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## Chapter 5

# Collective Management in the European Union

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## 1 Introduction

With the rapid growth of the Internet and mobile telephone use, the market for legitimate music delivery services has literally exploded in recent years. Online music services are accessible across the European Union (EU); thus the need for multi-territorial licensing that spans throughout the European territory is more acute than ever. In the absence of such licensing schemes, online content providers must currently obtain a license from every collective rights management organization (CMO) in each territory of the EU in which the work is accessible, so as to avoid liability for copyright infringement. Rights clearance for the exploitation of non-domestic repertoire must therefore occur via a network of reciprocal representation arrangements between CMOs that in most cases occupy a monopoly position within their national territory. This system has been criticized as expensive and burdensome for online users of copyright protected material. Although the multi-territorial licensing of (online) music is at this time the most pressing issue at the European level, it emphasizes the need for a coherent system of collective rights management as a whole.<sup>1</sup> The role and functioning of CMOs in the exploitation of

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<sup>1</sup> See: *Commission Decision of 16 July 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)*, C (2008) 3435 final, Brussels, 16 Jul. 2008, online: <<http://ec.europa.eu/competition/antitrust/cases/decisions/38698/en.pdf>> (last visited: 5 Jan.

copyright-protected works in Europe therefore stands under the close scrutiny of European lawmakers and stakeholders with a view to developing solutions for the licensing of the aggregate repertoire of works administered by all European societies.<sup>2</sup>

To improve the flow of cross-border licensing of copyright-protected works, the idea has been put forward that the market for collective management of rights be liberalized for right owners and users. The proponents of this solution argue that the most effective model for achieving multi-territorial licensing of legitimate online music would be to enable right holders to authorize a CMO of their choice to manage their works across the entire EU. Similarly, users should also be able to obtain a license from any society within the EU, even if located outside of the user's territory of economic residency.<sup>3</sup> In principle, increased competition between CMOs should be beneficial for both authors and users because the organizations would have to compete on the basis of their economic efficiency, transparency and accountability.<sup>4</sup>

Whether such a liberalization of the market is indeed the best solution to the problems of cross-border licensing of copyright-protected works is a highly disputed issue. Some steps have been taken in this direction, however, most notably through the Recommendation on collective cross-border management of copyright and related rights for legitimate online music services<sup>5</sup> and the decision of the European Commission in the CISAC case.<sup>6</sup> These two documents have put the European market for the collective

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2010), also reported in: [2009] 4 *Common Market Law Reports* 12 [CISAC decision]; *Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 - IFPI 'Simulcasting')*, O.J. L. 107/58 of 30 Apr. 2003, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:107:0058:0084:en:PDF>> (last visited: 5 Jan. 2010) [IFPI Simulcasting decision].

<sup>2</sup> L. Guibault, 'A quand l'octroi de licences transfrontières pour l'utilisation de droits d'auteur et de droits voisins en Europe?', *Les Cahiers de Propriété Intellectuelle*, vol. 16, 2004-HS (Hors série): 189–208.

<sup>3</sup> European Commission, *Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 – BUMA and COMP/C2/39151 SABAM (Santiago Agreement – COMP/C2/38126)*, O.J. C. 200/11 of 17 Aug. 2005, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:200:0011:0012:EN:PDF>>, 5 Jan. 2010.

<sup>4</sup> For an article expressing doubt on this point, see P.B. Hugenholtz, 'Is concurrentie tussen rechtenorganisaties wenselijk?', *AMI* (2003): 203, at 205.

<sup>5</sup> *Commission Recommendation 2005/737/EC on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services*, O.J. L. 276/54 of 21 Oct. 2005, <[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l\\_276/l\\_27620051021en00540057.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_276/l_27620051021en00540057.pdf)>, 5 Jan. 2010 [Online Music Recommendation].

<sup>6</sup> CISAC decision, *supra* n. 1.

management of rights in turmoil, especially because stakeholders cannot fall back on any harmonized rules on good governance of CMOs.

Although the creation at the European level of a level playing field for CMOs has been an item on the European Commission's agenda at least since the publication of the Green Paper of 1995,<sup>7</sup> the *acquis communautaire* regulating the activities of CMOs remains rather sparse. Up until recently, the core of the *acquis* was composed of the decisions rendered on the basis of the European rules on competition. Over time, the European Court of Justice (ECJ) and the European Commission have developed an impressive body of jurisprudence putting the alleged anti-competitive behaviour of CMOs to the test of the European competition rules.<sup>8</sup> These were previously laid down in Articles 81 and 82 of the EC Treaty (TEC) and are currently provided for in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).<sup>9</sup> In addition to the European competition law jurisprudence, efforts toward the establishment of a regulatory framework for CMOs have intensified in the past years, as evidenced by a number of documents issued by the European Parliament and the Commission.<sup>10</sup> Whereas the initial intention was to establish principles of good governance within CMOs, the preoccupations of the European lawmakers have now moved towards resolving the issue

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<sup>7</sup> European Commission, *Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 final, Brussels, 19 Jul. 1995, <[http://aei.pitt.edu/1211/01/copyright\\_info\\_society\\_gp\\_COM\\_95\\_382.pdf](http://aei.pitt.edu/1211/01/copyright_info_society_gp_COM_95_382.pdf)>, 5 Jan. 2010.

<sup>8</sup> See *infra* para. 2.

<sup>9</sup> The Treaty of Lisbon entered into force on 1 Dec. 2009, renaming the EC Treaty (TEC) to Treaty on the Functioning of the European Union (TFEU) and changing the numbering of the provisions. See Consolidated version of the Treaty on the Functioning of the European Union, O.J. C. 115/47 of 9 May 2008, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>>, 6 Jan. 2010. Hereinafter, the text refers to the TFEU articles. The corresponding articles of the TEC are added in parentheses.

<sup>10</sup> See: European Parliament, *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI))*, P5\_TA(2004)0036, Strasbourg, 15 Jan. 2004, <[www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0036](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0036)>, 6 Jan. 2010 [Community Framework Resolution]; European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market*, COM (2004) 261 final, Brussels, 16 Apr. 2004, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0261:FIN:EN:PDF>> (last visited: 6 Jan. 2010) [Communication on the Management of Copyright in the Internal Market]; European Commission, *Communication from the President in agreement with Vice-President Wallström – Commission Work Programme for 2005*, COM (2005) 15 final, Brussels, 26 Jan. 2005, <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0015en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0015en01.pdf)>, 6 Jan. 2010 [Commission Work Programme for 2005]; European Commission, *Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright*, Brussels, 7 Jul. 2005, online: <[http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf)>, 6 Jan. 2010 [Study on Cross-Border Collective Management of Copyright].

of cross-border licensing of copyright protected works. All efforts have yet to lead to a binding set of rules, however.

This chapter is divided in three main parts. First, the chapter describes the current state of the law concerning CMOs in Europe, as pronounced over the past few decades in decisions of the ECJ and the European Commission in competition matters. Second, the chapter discusses the recent efforts deployed by the European lawmakers toward the establishment of a legal framework governing the activities of CMOs in Europe, and more specifically the multi-territorial licensing of online music services. The third part analyses the actual and potential impact on the market for the cross-border collective management of legitimate online music services of the most recent measures adopted by the European bodies. The chapter concludes on the overall state of the law in Europe pertaining to CMOs.

