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Collecting societies and cultural diversity in the music sector

I. Collective licensing in the music industry

The system of collective music rights management has an important cultural connotation. Primarily responsible for the collection and distribution of royalties to right owners, collecting societies enable more creative artists (i.e. authors and performers) to earn an income from their cultural profession than it is possible via individual rights administration. Compared to possible results from individual management, the income collecting societies collect for right holders is bigger, because there is a significant advantage in cost effectiveness. Clearly, the more efficient collecting societies are in terms of maximising revenue collection and minimising the costs associated with rights

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management, the more money is paid to artists. This improves artists' ability to earn a living and therefore facilitates cultural creation. The same could be said regarding music publishers and record producers. Remuneration for investment in cultural creation and production acts as an incentive for further investments to promote creativity and innovation.

Additionally, by offering a single point for rights clearance, collecting societies prevent commercial users from having to negotiate with multiple right holders. Bearing in mind that high transaction costs may act as a deterrent for rights licensing (especially for individuals and operators of medium or small size), collective rights management reduces transaction costs and exerts a positive influence on the volume of rights trading. Users do not need to track down the various individual right holders of the works they want to exploit for licensing purposes. With one licence (instead of many), they can clear rights for a series of musical works. From this perspective, it could be argued that collecting societies support a broader range of music works and repertoires becoming available on the market. In other words, they promote increased distribution and access to music content.

Interestingly, collective rights management also acts as a safeguard for 'weaker' right owners, mainly young, not particularly famous or less popular artists. Collecting societies cater to all their members, whatever their talents or success. This has allowed for the effective institutionalisation of a certain amount of solidarity between right holders, in the sense that fees and tariffs are not conditioned by popularity. Less successful artists receive remuneration on the basis of the same conditions applied to top stars and at the same intervals. Accordingly, European collecting societies have been based on a system of cross-subsidisation among their members with part of the costs linked to the management of less commercial music genres being absorbed by other more popular music segments.

II. Territoriality

Copyright and related rights are rights of a territorial nature. They are granted by domestic legislation which defines the scope of the protection afforded within national borders.

The principle of territoriality is of relevance and importance for the exercise of copyright and related rights. It determines which law will apply to the act of exploitation of protected content and does not entail that music rights licensing should be limited to the national territory. There is indeed no legal or practical requirement constraining right holders to restrict rights exploitation on a national basis. Right holders are free to choose the territories in which licensing of their rights should be possible.

For decades, collective management of authors' and music publishers' rights in Europe has centred on mono-territorial, yet multi-repertoire licensing arrangements. Most European collecting societies have been connected to each other through bilateral agreements, allowing for the reciprocal representation of their repertoires. Under this system, each collecting society has been entitled to licence not only the repertoire of its own members (i.e the domestic repertoire) but also the repertoire of its associated collecting societies (i.e the foreign repertoire) for commercial exploitations taking place in its country of establishment.

In the light of the reciprocal representation licensing model, royalty collection and distribution, due as a result of the exploitation of rights on a national basis, has acquired a cross-border dimension. Collecting societies collect royalties not only for their members but also for the members of their affiliated societies. The revenues generated from the exploitation of foreign repertoire on domestic territory are then transferred to the affiliated societies for distribution to right holders.
Turning to performers' and record producers' rights, collecting societies in Europe have not been successful in establishing such an advanced system of reciprocal representation, as is the case for authors' and music publishers' rights. Whilst many European collecting societies representing performers have entered into reciprocal agreements for the repertoires they represent, most of these agreements have not been fully implemented mainly due to the lack of appropriate computerised infrastructure and reporting difficulties. Some of them further contain a waiver for revenue transfers, as it is assumed that reciprocal flows of remuneration would neutralise each other. The number of reciprocal representation agreements between European collecting societies representing record producers is limited.

The absence of a broad portfolio of rights that collecting societies are mandated to manage, has generally hampered the development of a sophisticated reciprocal representation network of collecting societies representing performers' and record producers' rights. Performers typically transfer their rights to the record producer.[2] This is clearly the case, for instance, for the making available right. Major record companies, on the other hand, but also some large independents, often

[2] The lack of legislative measures adopted at EU level with a view to protecting performers' rights to equitable remuneration against record producers 'predatory' acquisitions of their exclusive rights merits attention in this respect. Only Directive 92/100/EC provides such protection to performers for the sole transfer or assignment of the rental right. Some EU countries have identified the problem and introduced legislation to protect the interests of performers. This is the case of Spain. The Spanish Copyright Law, while recognising the performers' right of making available, establishes a presumption of transfer to the producer. Accordingly, when the performers sign individually or collectively a contract with a phonogram or audiovisual producer regarding the production of phonograms and audiovisual recordings, it is presumed that their making available right is assigned to the producer, except for the equitable remuneration right that cannot be waived and must be paid and managed through collecting societies. In the opinion of AIE, the Spanish collecting society for performers, the solution applied in Spain should expand in other European countries too, since it helps to control the use of performances in the online environment.

resort to individual management.[3] For other types of rights, sub-licensing represents the main means through which cross-border collection and distribution of royalties takes place. Multinational companies (and to some extent also independent phonogram producers) outsource their rights to local labels - members of local collecting societies - in order to be able to receive royalties for the exploitation of their rights in the country of establishment of the collecting societies concerned.

