at € 9.500 (which comprises 20 internal man hours, external legal advice and travel expenses). On the assumption that mechanical rights and public performance rights in most Member States can be cleared with one society, the overall cost of the requisite licences per Member State would amount to $25 \times € 9.500 = € 237.500$. On the basis that a profit of € 0.10 can be achieved per download, the online music provider would have to sell 2.37 million downloads merely to recover the cost associated with obtaining the requisite communication to the public and mechanical reproduction licenses.

As legitimate online music services have to compete with the readily available free and illegal music services, these costs will stifle legitimate business models, while they are not borne by illegal competition. As many forms of online exploitation will, as a result not be remunerated, the “royalty cake” will stagnate and even shrink.

5. ASSESSMENT AND EVALUATION

Assessment and evaluation will be conducted in line with the policy objectives as identified above.

The *assessment* could develop along three strands:

- (i) The first concentrates on the short-term, starting right after the adoption of the proposal. It focuses on the sheer implementation of the proposal, i.e. amendments of rules, contract clauses etc;
- (ii) The second mid-term strand focuses on direct effects like the number of new multi-territorial licences issued at a given point in time which should be clearly identifiable after about two years;
- (iii) The last strand tries to aims on monitoring the overall economic and social impacts of the proposal “on the ground” in the mid- to long-term.

An effective assessment of the proposal would have to rely on the cooperation of CRMs and require some effort in distinguishing between national and cross-border activities in their reporting. Once such reporting has been established it should be possible to effectively monitor the effects of the proposal over time.

A first comprehensive *evaluation* could then take place after the adoption of the proposal. The objective would be to get a clear picture of the situation in order to decide whether additional or different measures were necessary. The evaluation would be based on the information and data produced by the monitoring complemented by additional information about the sector and the general context like the technological development.

5.1. Improved accessibility of creative output especially to online content providers

We propose to monitor improved accessibility of copyright-protected musical works to online content providers by monitoring attainment of the following four operational objectives.

5.1.1. A licensing policy of CRMs societies that is in line with the demand of online content providers

Success in enhancing cross-border licensing for commercial users is measurable if all clauses in reciprocal representation agreements that hinder cross-border licensing are eliminated and if, as a consequence, the amount of cross-border licences awarded to legitimate online music service providers increases by 2009 as compared to 2005.

Indicators:

- Share of restrictive clauses in reciprocal agreements that have been eliminated;

- Increase in the number of cross-border licences compared to 2005.

5.1.2. *Enhancement of transparency of CRM societies*

Success of this policy objective can also be measured if, as a consequence of increased competition among CRMs, the latter's transparency, accountability, royalty distribution and the quality of enforcement improves. This can be measured by surveying right-holders and monitoring, for example, the quality of CRMs websites and other publications.

Indicators:

- Opinion survey on the transparency and accountability of CRMs, the efficiency of royalty distribution and the quality of the enforcement of rights;
- Relationship between overhead costs and royalties collected;
- Relationship between royalties collected and royalties distributed.

5.1.3. *Improved clearance of copyright protected works across the EU*

Attainment of this objective is both measurable and verifiable if legitimate online music services create revenue in 2009 that exceeds the revenue created by legitimate services in 2005. Revenue from legitimate online music can be measured on the basis of CRMs annual accounts, which should list all revenue generated from legitimate online exploitation of musical works separately. Most rights managers already at present identify the different forms of exploitation, e.g., public performance income vs. broadcasting and dubbing income in the PPL annual report.

Indicators:

- Share of revenues from legitimate online music services in total revenues of CRM societies;
- Relationship between the revenues from legitimate online music services collected by CRM societies and those collected directly by right holders via DRM etc.

5.1.4. *A significant increase in the availability of multi-territorial licences for online content providers*

A licensing policy that is in line with the ubiquity of the online environment can be measured if the number of online music service providers that operate with a multi-territorial licence increases between 2005 and 2009. Another way of measuring success in reaching this policy objective would be a corresponding reduction of online music service providers that continue to operate on the basis of mono-territorial licences. In practice, these phenomena can be measured by making regular enquiries with the industry associations of online service providers between 2005 and 2009.

Indicators:

- Increase in the number of multi-territorial licences issued;

- Share of multi-territorial licences in the total number of licences issued to online content providers.