## 2 Control of CMOs through Competition Law

In general, CMOs in the EU Member States are subject to control under the two basic provisions of Community competition law, Articles 101 and 102 TFEU (ex Articles 81 and 82 TEC). Article 101 TFEU (ex Article 81 TEC) prohibits agreements between undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the common market. This can be the case, for example, with price-fixing agreements. Article 102 TFEU (ex Article 82 TEC) prohibits the abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. This can be the case, for example, where an undertaking imposes unfair trading conditions or where it applies dissimilar conditions to equivalent transactions with other trading parties.

CMOs occupy a dominant market position in at least two respects: first, toward the users of protected works who may have just one legitimate supplier of licenses and, second, toward the individual owners of protected works who may have no alternative provider of a rights administration infrastructure. Furthermore, CMOs may be engaging in practices in restraint of trade, contrary to Article 101 TFEU (ex Article 81 TEC), by

reinforcing their competitive position on the national market through reciprocal representation agreements for the exploitation of their respective repertoires.

European case law has consistently held that Articles 101 and 102 TFEU (ex Articles 81 and 82 TEC) are applicable to CMOs. First, these organizations constitute ‘undertakings’ within the meaning of these provisions. By acting as agencies entrusted with the safeguard of the rights of copyright owners, they participate in the commercial exchange of services and are therefore engaged in the exercise of economic activities,<sup>11</sup> irrelevant of whether they make profit or not.<sup>12</sup> Second, as CMOs enjoy a (quasi)-monopoly in their field, they are deemed to have a ‘dominant position’ in the meaning of Article 102 TFEU (ex Article 82 TEC).<sup>13</sup> Note that whether undertakings occupy a dominant position is not a relevant factor for consideration of a complaint under Article 101 TFEU (ex Article 81 TEC) – undertakings are prohibited from setting up agreements and engaging in concerted practices irrespective of whether they enjoy a dominant position.<sup>14</sup>

An exhaustive account of the European case law on the subject of CMOs would go far beyond the objectives of this chapter. The following pages are therefore limited to giving a broad overview of the main elements of the European competition rules as applied to CMOs.<sup>15</sup> As discussed later, the intervention of the ECJ and of the European Commission has traditionally addressed three broad issues: (1) the relationship between CMOs and their members, (2) the relationship between CMOs and users and (3) the reciprocal

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<sup>11</sup> See *IFPI Simulcasting* decision, *supra* n. 1, at para. 59, with reference to, *inter alia*, the ECJ judgments in Case 127/73, *Belgische Radio en Televisie (BRT) v. SABAM*, (1974) E.C.R. 51 and 313 [*BRT v. SABAM*]; Joined Cases 55/80 and 57/80, *Musik-Vertrieb Membran GmbH v. GEMA*, (1981) E.C.R. 147; and Case 7/82, *GVL v. Commission*, (1983) E.C.R. 483 [*GVL v. Commission*].

<sup>12</sup> See: *Commission Decision 81/1030/EEC of 29 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV/29.839 - GVL)*, O.J. L. 370/49 of 28 Dec. 1981, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31981D1030:EN:HTML>>, 6 Jan. 2010 [*GVL* decision], at para. 44.

<sup>13</sup> *GVL v. Commission*, *supra* n. 11, at paras 41–45.

<sup>14</sup> P. Sean Morris, ‘The reform of Article 82 and the operation of competition principles upon the normal trading functions of copyright collecting societies’, *Journal of Intellectual Property Law & Practice* 4, no. 8 (2009): 566–572, at 569.

<sup>15</sup> For further reading, see I. Govaere, *The Use and Abuse of Intellectual Property Rights in E.C. Law* (London: Sweet & Maxwell, 1996), 337; D.G. Goyder, *EC Competition Law*, 4th edn (Oxford: Oxford University Press, 2003), 660; F.L. Fine, ‘The Impact of EEC Competition Law on the Music Industry’, *Entertainment Law Review* (1992): 6 at 11; E. Lui, ‘The Eurovision Song Contest: A Proposal for Reconciling the National Regulation of Music Collecting Societies and the Single European Market’, *Entertainment Law Review* (2003): 67 at 73; and K.J. Koelman, ‘Collectieve Rechtenorganisaties en Mededinging – deel I’, *AMI* (2004): 45 at 49–50.

relationship between different CMOs. In view of the increased legal and political importance recently taken by the issue of the multi-territorial licensing of works and in view of the impact it has on the Internal Market, greater attention will be paid in this section to the competition law aspects of the reciprocal relationship between CMOs than to the other two types of relationships.

## 2.1 Relationship with Members

The relationship between CMOs and their members was the object over the years of a certain scrutiny under the rules of European competition law. The main aspects of the legal framework regarding the relationship between CMOs and their members are still laid down in the early decisions rendered by the European Commission involving the German collective management organization GEMA.<sup>16</sup> In the *GEMA I* case, the European Commission put the following points to the test of Article 102 TFEU (ex Article 82 TEC): (1) the scope of the assignment of rights in favour of the CMO, (2) the distribution of income, (3) the membership of foreign right holders and (4) the member's ability to have recourse to courts to decide on disputes with the CMO.

The Commission made at least two important rulings. First, the obligation set by a CMO requiring its members to assign unduly broad categories of rights, for example, to exclusively assign all their current and future rights with respect to all categories of works worldwide, could constitute an abuse of a dominant position. This aspect of the decision was later confirmed by the ECJ in the *BRT v. SABAM* case.<sup>17</sup> In the Court's opinion, the decisive factor when examining the statutes of a CMO in the light of the European competition rules, is whether the statutes exceed the limits absolutely necessary for effective protection (the 'indispensability' test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than necessary (the 'equity' test).<sup>18</sup> In the *SABAM* case, the Court ruled that 'a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different

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<sup>16</sup> *Commission Decision 71/224/EEC of 2 June 1971 relating to a proceeding under Article 86 of the EEC Treaty (IV/26 760 - GEMA)*, O.J. L. 134/15 of 20 Jun. 1971 [*GEMA I* decision].

<sup>17</sup> *BRT v. SABAM*, *supra* n. 11.

<sup>18</sup> *Ibid.*, at paras 8–11.

generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal'.<sup>19</sup>

Second, the European Commission stressed in the *GEMA I* case that CMOs may not discriminate among members in regard to the distribution of income.<sup>20</sup> The Commission held that GEMA had abused its dominant position by paying supplementary fees, from revenue collected from the membership as a whole, only to those members who had been ordinary members for at least three years. Also, the Commission ruled that CMOs may not refuse nationals of other EU Member States as members, nor impose discriminatory terms concerning their membership rights, for example, by preventing a foreign right holder to become an ordinary or extraordinary member (a voting member).<sup>21</sup> According to the Commission, such practices must automatically be regarded as an infringement of Article 102 TFEU (ex Article 82 TEC), as they run counter to the principle of equal treatment resulting from the prohibition of 'any discrimination on grounds of nationality' in Article 18 TFEU (ex Article 12 TEC). Moreover, the refusal to accept the membership of nationals of other Member States falls directly under the special prohibition of discrimination under Community competition law, as contained in Article 102(c) TFEU (ex Article 82(c) TEC). In this respect, the ECJ confirmed, in the *Phil Collins* case,<sup>22</sup> that domestic provisions containing reciprocity clauses cannot be relied upon to deny nationals of other EU Member States' rights conferred on national authors.