This said, it should be noted that direct membership of foreign right holders has created an additional channel for royalty collection and distribution abroad. Early Commission findings that the refusal of collecting societies to conclude management agreements on the basis of nationality infringes EC competition law paved the way for the acceptance of foreign right owners as members of local collecting societies. This applies for both the collecting societies representing authors and music publishers and the collecting societies representing performers and phonogram producers.[4]

III. Rights management in Europe

Music rights management has attracted much Community attention in recent years. On 18 May 2005, the European Commission published Recommendation 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services, advocating multi-territorial licensing for the online environment.[5] Issued a few years later, the Commission Communication 'Creative Content Online in the Single Market' drew attention to the need to improve existing licensing mechanisms for different types of creative content, including music, so as to allow for the development of multi-territory rights clearance methods.[6] The Commission's

[3] Note for instance the new deal reached by YouTube and Universal regarding the creation of a new online hub for music videos, called VEVO, which will operate under a licence by Universal, covering neighbouring rights (www.nytimes.com/2009/04/10/technology/internet/10google.html).

[4] Commission Decision 82/204/EEC of 4 December 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.971 – GEMA statutes), OJ L 94, 8/4/1982, p. 12, and Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839-GVL), OJ L 370, 28/12/1981. Even today, however, most members of the collecting societies are nationals or nationally-based companies.

[5] European Commission, Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276, 21/10/2005, p. 54.

[6] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the single market, COM(2007) 836, 3/1/2008.

anti-trust decision adopted in July 2008 with respect to the CISAC case provided further insight into the issue of music rights management.[7]

Over the past few years, culture, creativity and cultural diversity have progressively gained resonance in European affairs. The 2007 Commission Communication on a 'European agenda for culture in a globalising world'[8] and the active negotiation and rapid adherence of the European Community to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions[9] illustrate the increased attention afforded to culture and cultural diversity by the European institutions. Both instruments should be seen as complementing Article 151 of the EC Treaty, particularly its paragraph 4, according to which '[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures'.

Central to the notion of cultural diversity is the production and diffusion of diverse cultural expressions. Specifically in the field of music, the essence of cultural diversity lies in the creation and distribution of varied musical content. Proper rewards for creators and access to a wide range of music repertoires are *sine qua non* conditions for the preservation and further stimulation of Europe's cultural wealth.

In the wake of EU action in the field of music rights management for digital exploitation, various business models for multi-territorial music rights clearance have been contemplated by market operators. These essentially pertained to the management of copyright, namely the management of the rights held by composers, authors and music publishers, and not the management of the neighbouring rights enjoyed by performers and record producers.

Whilst not all the business models considered have materialised in the provision of pan-European licences, it is plain that the EU objective of overcoming territorial segmentation of copyright management in the digital environment has been attained. New entities created for multi-territorial licensing in the digital environment arised.

a) Centralised European Licensing and Administrative Service (CELAS)

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[7] European Commission, Decision C(2008) 3435 of 16/7/2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC), available at: http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf.

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalising world, COM(2007) 242.

[9] UNESCO Convention on the protection and promotion of the diversity of cultural expressions, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=33232&URL_DO=DO_TOPIC&URL _SECTION=201.html.

CELAS GmbH is a new entity established in 2007, with the seat in Munich that is jointly owned by GEMA and PRS for Music (i.e. the German and UK collecting societies for the administration of the rights of authors, composers and music publishers). CELAS was set up to provide cross-border licensing and administration services on a pan-European basis to right holders for online and mobile exploitations. The entity is 'open for all types of right holders' however, currently it only licenses the mechanical rights of EMI Music Publishing's Anglo-American repertoire. According to the information received, the company has no plans for repertoire expansion and does not undertake any activity related to cultural and social policy purposes.

CELAS is managed by a Chairman and two Managing Directors based in Germany and the UK. The Managing Directors are responsible for CELAS but are employed by GEMA and PRS for Music respectively. CELAS offices are located within the premises of GEMA and PRS for Music. Through service agreements concluded between them, CELAS has access to and uses GEMA and PRS for Music technical infrastructure and databases. According to CELAS, the costs of the services offered to EMI Music Publishing, but also the costs for its establishment, are covered by a commission charged to EMI Music Publishing.