5.2. Full participation of right-holders in the revenue stream generated by more efficient cross-border exploitation of copyright

We propose to monitor whether right-holders are able to enjoy copyright protection wherever such rights are exploited under licence, independent of modes of use or national borders, by monitoring attainment of the following three operational objectives.

5.2.1. Freedom for right-holders to choose the best placed CRM and to switch between CRMs

Success in enhancing use made of the basic Treaty freedom to seek out the most suitable collective rights management service throughout the EU can be measured if authors with an international following increasingly choose their collecting society for the management of their online music rights independent of domicile or nationality. Indicators for success would be data on authors that actually change CRM for the online exploitation of their rights in musical works.

Indicator:

- Number of right-holders that have switched to another CRM society.

5.2.2. Enhancement of transparency and accountability of CRM societies, equitable royalty distribution and enforcement of rights

Success of this policy objective can also be measured if, as a consequence of increased competition among CRMs, the latter's transparency, accountability, royalty distribution and the quality of enforcement improves. This can be measured by surveying right-holders and monitoring the quality of CRMs websites and other publications.

Indicators:

- See 5.1.2. above;
- Share of statutes that have been amended in order to abolish e.g. discrimination of non-domestic right holders.

5.2.3. Distribution of royalties collected on behalf of right-holders in territories other than their home territory to right-holders directly and without discrimination on the grounds of residence, nationality, or category of membership

A more effective cross-border distribution of royalties can be measured by continuing the monitoring of the evolution as described in the table under Section 1.4.2. and comparing royalties distributed to non-domestic societies (as a % of royalties collected) with the relative importance of the non-domestic repertoire. If the gap between the two percentages narrows between 2005 and 2009, this policy objective has been met.

Indicator:

- Share of royalties distributed to foreign right-holders in the total of royalties distributed relative to the share of non-domestic repertoire in the CRM society's repertoire.

6. RESULTS OF STAKEHOLDER CONSULTATION

This impact assessment has been drawn up making use of the data available to the Commission. It is based on three sources:

- a stakeholders consultation launched on 16 April 2004 (Commission Communication to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market, COM (2004) 261 final)⁴¹;
- a follow-up consultation launched on 7 July 2005 (Music copyright: Study on a community initiative on the cross-border collective management of copyright, available at: http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm); and
- answers submitted by Member States in response to a Commission questionnaire. No external study was commissioned specifically in order to prepare this Impact Assessment, although studies on collective management of copyright were commissioned earlier.

The principal positions taken by stakeholders on the three policy options set out in this IA can be summarised as follows:

Authors' societies, via GESAC, come out in favour of option 2 with additional safeguards against dumping of valuable repertoire by smaller rivals within the network of reciprocal representation agreements. They do not think that further regulation on governance or dispute resolution is necessary. Authors' societies would like a form of EU-wide licensing using the existing reciprocal arrangements but would like to have safeguards enabling them to control the price of their own repertoire; if need be, very large authors' societies such as the UK and the French societies are willing to withdraw from reciprocal arrangements with authors' societies that they perceive "devalue" their repertoire by undercutting on price.

Performers' societies are almost exclusively concerned with improved governance on the cross border distribution of royalties. They show no particular interest in fostering EU-wide licensing and are uncommitted on any of the options.

Music publishers, BMG, EMI, Sony, Universal, Warner-Chappell and independent publishers (International Confederation of Music Publishers and IMPALA) favour option 3. Music publishers wish to maximise returns achieved with their repertoire. Certain music publishers have indicated that they, regardless of any Commission action, will withdraw their repertoire from the existing reciprocal agreements and tender it for a single EU wide licence.

41 Collecting societies and their umbrella organisations, a wide range of right-holders and their umbrella organisations and a wide variety of users of copyright content, as well as manufacturers of information technology equipment submitted detailed comments in response to the Commission Communication of 16 March 2004.

Major record producers (IFPI) are licensees of authors' rights and favour option 2. As licensees, their main interest is to minimise royalties to be paid to authors' societies. In this context, interest in low rates as licensees outweighs their interest as licensors of sound recordings. Record producers have no interest in regulation on governance or dispute resolution.