Years later, the European Commission ruled in its '*Daft Punk*' decision<sup>23</sup> that where the statutes of a CMO contain a mandatory requirement according to which all rights of an author must be assigned, without distinction, the organization may be abusing its dominant position, given that such practice corresponds to the imposition of an unfair trading condition. In this case, the two Daft Punk members wished to individually manage their rights for exploitation on the Internet, CD-ROM, DVD, etc. The French

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<sup>19</sup> *Ibid.*, at para. 12.

<sup>20</sup> See, e.g., Fine, *supra* n. 15, at 12; and L. Bently & B. Sherman, *Intellectual Property Law*, 3rd edn (Oxford: Oxford University Press, 2009), at 298.

<sup>21</sup> See also: *GVL* decision, *supra* n. 12; and *GVL v. Commission*, *supra* n. 11.

<sup>22</sup> ECJ judgment in Joined Cases C-92/92 and C-326/92, *Phil Collins and Patricia Im- und Export v. Imtrat and EMI Electrola*, (1993) I E.C.R. 5145.

<sup>23</sup> *Commission Decision of 06.08.2002 in case COMP/C2/37.219 Banghalter / Homem Christo (Daft Punk) v SACEM*, <<http://ec.europa.eu/competition/antitrust/cases/decisions/37219/fr.pdf>>, 6 Jan. 2010 [*Daft Punk* decision].

collective management organization SACEM refused membership, arguing that it protected authors from unreasonable demands of the record industry and prevented a cherry-picking of the most valuable rights.<sup>24</sup> The Commission considered this refusal as a disproportionate curtailment of individual management of the rights in question contrary to Article 102 TFEU (ex Article 82 TEC). Although the Commission recognized the legitimacy for SACEM to retain the means to monitor which authors wish to manage certain rights individually, it accepted that SACEM may retain its rule against individual management, provided derogations could be granted. Each application must be examined by SACEM on a case-by-case basis, and its decisions must be reasoned and objective. Following the *Daft Punk* decision, SACEM modified its statutes, which now allow members to apply for partial withdrawal of the rights assigned.

## 2.2 Relationship with Users

The relationship that CMOs entertain with users falls also under the scrutiny of Article 102 TFEU (ex Article 82 TEC), for CMOs may be tempted to abuse their dominant position when issuing licenses for the use of works in their repertoire. Over the years, the ECJ and the European Commission have developed an important body of jurisprudence in this area, addressing issues such as (1) the CMOs' relationship with foreign users, (2) the practices of blanket licensing and (3) the CMOs' pricing policy. The seminal case in this area remains the ECJ's judgment in the *Tournier* affair.<sup>25</sup> In this case, French discothèque owners had complained that the fees charged by the French collective management organization SACEM were excessive, in particular because the discothèque owners mainly used popular dance music of Anglo-American origin while the SACEM's fees were calculated for the use of the worldwide repertoire. As a result, the discothèque owners attempted, without success, to obtain a license directly from the relevant foreign CMOs.

The *Tournier* decision delivered a ruling on at least three important points. First, the ECJ ruled that a national CMO may refuse to grant direct access to its own national

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<sup>24</sup> T. Toft, *Collective Rights Management In The Online World - A review of recent Commission initiatives*, Brussels, DG Competition, 8 Jun. 2006, <[http://ec.europa.eu/competition/speeches/text/sp2006\\_008\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2006_008_en.pdf)>, 6 Jan. 2010, 12.

<sup>25</sup> ECJ judgment in Case 395/87, *Ministère public v. Tournier*, (1989) E.C.R. 2521 [*Tournier*].



repertoire to users established in other EU Member States only for efficiency reasons. For example, if it would be too burdensome to organize its own management and monitoring system in these countries. However, if the refusal were the result of agreements or concerted practices between the national CMOs in the Member States in which the users are established, this would have the object or effect of restricting competition in the common market contrary to Article 101 TFEU (ex Article 81 TEC).<sup>26</sup>

Second, the Court considered whether CMOs could refuse to grant licenses for only parts of their repertoire.<sup>27</sup> Instead of a blanket license, the discothèque owners had asked SACEM to grant them licenses for only the part of its repertoire that they actually used (popular dance music of Anglo-American origin), but SACEM refused. The Court ruled that the refusal by a CMO to grant national users licenses for only a certain part of the foreign repertoire it administers would not be prohibited under Article 101 TFEU (ex Article 81 TEC), unless such practice could entirely safeguard the interests of the right holders without thereby increasing the costs of managing contracts and monitoring the use of protected works.<sup>28</sup>

Third, in relation to SACEM's tariffs, the Court observed that one of the most pronounced differences among CMOs in the Member States lies in the level of operating expenses. The discothèque owners complained that SACEM charged excessive, non-negotiable and unfair royalties. The Court considered that a national CMO imposes unfair trading conditions in the meaning of Article 102 TFEU (ex Article 82 TEC), if the royalties charged are appreciably higher than those charged in other Member States, unless the differences were justified by objective and relevant factors.<sup>29</sup>

More recently, in the *Kanal 5* case,<sup>30</sup> the ECJ examined a remuneration model applied by a CMO for the television broadcast of protected musical works, whereby the royalties are calculated as a percentage of the revenue of the broadcasting companies and

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<sup>26</sup> *Ibid.*, at paras 16–26. See also: ECJ judgment in Joint Cases 110/88, 241/88 and 242/88, *Lucazeau v. SACEM*, (1989) E.C.R. 2811 [*Lucazeau*], at paras 10–20.

<sup>27</sup> See Hugenholtz, *supra* n. 4, at 205; Bently & Sherman, *supra* n. 20, at 301; and J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht* (Deventer: Kluwer Law International, 2005), at 466.

<sup>28</sup> See *Tournier*, *supra* n. 25, at paras 27–33.

<sup>29</sup> *Ibid.*, at paras 34–36. See also: *Lucazeau*, *supra* n. 26, at paras 21–33.

<sup>30</sup> ECJ judgment in Case C-52/07, *Kanal 5 Ltd and TV 4 AB*, O.J. C. 32/2 of 7 Feb. 2009, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:032:0002:0003:EN:PDF>>, 6 Jan. 2010.

according to the amount of the music broadcast. The Court ruled that such a remuneration model does not run counter to Article 102 TFEU (ex Article 82 TEC), unless another method enables a more precise identification of the use and audience of those works without incurring a disproportionate increase of management and supervision costs. The fact that the royalties due are calculated in a different manner depending on whether the broadcasting company is commercial or public may constitute an abuse if the CMO applies dissimilar conditions to equivalent services and if it places the television companies at a competitive disadvantage without objective justification.

### 2.3 Reciprocal Agreements between CMOs

The rights clearance for the exploitation of non-domestic repertoire occurs on the basis of a network of reciprocal representation arrangements between CMOs. Through reciprocal agreements, the parties give each other the right, on a non-exclusive basis, to exploit the copyrights on their respective repertoire in their respective territories. As the ECJ stated in the *Tournier* decision, the advantage of a system of reciprocal agreements is that it ‘enables copyright-management societies to rely, for the protection of their repertoires in another State, on the organization established by the copyright-management society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements’.<sup>31</sup> To the extent that CMOs are or become actual or potential competitors in respect to their services, the agreements between them could lead to a restriction of competition, contrary to Article 101 TFEU (ex Article 81 TEC). According to settled jurisprudence, concerted action by national CMOs with the effect of systematically refusing to grant direct access to their repertoires to foreign users must be regarded as amounting to a concerted practice restrictive of competition and capable of affecting trade between the Member States.<sup>32</sup>

Early on, the European Commission held that the CMOs in the different Member States must compete against each other, at least in certain areas. In 1985, the Commission held that the practices of GEMA, who charged royalties on sound recordings manufactured in Germany even where the licensee had obtained a mechanical license

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<sup>31</sup> *Tournier*, *supra* n. 25, at para. 19.