CELAS represents approximately half a million works, a substantial part (40%) of which are 'split' copyright works (i.e. works with more than one right owner). Since only a portion of these works is represented by CELAS, commercial users need to resort to other collective rights managers as well, in order to clear all necessary rights for their digital activities.
CELAS licences for the online and mobile usage of EMI Music Publishing's Anglo-American repertoire cover all interactive and some non-interactive forms of exploitation, including ringtones, downloads, streaming and webcasting. In 2008, CELAS entered into agreements with several commercial users, amongst which featured 7Digital, iTunes, Nokia, Real and Omnifone. By the end of January 2009, licences have been granted to more than 20 of the largest digital providers in Europe.[10] With respect to tariff setting, the company indicated that it takes as a point of reference the tariffs made public by the collecting societies based in the territories of exploitation.[11]

CELAS explained that EMI Music Publishing initially granted it exclusivity. With its accord, the exclusivity was subsequently lifted, so that clearance of the rights entrusted to CELAS for management can in principle be performed by other agents and collecting societies too. Interestingly, CELAS appears willing to maintain its original vocation as the 'exclusive' licensor of

[10] These are limited in scope to the territories of Albania, Andorra, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Iceland, the Republic of Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, FYROM, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

[11] It should be noted however that in some countries, there are no such published tariffs.

the mechanical rights of EMI's Anglo-American repertoire. According to information provided at its website (accessed on 28/5/2009), 'these rights are only available through CELAS or CELAS approved agents'.[12] It can reasonably therefore be surmised that some commercial users concluded agreements with CELAS, assuming that it exclusively represents the above mentioned rights. Moreover, the status of exclusivity seems to be ambiguous also for collecting societies, some of which still describe CELAS as the exclusive licensor of EMI's repertoire.

CELAS maintains that its contract with EMI Music Publishing adheres to the principle of freedom of choice for right holders and introduces transparency and control for rights managers in accordance with Commission Recommendation 2005/737EC. It considers its collaboration with EMI Music Publishing as one that enhances cultural diversity: creators are properly rewarded for their music which in turn is made widely accessible.

CELAS has drawn particular attention to the steps taken to inform European collecting societies about its establishment and activities. It also observed that it has offered them administrative assistance. Administrative support, as indicated, has taken the form of a) access to the CELAS database, so that European collecting societies can make the necessary repertoire adjustments; and b) the offering of guidance on 'reporting' formats, in order to minimise disruption at the point of interface with digital service provides.[13] Meanwhile, commercial users were informed directly and indirectly regarding the establishment and operation of CELAS. CELAS wrote to all significant users in December 2006/January 2007[14] and communicated information about changes to rights representation and licensing through the public launch of its website and many press articles and releases.

A significant amount of data requested regarding the operation of the company has remained undisclosed, as it is deemed confidential. Specifically, no information has been provided about: a) the value of the gross income generated by the granting of EU-wide licences; b) the value of the royalties distributed to EMI Music Publishing; c) the fees commercial users are charged with; d) the administrative fee charged to EMI Music Publishing for the services provided; and e) cost deductions. No access has been granted to the CELAS standard sample of EU-wide licence either.

b) Pan-European Central Online Licensing GmbH (PAECOL)

[12] See http://www.celas.eu/CelasTabs/Licensing.aspx. In fact, in its reply to the European Commission's 'call for comments', launched on 17 January 2007 with a view to assessing Europe's online music sector in the light of Recommendation 2005/737/EC (http://ec.europa.eu/internal_market/copyright/management/management_en.htm#call), CELAS took the position that competition among rights managers for same repertoire licences could lead to downward pressure on the value of music in Europe.

[13] Note that CELAS promotes DDEX (Digital Data Exchange) standards for reporting.

[14] CELAS continues to contact the same users and new users that it becomes aware of.

PAECOL, a 100% subsidiary of GEMA, was established in July 2008 in Munich. It was set up for the multi-territorial licensing of the mechanical rights of Sony/ATV Music Publishing in the digital environment, and for the moment, has no concrete plans to expand its repertoire. According to the information received, rights assignment has taken place on a non-exclusive basis, and European collecting societies have been accordingly informed via a PAECOL newsletter and GEMA's website. PAECOL may use GEMA's administration structures and data sources by means of a service contract signed with the latter.

The agreements offered by PAECOL cover all types of digital exploitation and are based on the country of destination principle with respect to tariffs (i.e. application of the local tariff where a local tariff has been established and is being applied). PAECOL indicated that it has already granted licences to various service providers but no information has been disclosed as to the identity of the licensees and the basic features of the agreements concluded. Along the same lines, no information was provided about: a) the gross income generated by its multi-territorial licensing activity; b) the value of the royalties distributed to Sony/ATV Music Publishing thus far; c) the fees commercial users are charged with; d) the administrative fee charged to Sony/ATV Music Publishing for the services provided; and e) cost deductions. Nonetheless, PAECOL has clarified that it undertakes no culture and social-policy related activity.

c) The Pan European Licensing Initiative of Latin American Repertoire (PEL)

SGAE, the Spanish collecting society representing authors, composers and music publishers, entered into mandate agreements with publishers (Sony/ATV Music Publishing and Peer Music) and Central and South American collecting societies[15] for the administration of Latin American repertoire in online and mobile exploitations. SGAE's intention is to become the one-stop-shop licensor for the digital uses of Latin American repertoire in Europe and it is still negotiating with other publishers and collecting societies to reach that goal.