Independent record producers (IMPALA) favour option 3 as this would allow them to establish their own rights management society.

Record producer societies favour option 2 as they would like to improve governance and accountability via reciprocal arrangements and introduce increased accountability of commercial users as part of this governance.

Radio broadcasters' favour option 2 as their main interest is to serve national markets at lowest possible licence rates. This can best be achieved by creating an EU-wide one-stop shop where the entire EU repertoire is available in a single transaction. In addition, competition between collective rights managers to function as this single one-stop shop licensor will lead to competitive rates.

Niche European cross-border television channels e.g. MTV, favour option 2 because this model would favour competition between societies and tariff levels that reflect market forces.

Online music providers favour option 2 with mandatory dispute resolution. Their main interest is an EU-wide licence for the aggregate EU repertoire. Online rates should be subject to dispute resolution.

Mobile network operators favour a combination of options 2 and 3 with dispute resolution. They want societies that have EU-wide mandates. Commercial users should be in a position to obtain a licence from societies that (a) license rights directly for the entire EU; and (b) via reciprocity for the remainder of the repertoire.

Consumers (BEUC) favour Option 2 as it represents the traditional approach built on reciprocity on the basis that the artistic community is driven to create, not by success or level of income, but guaranteed minimum income levels, which leads to greater consumer choice at more attractive prices.

7. COMMISSION PROPOSAL AND JUSTIFICATION

7.1. What is the final policy choice and why was it chosen?

The chosen policy option involves inviting Member States to take the steps necessary to promote a regulatory environment in which right-holders, rights managers and the commercial users of copyright and related rights can freely choose the individual or collective structures best suited for the EU-wide management of copyright and related rights for the provision of legitimate online music services.

The Commission would recommend that Member States take all measures deemed necessary, including national legislation, to ensure the full application by collective rights managers in their territories of the recommended practice of collective management of copyright and related rights for the provision of legitimate online music services.

The relationship between right-holders, collective rights managers and commercial users will be governed by a series of fundamental freedoms that these parties enjoy in their dealings with each other:

Commercial users:

- (1) Commercial users should be able to obtain multi-territorial licenses covering the entire EU for the provision of legitimate online music services irrespective of the Member State of residence or nationality of either the rights manager or the right-holder. Commercial users should specify the features of the online service they wish to provide.
- (2) A licence granted to the commercial user should define the categories of rights being licensed and the territorial scope of the licence.
- (3) Rights managers should publish repertoire, existing reciprocal arrangements with other rights managers, territorial licensing authority for their repertoire and applicable tariffs on their websites.

Right-holders:

The relationship between collective rights-holders and rights managers, whether based on contract or statutory membership rules, should include a minimum set of guarantees for right-holders with respect to all categories of rights that are necessary for the provision of legitimate online music services:

- (1) Right-holders should be able to determine the categories of rights entrusted for collective management.
- (2) Right-holders should be able to determine the territorial scope of the collective rights managers' licensing authority.
- (3) Right-holders should have the right to withdraw the rights necessary to operate legitimate online music services from existing agreements with collective rights managers and transfer their management, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or nationality of either the collective rights manager or the right-holder. Collective rights managers should, therefore, be free to accept right-holders from other Member States as their members, thereby encouraging rights managers to lift any territorial restrictions. When withdrawing the categories of rights necessary to operate legitimate online music services right-holders should give reasonable notice of their intention to withdraw any right or categories of rights to their current collective rights manager.
- (4) Once a right-holder has transferred the management of a right or categories of rights linked to the EU-wide management of musical works for online use collective rights managers should ensure that these rights or categories of rights are withdrawn from the scope of any existing reciprocal representation agreements concluded with another collective rights manager.