<sup>32</sup> *Ibid.*, at para. 23.

from a CMO in another Member State, constituted an abuse of a dominant position.<sup>33</sup> According to the Commission,<sup>34</sup> a mechanical license granted by a CMO in a Community Member State is valid throughout the Community and authorizes manufacture of sound recordings in any Member State. In other words, once a mechanical license has been granted in a Community Member State, this exhausts the right of a CMO in a Member State where the sound recordings are imported to charge another licensing fee. As a consequence, CMOs in Europe now have to compete against each other for so-called ‘Central European Licensing’ deals, allowing any user to acquire a mechanical license from one CMO that is valid throughout the Community.<sup>35</sup>

In the *Tournier* and *Lucazeau* cases, the ECJ addressed the reciprocal relationship between CMOs and concluded that such reciprocal agreements did not, as such, fall under Article 101(1) TFEU (ex Article 81(1) TEC), provided no concerted action was demonstrated. The reciprocal representation agreements appeared in those days to be economically justified in a context in which physical monitoring of copyright usage was required.<sup>36</sup> With the advent of the digital network environment, the exploitation of copyright-protected works has taken a new turn – one that can simultaneously reach the entire world and be monitored at a distance. As discussed in the following section in the *IFPI Simulcasting* decision and the more recent *CISAC* decision, these technological developments emphasize the need for multi-repertoire/multi-territory licenses, or in absence of such broad licenses, for a solid and transparent network of reciprocal agreements between CMOs.

### 2.3.1 IFPI Simulcasting Decision

The *IFPI Simulcasting* decision involved the licensing of neighbouring rights for the simulcasting of phonograms, where ‘simulcasting’ is defined as the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals. The right to license simulcast rights on the

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<sup>33</sup> See, e.g., Fine, *supra* n. 15, at 8–9; and Koelman, *supra* n. 15, at 49.

<sup>34</sup> Commission’s Press Release of 6 Feb. 1985, 2 *Common Market Law Review* 1.

<sup>35</sup> See M. Kretschmer, ‘The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments’, *European Intellectual Property Review* 24 (March 2002): 126, 133, online: <[www.cippm.org.uk/pdfs/kretschmer\\_eipr\\_032002.pdf](http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf)>, 6 Jan. 2010.

<sup>36</sup> *Tournier*, *supra* n. 25, at paras 34–46; and *Lucazeau*, *supra* n. 26, at paras 21–33.

Internet, given that simulcasting necessarily involves the transmission of signals into several territories at the same time, was not covered by the mono-territory inter-society mandates resulting from the existing reciprocal representation agreements. According to the IFPI Simulcasting reciprocal agreement, which the participating CMOs had signed on an experimental basis until the end of 2004, each of the participating societies could issue multi-territorial licenses for the online use of copyrighted works of the repertoires of these societies only to online users established in their own territory.<sup>37</sup> Following similar statements of objection against two similar constructs, known as the Santiago<sup>38</sup> and BIEM-Barcelona agreements,<sup>39</sup> the European Commission issued a statement of objection against the IFPI Simulcasting agreement and put its terms to the test of the provisions of Article 101 TFEU (ex Article 81 TEC).

Referring to the *Tournier* and *Lucazeau* cases, the European Commission considered that the monitoring task of CMOs in the online environment could easily be carried out directly on the Internet and could therefore take place from a distance, which meant that the traditional economic justification for CMOs not to compete in cross-border provision of services no longer applied in this context.<sup>40</sup> Moreover, the parties in this case must undertake to increase transparency in regard to the payment charged to the users of phonograms in their repertoire, by separating the tariff that covers the royalty proper from the fee meant to cover the administration costs.<sup>41</sup> This transparency in pricing would enable users to recognize the most efficient societies and to seek their licenses from the society that provides them at the lower cost. The Commission further stated that in the present case, the model chosen by the parties for the simulcasting licensing structure results in the society granting a multi-repertoire/multi-territory license being limited in its freedom as to the amount of the global license fee it will charge to a user.<sup>42</sup>

The Commission therefore held that where the IFPI Simulcasting agreement determined that each contracting party could charge users the license fees that apply in

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<sup>37</sup> See Guibault, *supra* n. 2, for more details about the competition aspects and the Commission's viewpoints of these agreements.

<sup>38</sup> Notification of cooperation agreements (Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM), O.J. C. 145/2 of 17 May 2001, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:145:0002:0002:EN:PDF>>, 6 Jan. 2010.

<sup>39</sup> Notification of cooperation agreements (Case COMP/C-2/38.377 – BIEM Barcelona Agreements), O.J. C. 132/18 of 4 Jun. 2002, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:132:0018:0018:EN:PDF>>, 6 Jan. 2010.

<sup>40</sup> *IFPI Simulcasting* decision, *supra* n. 1, at para. 61.

<sup>41</sup> *Ibid.*, at para. 103.

<sup>42</sup> *Ibid.*, at para. 67.

the territories into which the user simulcasts its services, it significantly reduced competition between CMOs in terms of price (Article 101 TFEU (ex Article 81 TEC)), because this practice resulted in tariffs that were to a large extent pre-determined.<sup>43</sup> On this point, at the request of the Commission during the proceedings, the parties undertook to split the copyright royalty from the administration fee such as to bring about an increased degree of transparency in the relationship between CMOs and users. This was meant to allow users (as well as members of the societies) to better assess the efficiency of each of the societies and have a better understanding of their management costs.

Before drawing its conclusion regarding the compatibility of the IFPI Simulcasting agreement with Article 101(1) TFEU (ex Article 81(1) TEC), the Commission considered whether the agreement could be exempted under paragraph (3) of the same Article.<sup>44</sup> As the Commission previously stated, in certain circumstances cooperation may be justified and can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. The Commission noted first that the IFPI Simulcasting agreement gave rise to a new product – a multi-territorial, multi-repertoire simulcasting license, covering the repertoires of multiple CMOs, enabling a simulcaster to obtain a single license from a single CMO for its simulcast that is accessible from virtually anywhere in the world via the Internet. Second, under the reciprocal simulcasting licenses system, broadcasters would benefit from the fact that by obtaining one simulcast license from a single CMO, they would be able to simulcast in any participating territory without fear of being sued for infringement of the relevant rights. Third, the system put in place through the IFPI Simulcasting

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<sup>43</sup> *Ibid.*, at paras 62–78.

<sup>44</sup> Article 101(3) TFEU (ex Art. 81(3) TEC) reads as follows: ‘The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

agreement would also benefit consumers, for it provides them with easier and wider access to a range of music by means of available simulcasts.