The PEL initiative has the following characteristics. The rights covered by the initiative are limited to rights for online and mobile uses, namely the reproduction and public communication rights (including making available rights) involved in the provision of internet and mobile music services. PEL's right holders are Sony/ATV Music Publishing and Peer Music (which represent the catalogue of their Latin American affiliates), as well as the authors, composers and publishers that are members of the Central and South American collecting societies that participate in the initiative.

[15] As regards Central and South American collecting societies, the mandate agreement consists of an extension of the geographical scope of the reciprocal representation agreements these collecting societies had with SGAE for online/mobile exploitations to cover the whole EEA and not just the Spanish territory.

The PEL repertoire is the 'Latin American' repertoire of the right holders described above. The identification of the works included in such repertoire is made through an online database containing all the works for which SGAE has received a mandate from the right holders.[16] Tariffs are based on the tariff of destination principle. SGAE' general tariffs for online/mobile uses are applicable for exploitations on the territory of Spain.[17]

According to SGAE, a specific implementation plan was followed to ensure smooth transition: publishers announced the withdrawal of their Latin American repertoire before signing the agreement with SGAE. After the entry into force of the agreement, SGAE sent information letters to all European collecting societies and instructed them to continue to collect royalties for local exploitations of Peer Music and SONY/ATV Music Publishing Latin American repertoire. Recently, SGAE has started negotiating with European collecting societies in order to conclude mandate agreements by which local societies would be SGAE's sub-agents in local territories for the administration of Latin American repertoire in the digital environment.

As the first PEL licences were granted very recently, no information is yet available regarding: a) the gross income generated by the PEL multi-territorial licensing activity; b) the value of the royalties distributed to right holders; c) the fees collected from users; d) the administrative fee charged to right holders for the services provided; and e) cost deductions.

d) The Pan-European Digital Licensing initiative (PEDL)

According to information collected from the press, the PEDL initiative was launched in June 2006 by Warner Chappell Publishing. European collecting societies representing authors and music publishers were invited to join, and currently five of them are reported to participate in it: PRS for Music (UK), STIM (Sweden), SACEM (France), SGAE (Spain) and BUMA-STEMRA (the Netherlands). [18] Collecting societies are designated as non-exclusive licensing agents of

[16] Access to such database is possible through SGAE's website but requires a login and password delivered by SGAE (http://212.101.75.90:8080/spectrav/NAV/EN/index.jsp).

[17] Whilst SGAE does not apply differentiated tariffs in function of the repertoire it licenses (i.e. the repertoire of its members and the PEL repertoire), in the case of PEL, only the turnover generated by the online/mobile music service provider with respect to the PEL repertoire shall be taken into consideration for determining the level of the licence fee. In the case of on-demand downloads, the identification of the downloaded works and their allocation to the repertoire to which they belong is relatively easy. In the case of streaming or other services where the online/mobile music provider's income is based on advertising or publicity, the licence fee percentage is applied on a weighted turnover corresponding to the use made of works which are included in the Latin American catalogue.

[18] Press articles also referred to the participation of GEMA, the German collecting society representing authors and music publishers, in the initiative. Contacted in the frame of this study, GEMA explained that although it initially showed interest in PEDL, it eventually decided not to join it.

Warner/Chappell Music for the mechanical rights of its Anglo-American repertoire and are authorised to grant pan-European licences for digital exploitation. Licences are granted on a short term basis (1-2 years) and tariffs are based on the country of destination principle. In principle, any European collecting society may join the initiative, provided it complies with a set of specific criteria intended to ensure transparency, efficiency and accountability. According to GESAC (European Grouping of Societies of Authors and Composers), the conditions imposed by Warner Chappell Publishing extend to maximum commission rates and the absence of deductions for cultural and social purposes.[19]

PRS for Music, contacted for the purposes of this study, refrained from providing more detailed information on PEDL. It has simply confirmed that it was mandated by Warner Chappell Publishing to license the mechanical rights of its Anglo-American repertoire for digital exploitation and that collecting societies in Europe were properly informed about such development through its bilateral communication routes and the usual trade press. It abstained from disclosing information regarding the value of the royalties collected under the PEDL initiative, claiming confidentiality. SGAE neither confirmed, nor informed of its participation to PEDL.

e) The ARMONIA initiative

In January 2007, SGAE and SACEM, the Spanish and French collecting societies for authors, composers and music publishers, signed a Memorandum of Understanding for the establishment of a joint framework for the licensing of works for online and mobile exploitations. Later, the Italian collecting society for the same category of right holders, SIAE, joined the initiative. Throughout 2007 and 2008, the three collecting societies worked together to solve various corporate, tax and technical issues related to the ARMONIA project.[20] Although a number of points are still under discussion, the general idea behind the project would be as follows. ARMONIA would be jointly managed by SGAE, SACEM and SIAE and would grant EU-wide licences. The repertoire licensed would be the aggregated repertoire of SGAE, SACEM and SIAE, entrusted to them by means of right holders' membership agreements.