In order to better organise the exercise of the above principles, it is proposed that Member States ensure that collective rights managers active in their territory respect rules on governance, transparency and accountability. Additional recommendations on accountability,

right-holder representation in the decision-making bodies of collective rights managers and dispute resolution should ensure that collective rights managers achieve a higher level of rationalisation and transparency and that right-holders and commercial users can make informed choices. Governance rules would 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. Such rules would include:

- (1) Collective rights managers should grant commercial users licences on the basis of objective criteria and without any discrimination against users.
- (2) Collective rights managers should be obliged to distribute royalties to all right-holders or category of right-holders they represent in an equitable manner.
- (3) Collective rights managers should establish clarity among themselves and vis-à-vis commercial users as to which right-holders they represent and update this information on a regular basis.
- (4) Collective rights managers should specify vis-à-vis all the right-holders they represent, the deductions for purposes other than for the management services provided.
- (5) Management contracts between collective rights managers and right-holders for the EU-wide management of musical works for online use should also specify whether and if so, to what extent, there will be deductions for purposes other than for the management services provided.
- (6) The relationship between collective rights managers and right-holders, whether based on contract or statutory membership rules should comprise the principle that a rights manager treats domestic and non-domestic right-holders or category of right-holder equally in relation to all elements of the management service provided.
- (7) The relationship between collective rights managers and right-holders, whether based on contract or statutory membership rules should contain the principle that right-holders' representation in the internal decision making process is fair and balanced namely commensurate with the economic value of their rights.
- (8) Collective rights managers should report regularly to all right-holders they represent whether directly or under reciprocal representation agreements on licences granted, tariffs applicable and royalties collected and distributed.
- (9) Member States are invited to provide for effective dispute resolution mechanisms in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights available to commercial users and right-holders in their territories.

The Commission intends to assess, on a continuous basis, the development of the online music sector and in particular to what extent the territorial restrictions in the reciprocal representation agreements have been lifted, whether commercial users can freely choose a collective rights manager across the Community, whether right-holders have been allowed to withdraw their online rights, whether domestic and non-domestic right-holders as well as different categories of right-holders enjoy the same rights and service levels in relation to

membership and all elements of the management service provided and whether there has been an increase in the grant of multi-territorial licences to commercial users.

This Recommendation would be addressed to the Member States and to all economic operators that are involved in the management of copyright and related rights in the EU.

7.2. How will this policy choice be implemented?

In line with better regulation principles, the form of EU policy needs to be tailored to the severity and urgency of the problems to be addressed. In addition, all policy initiatives should ensure that the cost of compliance does not exceed the expected economic benefits.

Introducing direct EU-wide mandates alongside existing reciprocal representation agreements requires a two-phase approach.

A first phase should consist in issuing a Commission Recommendation based on Article 211 EC. The Commission would recommend that all Member States should screen their applicable national rules in order to avoid any provisions that would hinder EU-wide licences being granted by any rights management entity for copyright and related rights for legitimate online music services, if that is what the market requires and right-holders want.

In particular, applicable national rules and regulations should be screened as to whether right-holders are free, even after the exercise of their initial choice, to withdraw their rights and choose another collective rights manager in another Member State best suited for the exploitation of their works. Applicable national rules and regulations should not preclude right-holders from withdrawing part of their rights (“unbundling”), as a minimum the rights necessary for the emergence of legitimate online music services, within a reasonable notice period. In addition, applicable national rules and regulations should not preclude cross-border rights management services and the grant of EU-wide licenses.

A Commission Recommendation should indicate a second phase: it would contain a sunset clause according to which the Commission would review practical results achieved in meeting the stated policy objective of the Recommendation. The Recommendation would reserve the Commission’s right to propose legislation should the self-regulatory voluntary approach not foster the policy objective set forth above.

7.3. Compatibility with international obligations

Introducing rules with respect to the better functioning of cross-border copyright management would comply with the Union’s obligations under the relevant international conventions to which the Community and its Member States are party. The creation of improved standards for rights management would be compatible with copyright principles and norms at international level. Respect for the territorial application of copyright protection does not preclude Community wide or cross-border licensing models. The aim would be to ensure that Community wide or cross-border licensing models are available, should the right-holder so choose and not restricted by agreement by CRMs.

There would not be any contravention of any of the Community’s or Member States’ own international obligations under the intellectual property treaties to which either the Community or the Member States are party. These are more specifically the Berne Convention (to which only the Member States are party and not the Community), the Rome

Convention 1961, the WTO TRIPS 1994, the WPPT and the WCT 1996. The international conventions do not expressly address the issue of management of rights but the underlying premise is that of the exercise of exclusive rights based on individual rights management. The Berne Convention states that countries of the Berne Union may determine through legislation the conditions under which certain rights may be exercised⁴². This allows Union countries to effectively choose the method of management. The WIPO WCT and WPPT which were adopted in 1996 and which the Community has not yet ratified do not deal with the management of rights.