The only point raising concerns in the eyes of the Commission, however, was the manner in which, pursuant to the IFPI Simulcasting agreement, the copyright-royalty element of the license tariffs remained pre-determined and unchangeable by the society granting a simulcasting license. Nevertheless, after thorough consideration of the tariffs structure, the Commission concluded that the pre-determination of national copyright royalty levels represented in the circumstances a guarantee without which the participating societies would not contribute with their individual inputs so as to create and distribute a multi-territory/multi-repertoire simulcasting license. Therefore, the Commission considered such restriction to be indispensable within the meaning of Article 101(3)(a) TFEU (ex Article 81(3)(a) TEC) and granted an individual exemption until the end of 2004 when the agreement expired.<sup>45</sup>

### 2.3.2 CISAC Decision

The model reciprocal agreement drawn up by the Confédération Internationale des Auteurs et Compositeurs (CISAC) became the object of a comparable inquiry under Article 101 TFEU (ex Article 81 TEC), as a result of two separate complaints from the radio broadcasting group RTL and Music Choice, an online music supplier in the United Kingdom. In 2006, the European Commission issued a statement of objection against the CISAC model contract itself and its bilateral implementation between the CMOs of the European Economic Area (EEA),<sup>46</sup> which contained territorial restrictions<sup>47</sup> creating an obstacle to obtaining a multi-territory/multi-repertoire license for the online use of music. The model contract at issue and the agreements deriving from it at bilateral level form the basis of collective copyright-management for all modes of performance of copyright-protected music to the public. It is important to note, however, that the complaints related only to the exploitation of musical works on modern platforms, such as the Internet, satellite and cable.

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<sup>45</sup> *IFPI Simulcasting* decision, *supra* n. 1, at para. 115. See also, C. Stothers, 'Copyright and the EC Treaty: Music, Films and Football', *European Intellectual Property Review* 31, no. 5 (2009): 272–282, at 280.

<sup>46</sup> The EEA includes all Member States of the EU plus Iceland, Norway and Lichtenstein.

<sup>47</sup> Sean Morris, *supra* n. 14, 566.

The Commission identified two potentially restrictive clauses in the CISAC model contract and the reciprocal agreements concluded on its basis by the European CMOs:

- Article 11(II) of the CISAC model contract, which reads: ‘While this contract is in force neither of the contracting Societies may, without the consent of the other, accept as a member any member of the other society or any natural person, firm or company having the nationality of one of the countries in which the other Society operates’;
- Article 6(II) of the CISAC model contract, which reads: ‘For the duration of the present contract, each of the contracting Societies shall refrain from any intervention within the territory of the other Society in the latter’s exercise of the mandate conferred by the present contract’.<sup>48</sup>

Taken individually, such restrictions had already given rise to investigations by competition authorities, leading, for example, to the GEMA decision<sup>49</sup> and the GVL case,<sup>50</sup> regarding membership discrimination clauses, and to the *Tournier* decision,<sup>51</sup> regarding restrictions in the grant of licenses to users located in another country. It is therefore no surprise that the Commission, in its decision of 16 July 2008, declared the practices of 24 EEA CISAC members contrary to Article 101 TFEU (ex Article 81 TEC).<sup>52</sup>

Before assessing whether the clauses in the model contract were contrary to Article 101 TFEU (ex Article 81 TEC), the European Commission engaged in a very detailed analysis of the relevant product and geographical markets in relation to the activities of CMOs. The Commission identified three distinct product markets: the provision of copyright administration services to right holders, the provision of services to other CMOs and the licensing of public performance rights for satellite, cable and Internet transmissions to commercial users. With respect to this last point, the Commission noted that, contrary to the *Tournier* and *Lucazeau* cases, a local presence is no longer required to monitor the use of the license for Internet, satellite and cable broadcast. As a consequence, CMOs have the technical capacity to issue multi-territorial licenses, although the uniform and systematic territorial delineation precludes them from offering multi-repertoire and multi-territorial licenses to commercial users. Conversely, the

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<sup>48</sup> CISAC decision, *supra* n. 1, at para. 74.

<sup>49</sup> GEMA I decision, *supra* n. 16.

<sup>50</sup> See: GVL decision, *supra* n. 12; and GVL v. Commission, *supra* n. 11.

<sup>51</sup> *Tournier*, *supra* n. 25, at para.19.

<sup>52</sup> CISAC decision, *supra* n. 1.

geographical market for the provision of copyright administration services to right holders remains national.<sup>53</sup>

Putting the CISAC model contract to the test of Article 101 TFEU (ex Article 81 TEC), the Commission then enquired how the agreement affected competition within the EEA. It found that competition between CMOs was affected in two ways: first, in relation to their own services or repertoires, and, second, in relation to the offering of similar repertoires. With respect to the first form of restraint on competition, the membership restrictions in the model contract impeded the ability of an author from becoming a member of the CMO of his choice or to be simultaneously a member of different EEA societies in different EEA territories.<sup>54</sup> As the Commission opined:

the membership restrictions contribute to bringing about clearly separated national repertoires since they make it more difficult for authors to become members of other collecting societies. Without the membership restriction this distinction by nationality is less likely to exist, and this would potentially render the repertoires more homogeneous in the long term.<sup>55</sup>

With respect to the second form of restraint on competition, the territorial delineation clause, the Commission considered that territorial restrictions were not explained by the territorial nature of copyright and that the need for a local presence did not justify the systematic delineation of the territory as the territory of the country where the CMO is established. According to the Commission, this clause ‘effectively leads to national monopolies for the multi-repertoire licensing of public performance rights and has the effect of segmenting the EEA into national markets. Competition is restricted on two levels: (i) on the market for administration services which collecting societies provide to each other; and (ii) on the licensing market’.<sup>56</sup> As the Commission further stated:

the mutually guaranteed territorial monopolies for the licensing of public performance rights ensure that each collecting society will be able to charge administration costs for the management of rights and the delivery of the license without facing competitive pressure on these fees from other collecting societies.<sup>57</sup>

The Commission concluded that, on the basis of the evidence presented, the territorial delineation clause could not be objectively explained and was not necessary for ensuring that EEA CISAC members grant each other reciprocal mandates. The model contract

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<sup>53</sup> M.M. Frabboni, ‘Old Monopolies Versus New Technologies – The Cisac Decision In Context’, *Entertainment Law Review* 20, no. 3 (2009): 76–81, at 79.

<sup>54</sup> CISAC decision, *supra* n. 1, at para. 125.

<sup>55</sup> *Ibid.*, para. 126.

<sup>56</sup> *Ibid.*, para. 207.

<sup>57</sup> *Ibid.*, para. 210.



therefore amounted to a concerted practice in restraint of competition contrary to Article 101 TFEU (ex Article 81 TEC). Finally, the Commission was of the view that the model contract and its implementation by the EEA CISAC members did not meet any of the four cumulative conditions of Article 101(3) TFEU (ex Article 81(3) TEC) so as to justify an exemption.

The Commission considered that the EEA CISAC members had acted in a concerted way to prevent any competition between themselves regarding the management of music distribution rights by Internet, cable and satellite and that these practices, by permitting the maintenance of national monopolies, were preventing the issue of pan-European licenses. Nevertheless, the decision did not fix any financial penalty, and allowed the CMOs to retain their current system of bilateral agreements, with a few modifications.<sup>58</sup> The companies therefore were given 120 days from the date of the decision to submit revised bilateral agreements to the European Commission.