SGAE has disclosed that the European Commission's CISAC competition case has substantially delayed the development of ARMONIA, notably because it imposed bilateral negotiations among collecting societies for the amendment of the traditional reciprocal representation agreements. As of

[19] GESAC paper on 'Collective management as regards cross-border music services', presented to a conference organised by Association Belge pour le Droit d'Auteur in Brussels on 9 March 2009.

[20] Initially, the three collecting societies sought to establish a new and independent legal entity for the licensing of their aggregated repertoire at pan-European level. The main difficulty faced in this respect has been the taxation regime that would apply to such a new structure and issues of double taxation.

today, the entity is not yet operational, no licences have been granted, and no specific steps have been taken vis-à-vis foreign collecting societies with the aim to inform them about the withdrawal of the joint SACEM, SGAE and SIAE repertoire.

SIAE explained that should it become operational, ARMONIA would be active at two different levels: a) creating new technical tools that enable joint collective management; and b) attracting users providing innovative services. With regard to technical features, the main challenge for the three collecting societies involved in the project is the creation of a repertoire database which will serve to determine the share of each collecting society in the licensing services provided.[21] As to commercial users, the brand favours structured negotiations with operators of specifically defined territories, in order to increase synergies, combine know-how and share experience and information.

IV. Reactions from Brussels

The advent of new technologies and the expansion of digital content services in Europe have generated heated debates over the optimum model for music rights management, inducing the European institutions to take action in the field.

Noting that the licensing of 'online rights', that is the licensing of the rights which are required for the online exploitation of protected works, is commonly restricted by territory, the 2005 Commission Recommendation stressed the need for a licensing policy that reflects the ubiquity of the online environment. Although the Recommendation did not prescribe a particular model of rights licensing, it deplored the fact that commercial users willing to operate on a European basis were forced to negotiate the clearance of rights in each Member State with each of the respective collecting societies. Advocating multi-territorial licensing, so as to promote the development of pan-European digital music services, the Recommendation stipulated that right holders should enjoy the right to entrust the management of online rights, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of nationality and residence considerations. Additional recommendations for a) equitable royalty collection and distribution without discrimination on the grounds of residence, nationality or category of right holder; b) increased collective rights managers' accountability; c) fair right holders' representation in the collective rights managers' internal decision-making; and d) effective dispute resolution procedures were made as well.

Making clear that right holders should, upon reasonable notice of their intention to do so, enjoy the right to withdraw any of their online rights from the entity entrusted with their management and

[21] Work identification should be automatic and billing should take place separately per collecting society on the basis of a common, shared format.

transfer them to another collective rights management body, the Recommendation challenged the traditional structures of collective copyright management. It particularly called into question the highly developed system of reciprocal representation agreements between collecting societies representing authors and music publishers. As already explained, the latter allowed each national collecting society to represent the aggregated repertoire of its affiliates on its territory.

The European Parliament criticised recourse to a soft law instrument for such a sensitive and delicate matter, without prior consultation and without its formal involvement.[22] Whilst accepting that right holders should in principle be free to choose a collective rights manager for their representation, it expressed concern about the potentially negative effects of the Recommendation on local and niche repertoires, given the risk of rights concentration in the bigger collective rights managers. Arguing for the introduction of a fair and transparent competitive system that would avoid downward pressure on authors' revenues, it invited the Commission to present a proposal for a flexible framework directive regulating the collective management of copyright and related rights for cross-border online music services. Nevertheless, the Commission took the position that in a fast-changing environment, it is preferable to allow markets to develop, and confined itself to monitoring emerging online licensing trends.[23]

Though not solely concerned with music, the 2008 Commission Communication 'Creative Content Online in the Internal Market' identified multi-territorial licensing as one of the main challenges raised by the uptake of online content services in Europe. Ascertaining that EU-based action was necessary in the field, the Communication launched a public consultation process, focusing *inter alia* on multi-territorial rights clearance, and created a stakeholders' cooperation platform, the 'Content Online Platform', to foster debate.

In the midst of profound market developments geared to multi-territorial (and essentially pan-European) licensing, the CISAC anti-trust decision, issued in July 2008, shed new light on the system of reciprocal representation agreements between European collecting societies and its compatibility with EC law. Centring on the conditions of management and licensing of authors'

[22] See European Parliament, Report on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC, 2006/2008(INI)), Committee on Legal Affairs, Rapporteur: Katalin Levai, A6-0053/2007, 5/3/2007. See also European Parliament, Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC, 2006/2008(INI)), OJ C 301E, 13/12/2007, p. 64, and Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-20080462+0+DOC +XML+V0//EN.