7.4. Have any accompanying measures to maximise positive impacts and minimise negative impacts been taken?

In order to increase the cultural awareness within the Union, it might be worth considering direct and transparent subsidisation of national social and cultural funds and make such funding available to right-holders in other Member States. This might foster the emergence of a true European cultural identity. Such considerations are, however, outside the scope of this impact assessment.

42 Article 11bis and Article 13(1) of the Berne Convention provide for the possibility of limitations on certain exclusive rights.

ANNEX 1: MAJOR EUROPEAN PERFORMANCE AND MECHANICAL RIGHTS SOCIETIES

| COUNTRY | COLLECTING SOCIETY | RELEVANT COPYRIGHTS |
|----------------|--|---|
| Austria | AUSTRO-MECHANA (Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH. | Mechanical Rights |
| | AKM (Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger | Performance Rights |
| Belgium | SABAM (Société Belge des Auteurs) | Mechanical rights , performance rights |
| Cyprus | No public organisation | |
| Czech Republic | OSA (Ochranny Svaz Autorsky – Performing and Mechanical Rights Society of Composers, Authors and Publishers) | Mechanical and performing rights |
| Denmark | KODA (Selskabel & Forvatning af Internationale Kemponlstretfighederi Danmark) | Performance Rights |
| Estonia | EAU (Eesti Autorite Uhing) | Full repertoire |
| Finland | TEOSTO (Bureau International du Droit d’Auteur des Compositeurs Finlandais) | Performance Rights |
| France | SACEM (la Société des auteurs compositeurs et éditeurs de musique | Performance Rights |
| | SDRM (Société pour administration du droit des reproductions mécaniques des auteurs, compositeurs et éditeurs) | Mechanical Rights |
| Germany | GEMA (Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte) | Mechanical Rights; Performance rights |
| Greece | AEPI (Hellenic Copyright Society) | Mechanical Rights; Performance rights |
| Hungary | ARTISJUS – Hungarian Bureau for the Protection of Authors Rights | Mechanical and performing rights |
| Ireland | MOPSI (Mechanical Copyright Protection Society Ireland) | Mechanical Rights |
| | IMRO (Irish Music Rights Organization) | Performing Rights |

| | | |
|------------------|---|--|
| Italy | SIAE (Società Italiano degli Autori ed Editori) | Mechanical performance rights; rights; |
| Latvia | AKKA-LAA – Latvian Copyright Agency | Multi-repertoire |
| Lithuania | LATGA-(A) (Lietuvos Autoriu Teisiu Gynimo AsociacijosAgentura) | Multi-repertoire |
| Malta | KOPJAMALT (Maltese collecting Society) | Multi-repertoire |
| Netherlands | STEMRA (Stichting tot Exploitatie van Mechanische) | Mechanical Rights |
| | BUMA (Het Bureau voor Muziekauteursrecht) | Performance Rights |
| Nordic Countries | Nordisk Copyright Bureau | Mechanical Rights |
| Norway | Norsk Selskap for Forvaltningen av fremførings (TONO) | Performance Rights |
| Poland | ZAIKS (Zwiazek Autorow I Kompozytorow Sceniczych – Association of Authors and Stage Composers) | Mechanical and Performing Rights |
| Portugal | SPA – Sociedade Portuguesa de Autores | Mechanical Rights ; Performance Rights |
| Slovakia | SOZA (Slovensky Ochranny Zvaz Autorsky – Slovak Society of Authors) | Mechanical and Performing rights |
| Slovenia | SAZAS Združenje skladateljev, avtorjev in založnikov za zascito avtorskih pravic Slovenije – The Society of Composers, Authors and Publishers of Slovenia | Mechanical and Performing Rights |
| Spain | SGAE (Sociedad General de Autores de España) | Mechanical Rights; Performance Rights |
| Sweden | STIM (Svenska Tonsättares Internationella Musikbyrå) | Performance Rights |
| United Kingdom | MCPS (Mechanical Copyrights Protection Society) | Mechanical Rights |
| | PRS (Performing Rights Society) | Performance Rights |