In October 2008, CISAC filed for appeal of the Commission's decision before the Court of First Instance. It argued that the decision creates legal uncertainty for copyright holders and for users.<sup>59</sup> CISAC submitted that the Commission made an error by determining that the parallel territorial delineation resulting from the reciprocal representation agreements concluded by the EEA CISAC members constitutes a concerted practice. CISAC considers that the presence of a territorial delineation clause in all the reciprocal representation agreements concluded by its members is not the product of a concerted practice to restrict competition. Rather, this state of affairs exists because all the societies find it in the interest of their members to include such a clause in their reciprocal representation agreements. Alternatively, CISAC claims that if there were a concerted practice on territorial delineations, it would not be restrictive of competition within the meaning of Article 101 TFEU (ex Article 81 TEC) for two reasons. First, it thinks that the alleged concerted practice on territorial delineations is not illegal because it concerns a form of competition that is not worthy of protection. Second, even if the alleged practice were to be considered to restrict competition, it believes that it does not

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<sup>58</sup> Frabboni, *supra* n. 53.

<sup>59</sup> Action brought before the European Court of Justice on 3 Oct. 2008, Case T-442/08, *CISAC v. Commission*, O.J. C. 82/25 of 4 Apr. 2009, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:082:0025:0026:EN:PDF>>, 6 Jan. 2010.

infringe Article 101(1) TFEU (ex Article 81(1) TEC) because it is necessary and proportionate to the legitimate objective pursued. At the time of writing, the appeal was still pending.

### 3 European Regulatory Framework Relating to CMOs

Over the last few years, the European Commission has gained the conviction that, next to the control *ex post* exercised over the activities of CMOs under the rules of European competition law, a level playing field of undistorted competition between CMOs will emerge only provided that appropriate legislative measures are adopted to support it. The discussions around the establishment of a European legal framework for CMOs have shifted over the past few years from the wish to harmonize rules on the good governance of CMOs to the need to solve the more pressing multi-territorial licensing issues.<sup>60</sup> The main reason advanced for this lies in the fact that the market has failed to produce effective structures for cross-border licensing and cross-border royalty distribution and that it has not rectified a series of contractual restrictions preventing authors or other right holders from seeking the best collective rights management service across national borders. The following sections describe the main policy documents that have paved the way to the adoption of the 2005 Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, before examining the content of the Recommendation itself and the critique that it generated.

#### 3.1 Resolution of the European Parliament

The European Parliament's Resolution of January 2004 on the subject set out policy considerations, which the European Commission should take into consideration when the time comes to draw up the text of a directive.<sup>61</sup> At the outset, the European Parliament emphasized the importance of the cultural and social aspects of collective rights management and the traditional and still necessary role of CMOs.<sup>62</sup> The Parliament pointed out that in the area of copyright and related rights, a proper, fair, and professional

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<sup>60</sup> Study on Cross-Border Collective Management of Copyright, *supra* n. 10, at 30.

<sup>61</sup> Community Framework Resolution, *supra* n. 10.

<sup>62</sup> See A. Dietz, 'European Parliament versus Commission: how to deal with collecting societies?', *International Review of Intellectual Property and Competition Law* (2004): 809 at 810–814.

system of collective rights management is crucial for financial as well as cultural success. Collective rights management can constitute an important factor in stimulating creativity and influencing the growth of cultural and linguistic diversity. Nevertheless, the Parliament was rather critical about the actual state of collective rights management in the EU. It noted, for instance, the deficit in the internal democratic structures of CMOs, the lack of transparency in the financial policy of the societies and the absence of rapid dispute settlement mechanisms. In addition, the European Parliament observed that major structural differences existed in the regulation and efficiency regarding the external control of CMOs in the different Member States. Therefore, the European Parliament believed ‘that a Community approach in the area of the exercise and management of copyright and related rights, in particular of effective collective rights management in the internal market, must be pursued’.

In this respect, the European Parliament presented several possible solutions,<sup>63</sup> one of which was the creation of common tools and of comparable parameters and the coordination of CMOs’ areas of activity. With respect to the societies’ internal democratic structure, a proposal was made to establish minimum standards for organizational structures, transparency, accounting and legal remedies. Furthermore, the European Parliament called for the adoption of provisions requiring the publication of tariffs, distribution keys, annual accounts, a listing of appropriate management costs and information on reciprocal representation agreements. A framework of minimum standards for the calculation of tariffs and of uniform coding standards for works should also be instituted to simplify the exercise of rights. With regard to the cooperation between CMOs, a call was made for an efficient exchange of information between the societies and the discontinuation of so-called ‘B contracts’ in reciprocal representation agreements.<sup>64</sup> Finally, the European Parliament made a general call for the establishment of efficient, independent, regular, transparent and expert control mechanisms and for comparable and compatible arbitration mechanisms in all EU Member States.

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<sup>63</sup> *Ibid.*, at 819.

<sup>64</sup> See Community Framework Resolution, *supra* n. 10, at paras 45 and 56. In the current system of reciprocal representation agreements, there are two kinds of agreements. Under the ‘A agreements’ a reciprocal transfer of royalties collected is provided for, where under the ‘B agreements’, no money or data is transferred and each society collects and distributes royalties used in its territory only to its own right holders.

However, together with the introduction of equitable, transparent and balanced rules for CMOs, the European Parliament also appealed to the restriction of competition law to cases of abuse, in order to safeguard rights management effectively both now and in the future. According to the Explanatory Statement to the Resolution, a misguided insistence on competition would lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs. Furthermore, the European Parliament saw CMOs as an important safeguard in the world of media concentration. It stressed that the monopoly of CMOs should not be replaced by a monopoly of the media industry.

### 3.2 Communication from the Commission

In contrast to the Parliament's Resolution, the European Commission's Communication of 2004 on the Management of Copyright and Related Rights in the Internal Market was a rather technically and legally oriented document.<sup>65</sup> The European Commission stated that to safeguard the functioning of collective rights management throughout the Internal Market and to ensure that it continues to represent a valuable option for the management of rights benefiting right holders and users alike, a legislative approach at Community level was required. Although the Commission recognized that competition rules remain an effective instrument for regulating the market and the behaviour of CMOs, it took the view that an internal market in collective rights management could be best achieved if the monitoring of CMOs under competition rules was complemented by the establishment of a legislative framework.

According to the Commission, complementary action was needed on those aspects of collective rights management that impede the full potential of the Internal Market in regard to the cross-border trade of goods and provision of services based on copyright and related rights. In this respect, the efficiency, transparency and accountability of CMOs were of particular importance. To improve the functioning of collective rights management in the Internal Market, the Commission intended to establish a level playing field in which general conditions for several features of collective rights management would be defined. These features were:

- Establishment and status of CMOs

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<sup>65</sup> Communication on the Management of Copyright in the Internal Market, *supra* n. 10.

The Commission wanted the establishment of CMOs to be subject to similar conditions in all Member States. These conditions would relate to the persons who may establish a society, the status of the latter, the necessary proof of efficiency, operability and accounting obligations and a sufficient degree of representativity. On the other hand, the Commission saw no need to bring uniformity in regard to the legal form of organization of CMOs, because it reasoned that the efficiency of a society is not linked to its legal form.

– Relationship with users

In their relation to users, the Commission deemed it necessary to safeguard the functioning of CMOs as one-stop shops for licensing. Common ground would therefore be required on the grant of licenses under reasonable conditions, the transparency in the pricing policy of the CMOs and the reasonableness of the tariffs. Furthermore, the Commission found it essential for users to be in a position to contest the tariffs before national courts or specially created mediation tribunals or with the assistance of supervisory authorities.