[23] European Commission, Monitoring of the 2005 Music Online Recommendation, 7/2/2008, available at: http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf.

public performance rights by EEA-based collecting societies (members of CISAC, the International Confederation of Societies of Authors and Composers), the decision did not question the practice of reciprocal representation agreements. It found however that membership clauses, contained in the agreements, that obliged right holders to resort to their national collecting society for the provision of management services were incompatible with EC competition rules. Similarly, territorial exclusivity clauses preventing collecting societies from offering licences to commercial users outside the national territory were deemed to hamper competition. With respect to the granting of licences for internet, satellite and cable transmissions, in particular, the Commission held that the systematic and coordinated territorial delineation of the agreements by national territory constituted a concerted practice.[24] Contesting the resulting *de facto* exclusivity for the licensing of the aggregated repertoire of the collecting societies participating in the system and the strict segmentation of the market on a national basis, the Commission required collecting societies to review their agreements, making clear that territorial mandate delineation, though still possible, should be decided independently, on a bilateral basis.[25]

What becomes apparent from the preceding analysis is that EU action in the field of music rights management stems from various institutional actors. Notably, within the European Commission, different Directorate Generals (DGs) strive to seek an adequate response to the challenge of multi-territorial licensing. Whilst the 2005 Commission Recommendation was based on work carried out by DG Internal Market and Services, the CISAC decision and the 'Content Online' Communication derived respectively from DG Competition and DG Information Society and Media. DG Competition further hosted a roundtable on the opportunities and barriers to online retailing, where

[24] In this respect, it should be noted that pursuant to Article 230 EC, CISAC brought before the CFI an action for annulment of Article 3 of the Commission's decision, according to which the collecting societies infringed Article 81 EC and Article 53 of the EEA agreement by coordinating the territorial delineation of the reciprocal representation mandates granted to one another in a way that licensing is limited to the domestic territory of each collecting society. In support of its application, the applicant submitted that the inclusion of a territorial delineation clause in all the reciprocal agreements concluded by its member collecting societies is not the product of a concerted practice to restrict competition. Rather, this state of affairs exists because the collecting societies find it in the interest of their members to incorporate such a clause in their reciprocal representation agreements. See in detail, Action brought on 3 October 2008 - *CISAC v Commission*, Case T-442/08, OJ C 82, 4/4/2009, p. 25. Similar actions for annulment of Article 3 of the CISAC decision were also lodged with the CFI by SAZAS, the Slovenian collecting society for authors, composers and music publishers, and SOZA, the Slovak collecting society for authors, composers and music publishers. See Action brought on 29 September 2008, *SOZA v Commission*, Case T-413/08, OJ C 301, 22/11/2008, p. 56, and Action brought on 29 September 2008, *SAZAS v Commission*, Case T-420/08, OJ C 313, 6/12/2008, p. 42.

[25] The European Commission originally set the collecting societies a time limit of 120 days for the revision of their agreements, which was extended until 15/03/2009.

selected consumer and industry representatives were invited to submit their views.[26] Interestingly, just a few weeks before the completion of this study, a new legislative initiative of DG Information Society and Media and DG Health and Consumers for the creation of a Europe-wide copyright licence for online content was reported in the press.[27] The involvement of all these institutional bodies, each one with its own remit and policy agenda, creates a confusing picture and complicates follow-up. Without proper coordination and constructive inter-service and inter-institutional consultation, policy development in the field of multi-territorial rights clearance might prove a very difficult venture.

Following the adoption of Commission Recommendation 2005/737/EC, various business models have been developed for EU-wide licensing of music rights for digital exploitation. These have essentially taken the form of:

- new entities established and appointed as non-exclusive licensing agents of major music publishers (i.e. CELAS and PAECOL);
- agreements concluded between major music publishers and several collecting societies, appointing the latter as non-exclusive licensing agents of the publishers' repertoire (i.e. the PEDL initiative);
- agreements concluded between music publishers (including major music publishers) and several collecting societies, enabling one of the latter to provide one-stop-shop licences for the aggregated repertoire of all the actors involved (i.e. the PEL initiative);
- agreements concluded between several collecting societies for the exclusive joint representation of their repertoires (i.e. the ARMONIA project); and
- new structures created with various collecting societies as shareholders for the provision of multi-territory and multi-repertoire licences (i.e. the SOLEM initiative).

Although some of these business models have not yet materialised in the provision of EU-wide licences, it is clear that a variety of new multi-territorial licensing patterns are currently being explored. From this perspective, it could be argued that the 2005 Commission Recommendation has reached its objective of overcoming territorial segmentation of copyright management. At the same

[26] The first meeting was held on 17 September 2008 (http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1338&format=HTML&aged=0&language=EN&gui). A follow-up meeting, which focused on the online distribution of music, took place on 16 December 2008. The views of its participants were consolidated in a document 'Online commerce retailing: Report on opportunities and barriers to online retailing', published on 26 May 2009 at: http://europa.eu/rapid/press ReleasesAction.do?reference=IP/09/832&format=HTML&aged=0&language=EN&guiLanguage=en).

[27] See K.J. O'Brien, 'EU to hear proposals on cross-border net copyright', available at: http://www.nytimes.com/2009/05/05/business/global/copyright.html?_r=3.

time, however, it has also induced new market trends in terms of repertoire representation: it has actually entailed repertoire fragmentation.

With the exception of SOLEM and ARMONIA, which though not operational, aim at the provision of multi-repertoire licences, all other business models identified have given vent to mono-repertoire licensing formats. Pan-European licences can in principle be granted for Anglo-American and Latin American repertoires only. The former one-stop-shop system, founded on the reciprocal representation network of Europe's collecting societies, allowed a single collecting society to grant access to the entire repertoire of the collecting societies participating in the system on its territory. The newly created licensing channels allow for the provision of mono-repertoire licences for multiple territories. In other words, there is no truly multi-territorial and multi-repertoire system in place.

It is important to mention that information regarding the royalties collected on behalf of right holders, consisting mainly of major music publishers, is generally not available. This type of information is considered market sensitive because it associates particular market players to their revenues. Other relevant data, for example, in relation to administrative fees charged for EU-wide licensing and cost deductions, have not been disclosed either. This obstructs an assessment of the impact of the new licensing models on the workings of national collecting societies, their economic sustainability and thus their ability to properly cater for the needs of local authors and music publishers. Data on a sizeable amount of music repertoire appear to have effectively become inaccessible.

This said, it should also be noted that the establishment of new entities for rights clearance in the digital environment raises important legal questions. The German Patent and Trade Mark Office (DPMA), which is responsible for the supervision of collecting societies in Germany, has inquired into the legal status of CELAS, examining whether CELAS should be considered as a new (or different) collecting society within the meaning of the German law on collective rights management. Following a preliminary assessment, in April 2009, the DPMA decided to bring the issue before the Federal Ministry of Justice (FMJ) for verification. Although the FMJ has not yet concluded its assessment, should CELAS be found not to be a collecting society, as understood under domestic law, this would essentially mean that CELAS could oppose to the supervision and transparency rules commonly applied to collecting societies in Germany.[28] It could refuse, for instance, to grant licences to specific commercial operators or decide to grant licences under discriminatory terms.

The issue of '(non-) exclusivity' also merits attention. Both CELAS and PAECOL maintain that they are non-exclusive agents of EMI Music Publishing and Sony/ATV. Non-exclusivity makes

[28] Note however that CELAS could also be considered as a licensing arm of GEMA. This would bind it to domestic supervision and transparency rules.

sense if the rights entrusted to these entities are also licensed by third parties. Moreover, no official statement by EMI Music Publishing and Sony/ATV, communicating other agents or collecting societies mandated to license the same rights that are entrusted to CELAS and PAECOL, has come to our knowledge. Of course, one should not rule out the possibility of EMI Music Publishing and Sony/ATV retaining the right to grant relevant licences themselves.

Finally when collecting societies are mandated to license the repertoire of major music publishers on a pan-European and non-exclusive basis (i.e. the PEDL initiative) parallel to the licensing of their own domestic repertoire, the issue is whether equal treatment is afforded to the domestic and the major publishers' repertoire. According to the principle of non-discrimination contained in the Recommendation itself, collecting societies should not treat their members under less favourable terms. Information collected in the frame of this study has not enabled us to confirm whether this is actually the case.[29]

V. Conclusions

Most of the business models which have emerged in the digital music rights licensing market as a response to the 2005 Commission Recommendation have derived from major music publishers. These have appointed newly established entities or specific European collecting societies as their agents for the management of part of their rights in specific music segments (i.e. mainly the mechanical rights enjoyed in the Anglo-American repertoire).

The exit of major music publishers from the system of reciprocal representation in relation to the EU-wide digital licensing of such rights has not equalled total abandonment of the reciprocal representation network. Major publishers continue to rely on the services of national collecting societies for other rights they enjoy in the same or other repertoires and have an enhanced power to influence collecting societies' licensing activity, notably by threatening to withdraw more repertoires and rights. This raises the question of balance of rights holders' interests. Composers, authors and local music publishers do not enjoy sufficient means to pursue and defend their interests. This poses a fundamental challenge for cultural diversity.

The non-disclosure of information regarding the revenues generated by the provision of pan-European digital licences in relation to the repertoires major music publishers have withdrawn from the system of reciprocal representation does not enable a succinct economic analysis of the impact of such withdrawals on the operation of European collecting societies and their ability to defend the interests of their membership. However, bearing in mind that the Anglo-American repertoire

[29] Note that Warner Chappell Publishing is reported to impose specific conditions on the collecting societies that join its PEDL initiative covering *inter alia* maximum commission rates.

represents a very important revenue source for the European collecting societies and that the digital market has the potential to become a very important market of music consumption, it can reasonably be expected that the collecting societies which are excluded from the management of major publishers' repertoires will progressively start facing reduced turnovers.

Direct licensing could continue and even expand to other repertoires and music rights but the ultimate question is who will be the market actors that will accommodate the needs of individual authors, composers and local music publishers. Should direct licensing affect the ability of European collecting societies – at least those of small or medium size – to cater for the interests of their members, this will have detrimental effects on cultural creation and the diffusion of a variety of music repertoires in Europe.

This is all the more troubling, when one considers that the European music market is not as diverse as one would consider it to be. The repertoires of the EU Member States do not develop at the same rate and do not circulate within the EU with the same success. The repertoires of the smaller EU countries and the new Member States, in particular, do not easily penetrate European markets. The presence of a wide range of foreign repertoires is also limited on European territory.