– Relationship with right holders

In the societies' relation to right holders, the Commission wished to achieve a level playing field in regard to the acquisition of rights (the mandate), the conditions of membership and the termination of membership. The mandate would offer right holders a reasonable degree of flexibility on its duration and scope. In principle, right holders should also have the possibility, in the light of the deployment of Digital Rights Management ('DRM') systems, to manage certain rights individually if they so desire. Moreover, the Commission wanted similar conditions to exist on the representation and the position of right holders within the society, for example, in regard to their influence on the decision-making process and their access to internal documents and financial records in relation to distribution and licensing revenue and deductions. In this respect, the leading principles must be the good governance, non-discrimination, transparency and accountability of the CMOs.

– External control of CMOs

Finally, the Commission wished to create a level playing field with respect to the external control of CMOs. The external control would cover such matters as the behaviour of

CMOs, their functioning, the control of tariffs and licensing conditions and the settlement of disputes. The Commission wanted to see adequate external control mechanisms be established throughout the Community and, to that end, ensure that specific supervisory bodies (such as specialized tribunals, administrative authorities or arbitration boards) became available in all Member States. In addition, the Commission wished to establish common ground on the powers of these bodies, on their composition and on the binding or non-binding nature of their decisions.

When considering the possible options to achieve the objectives outlined in the Communication, the Commission expressly stated that it no longer seemed to be an option to abstain from legislative action. For the Commission, neither soft law nor codes of conduct agreed upon in the marketplace appeared as an adequate solution. Therefore, the Commission expressed the intention to propose a legislative instrument.

### 3.3 Study on Cross-Border Collective Management of Copyright

In 2005, the European Commission published a study on the cross-border collective management of copyright.<sup>66</sup> In this document, the Commission identified the main problem encountered in the cross-border collective management of copyright as flowing from the fact that the core service elements of the ‘cross-border grant of licenses to commercial users’ and ‘cross-border distribution of royalties’ did not function in an optimal manner and hampered the development of an innovative market for the provision of online music services. The study underlined the difficulties of establishing the necessary number of agreements and the problem of legal uncertainty that this has caused.

Three different policy options were put forward as a proposal for reform on collective administration of copyright in the online environment:

- Option 1: To abstain from Community action;
- Option 2: To eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between CMOs;
- Option 3: To give right holders the choice to authorize a CMO of their choice to manage their works across the entire EU.

Option 2 would, according to the Commission, limit EU policy to improving the traditional way in which national CMOs in the Member States cooperate to ensure the cross-border management of copyright. It would introduce a single entry point and choice

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<sup>66</sup> Study on Cross-Border Collective Management of Copyright, *supra* n. 10.

for commercial end-users, but it would not introduce increased choice at the level of right holders as to the CMO to which to entrust the management of their rights. This solution would also improve the way reciprocal agreements function, by improving the way the affiliate society monitors use, collects royalties and transfers them back to the management society. In relation to licensing, this option would ensure that the territorial restrictions in classical reciprocity agreements that hinder the affiliate society from licensing the management society's repertoire beyond its own home territory are removed from all reciprocal representation agreements.<sup>67</sup> Moreover, reciprocal representation agreements would no longer provide that the affiliate society is restricted to granting a multi-territorial license to content providers whose economic residence is located in its 'home' territory.

By contrast, Option 3 would not rely on reciprocal representation agreements to give CMOs licensing authority over a homogeneous product. Instead, it would give all right holders across the EU the possibility to adhere to any CMO of their choice for the EU-wide exploitation of their online rights. Option 3 would effectively cut out the intermediary – the affiliate society – in favour of direct membership in a CMO who, by choice of the right holder, could receive an EU-wide mandate to manage this right holder's copyright protected works. Option 3 would therefore introduce choice and competition at the level between right holders and CMOs. The Commission expressed a strong preference for this option because it would offer the most effective model of cross-border management of copyright.<sup>68</sup> However, this option should first be adopted for rights clearance for online music, before being extended to the collective management of rights as a whole.

In setting forth Option 3 as the preferable long-term rights management model for cross-border copyright exploitation, the Commission emphasized that EU action should be based on the following core principles:

(1) Right-holders choice as to the online management society is based on the freedom to provide rights management services directly across borders. The freedom to provide cross-border management services by means of direct membership contracts will eliminate administrative

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<sup>67</sup> *Ibid.*, at 34.

<sup>68</sup> *Ibid.*, at 54. See also: M.M. Frabboni, 'Cross-border licensing and collective management: A proposal for the on-line context', *Entertainment Law Review* 16, no. 8 (2005): 204–208, at 206.

costs inherent in channelling non-domestic right-holders royalties through reciprocal agreements between different societies;

(2) The principle that a right-holders' choice of a single EU rights manager should be exercised irrespective of residence or nationality of either the rights-manager or the right-holder;

(3) The principle that a collective rights society's repertoire and territorial licensing power would not derive from reciprocal agreements but from right-holder concluding contractual agreements directly with a society of their choice. Right-holders should be able to withdraw certain categories of rights (in particular categories of rights linked to online exploitation) from their national CRMs and transfer their administration to a single rights manager of their choice. For that to work, these online rights must be withdrawn from the scope of reciprocal agreements as well;

(4) The principle that the individual membership contract will allow the right-holder to precisely define the categories of rights administered and the territorial scope of the society's authority. As the licensing authority would derive from the individual membership contract, the collective rights manager of choice would not be limited to managing these rights in his home territory only, but throughout the EU;

(5) Individual membership contracts create a fiduciary duty between the collecting society and its members, obliging the former to distribute royalties in an equitable manner. The principle of equitable distribution obliges CRMs to treat domestic and nondomestic members alike with respect to all elements of the management service provided. The fiduciary duty enshrined in membership contracts is thus a tool to maximise the royalties that accrue to right-holders;

(6) Membership cannot be refused to individual categories of right-holders who represent mainly non-domestic interests (e.g., music publishers). In addition, these right-holders should have a voice in how royalties are distributed that is that is commensurate to the economic value of the rights they represent;

(7) Non-discrimination as to the service provided and the fiduciary duty of the collective rights manager vis-à-vis its members introduces a culture of transparency and good governance as to how rights are collectively managed across EU borders.<sup>69</sup>

Contrary to the statement made in its 2004 Communication, according to which principles of good governance should be implemented through a legislative instrument, in its Staff Working Document, the Commission kept silent on the type of measure needed to put these principles into practice.

### 3.4 Recommendation of 2005 on Cross-Border Licensing of Online Music Services

Shortly after the publication of the Staff Working Document and at the close of a brief period of consultation with stakeholders, the European Commission issued on 18 October 2005 a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.<sup>70</sup> Despite its good intentions, this

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<sup>69</sup> Study on Cross-Border Collective Management of Copyright, *supra* n. 10, at 56.

<sup>70</sup> Online Music Recommendation, *supra* n. 5. See also: European Commission, *Commission Staff Working Document, Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services*, SEC (2005) 1254, Brussels, 11 Oct. 2005, <[http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf)>, 6 Jan. 2010.