In this context, European institutions, confronted with the challenge of cross-border music rights licensing, have various policy options: leave the market to find its rhythm or opt for some sort of regulatory intervention. The latter option offers a variety of alternatives: soft law measures, co-regulation schemes or legislative intervention by means of harmonisation. Whilst the choice is incumbent upon the European institutions, it is feared that if the market is left to evolve of its own, business models that further hamper the diversification of the European music scene could emerge (or might be emerging).

Clearly, music rights management has important implications for cultural diversity. What is indeed important in Europe is a mechanism whereby through increased collaboration among collecting societies and other licensing operators, music rights management aims at:

a) broad availability and access to a variety of repertoires, including small and specialised repertoires;

b) a balanced accommodation of the interests of all right holders, with renewed emphasis on the interests of creators of local or specialised cultural content;

c) user-friendly, uncomplicated and comprehensive rights clearance services;

increased rights managers' transparency and accountability.

The new licensing channels that have been established for the provision of EU-wide licences and are operational concern specific types of repertoire, primarily the Anglo-American repertoire. This contrasts the previous system of collecting societies' reciprocal representation, according to which

each collecting society could grant access to the entire repertoire of the collecting societies participating in the system on its territory. The new licensing arrangements allow for the provision of mono-repertoire licences for multiple territories. In other words, there is no truly multi-territorial and multi-repertoire system in place. Repertoire fragmentation is one of the principal results of EU action in the field of music rights management.

Most of the business models which have emerged in the digital music rights licensing market as a response to EU action have derived from major music publishers. Major music publishers have devoted much time and resources to the development of multi-territorial licensing mechanisms. Most of these mechanisms rest on the abandonment of the system of reciprocal representation for the mechanical rights they enjoy in the Anglo-American repertoire in relation to digital licensing. Such rights have been entrusted to specific collecting societies or newly created collective rights management bodies for pan-European digital exploitation.

Many European collecting societies (especially small and medium-sized collecting societies) have criticised these market developments, arguing that they will lead to an over-centralisation of market power and repertoires at the EU level, as well as undesired competition to the detriment of less commercially successful and local repertoires. The argument that their economic sustainability is endangered was also put forward.

Composers and lyricists appear largely unaware of the new licensing trends and their effects on their creative activity. Music publishers, on the other hand, acknowledge the need for the introduction of effective multi-territorial licensing channels but opinions diverge as to the optimum way to move forward. As to commercial users, these complain about the fragmentation of repertoires, induced by the abandonment of the reciprocal representation network by major publishers, the legal uncertainty as to the identity of the collective rights management bodies entitled to grant licences and the exact scope of such licences.

The exit of major music publishers from the system of reciprocal representation in relation to EU-wide digital licensing has not equalled total abandonment of the reciprocal representation network. Major publishers continue to rely on the services of national collecting societies for other rights they enjoy in the same or other repertoires and have an enhanced power to influence collecting societies' licensing activity in general, notably by threatening to withdraw more repertoires and rights.

This raises the question of balance of rights holders' interests. Composers and authors that are not represented by major music publishers, as well as local music publishers do not enjoy sufficient means to pursue and defend their interests. This poses a fundamental challenge for cultural diversity.

The importance of the Anglo-American repertoire as a revenue source for the European collecting societies has to be taken into account. One could reasonably argue that the collecting societies which are excluded from the management of such repertoire will progressively start facing reduced turnovers. This could affect their ability to cater for the needs of their members.

Moreover, it seems that commercial users now have less incentive to obtain licences for smaller or specialised repertoires. Rights clearance for the most commercially successful repertoire, that is the Anglo-American repertoire, is key to a market entrant wishing to operate on a pan-European basis. Since the latter is presently split amongst various rights managers, users face a multiplication of negotiations for rights clearance. The resulting costs could convince them to disregard rights licensing for local repertoires.

Direct licensing could continue and even expand to other repertoires and music rights but the ultimate question is who will be the market actors that will accommodate the needs of individual authors, composers and local music publishers. Should direct licensing affect the ability of European collecting societies – at least those of small or medium size – to accommodate the interests of all their members, this will have detrimental effects on cultural creation and the diffusion of a variety of music repertoires in Europe.

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Confronted with the challenge of cross-border music rights licensing, the European institutions have various policy options: leave the market to find its rhythm or opt for some sort of regulatory intervention. The latter option offers a variety of alternatives: soft law measures, co-regulation schemes or legislative intervention by means of harmonisation. Whilst the choice is incumbent upon the European institutions, it is feared that if the market is left to evolve of its own, business models that further hamper the diversification of the European music scene could emerge (or might be emerging).

At the end of the day, music rights management is not simply a legal matter. It is an issue of high political relevance, given the implications it entails for the preservation and promotion of cultural diversity in Europe. Perhaps a system enabling all collecting societies and licensing bodies established in the EU to provide pan-European and multi-repertoire licences whilst fostering competition for the efficiency of services provided and transaction costs would be to the benefit of all the parties involved: rights holders, users but also the final consumer of music.

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