Recommendation was met with severe criticism, not least because stakeholders thought the process of adoption of the Recommendation had been rushed and that no one had sufficient opportunity to consider the implications of the proposal or the practical modalities for implementation of the new system. Before turning to these points of critique in the next section, let us first examine the content of the Recommendation.<sup>71</sup>

At the outset, the Recommendation falls short of the promises made in the 2004 Communication in two ways. First, it remains a non-binding document calling not only Member States but also all ‘collective rights managers’ involved in the cross-border licensing of rights to live up to its principles on a voluntary basis.<sup>72</sup> Although Article 2 of the Recommendation invites Member States ‘to take steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services’, it sets no deadline for doing so, nor does it involve any sanction for failure to do so.<sup>73</sup> It is therefore highly doubtful that all Member States will voluntarily implement the requirements set by the Recommendation so as to achieve a minimum level of harmonization.<sup>74</sup>

Second, the Recommendation applies only to the cross-border licensing of rights in the online environment, leaving the off-line licensing models unaffected. Although it is to be expected that the online business models will influence the manner in which licenses are granted off-line,<sup>75</sup> it may take some time before both areas actually follow similar forms of licensing. According to some commentators, it is not excluded that, with respect to off-line uses of their repertoire, CMOs will for a time persist with the traditional way of granting licenses applicable to their own national territory only, relying on reciprocal

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<sup>71</sup> M.M. Frabboni, ‘Online Music Licensing: The Calm after the Storm’, *Entertainment Law Review* 17(2) (2006): 65–69.

<sup>72</sup> J. Drexler, ‘Le droit de la gestion collective en Allemagne après la recommandation européenne sur la gestion collective des droits en ligne dans le domaine musical’, in *Impulse für eine europäische Harmonisierung des Urheberrechts : Urheberrecht im deutsch-französischen Dialog*, ed. R.M. Hilty, C. Geiger & V.-L. Benabou (Berlin: Springer, 2007), 399–430, at 400.

<sup>73</sup> Member States and collective rights managers are merely invited to report to the Commission on a yearly basis, on the measures they have taken in relation to the Recommendation and on the management of copyright and related rights for the provision of legitimate online music services, so that the Commission can assess the need for further action at Community level. See: Art. 16 of the Online Music Recommendation, *supra* n. 5.

<sup>74</sup> R. Matulionytė, ‘Cross-Border Management and Principle of Territoriality’, *Journal of World Intellectual Property* 11, no. 5–6, (2009): 467–497, at 478.

<sup>75</sup> Drexler, *supra* n. 72, at 401.

agreements for representation in other EEA countries. Where CMOs decide to observe the requirements of the Recommendation for the online licensing of rights, while maintaining the traditional practice for off-line licensing, a situation of legal uncertainty in the collective management of rights is bound to arise for both right holders and users.<sup>76</sup>

Contrary to a directive, which is normally addressed to the Member States who are obligated to implement its rules in their national legal order, the Recommendation is addressed not only to the Member States, but also to all economic operators who are involved in the management of copyright and related rights within the Community. Some provisions contained in the Recommendation, however, are directed specifically to Member States. Article 2, for example, invites Member States ‘to take the steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services’. But most provisions are aimed at ‘collective rights managers’, who are defined as persons who provide to several right holders management services of copyright and related rights for the provision of legitimate online music services at Community level. Such management services include the grant of licenses to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to right holders.<sup>77</sup>

With respect to multi-territorial licensing of rights, the Commission decided to favour Option 3, as announced in its Staff Working Document, that is, to give right holders the choice to authorize a CMO of their choice to manage their works across the entire Union. The Recommendation incorporates the seven principles enumerated in the Staff Working Document. Article 3 of the Recommendation emphasizes that right holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right holder. This provision introduces competition among collective rights managers at the level of right holders,

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<sup>76</sup> Frabboni, *supra* n. 68, at 207.

<sup>77</sup> Article 1a of the Online Music Recommendation, *supra* n. 5.

because they are no longer compelled to join exclusively the CMO in their country of residence.

According to the Recommendation, right holders should be able to determine the online rights to be entrusted for collective management as well as the territorial scope of the mandate of the collective rights managers. Right holders should also, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi-territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the manager or the right holder. This principle directly addresses the situation encountered in the *Daft Punk* decision,<sup>78</sup> in which the authors wanted to withdraw their online rights from SACEM's management to exercise them individually (*supra*, text). This entails that where a right holder has transferred the management of an online right to another collective rights manager, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded among them.

The Recommendation further sets out principles with respect to the good governance of collective rights managers. Collective rights managers are therefore urged to inform right holders and commercial users about the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire, the applicable tariffs and any changes to these. Collective rights managers are invited to abide by the principle of non-discrimination in the grant of licenses to commercial users as well as in their relationship with right holders. Royalties should be distributed according to principles of equity and fairness. Collective rights managers should operate in a transparent manner and report regularly to all right holders they represent on any licenses granted, applicable tariffs and royalties collected and distributed. In particular, they should specify vis-à-vis all the right holders they represent the deductions made for purposes other than for the management services provided. With respect to the establishment of a dispute settlement mechanism, Member States are invited under the Recommendation to provide for effective solutions in particular in

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<sup>78</sup> *Daft Punk* decision, *supra* n. 23.

relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.<sup>79</sup>

### 3.5 Reactions of the European Parliament

Among the most critical reactions to the Commission's Recommendation on the cross-border licensing of legitimate online music services was that of the European Parliament. The Parliament felt the need to issue two resolutions in respect to this recommendation, a first one on 13 March 2007<sup>80</sup> and a second one, on 25 September 2008.<sup>81</sup> The first and foremost point of critique voiced by the European Parliament concerns the Commission's failure to undertake a broad and thorough consultation process with interested parties and with the Parliament before adopting the Recommendation, as well as the Commission's omission to involve Parliament formally, particularly in view of Parliament's previously mentioned resolution of 15 January 2004, given that the Recommendation clearly goes further than merely interpreting or supplementing existing rules. The Parliament found it unacceptable that a 'soft law' approach was chosen without prior consultation and without the formal involvement of Parliament and the Council, thereby circumventing the democratic process, especially as the initiative taken had already influenced decisions in the market to the potential detriment of competition and cultural diversity.

The Parliament further emphasized the important role played by national CMOs in providing support for the promotion of new and minority right holders, cultural diversity, creativity and local repertoires, which presupposes that they retain the right to charge cultural deductions. In this regard, the Parliament said to be concerned about the potentially negative effects of some provisions of the Recommendation on local repertoires and on cultural diversity, given the potential risk for favouring a concentration of rights in the bigger CMOs. Any initiative for the introduction of competition between

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<sup>79</sup> Frabboni, *supra* n. 71, at 68.

<sup>80</sup> 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)*, P6\_TA(2007)0064, Strasbourg, 13 Mar. 2007, online: <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN&language=EN)>, 6 Jan. 2010.

<sup>81</sup> European Parliament, *Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services*, P6\_TA(2008)0462, Brussels, 25 Sep. 2008, online: <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN&language=EN)>, 6 Jan. 2010.

rights managers in attracting the most profitable right holders must therefore be examined and weighed against the adverse effects of such an approach on smaller right holders, small and medium-sized CMOs and cultural diversity.

Consequently, the Parliament invited the Commission to make it clear that the 2005 Recommendation applied exclusively to online sales of music recordings. It also wished to see a genuine legislative procedure, for which the interested parties would be closely consulted, producing, as soon as possible, a proposal for a flexible directive under the co-decision procedure with a view to regulating the collective management of copyright and related rights in the online music sector. In the Parliament's view, such a proposal ought to take into account the special features of the digital era while safeguarding European cultural diversity.

In its 2008 Resolution, the European Parliament reiterated its opinion that the Commission's refusal to legislate – despite various European Parliament resolutions – and the decision to try to regulate the sector through a recommendation had created a climate of legal uncertainty for right holders and for users. It stressed that the effect of the CISAC decision would be to preclude all attempts by the parties concerned to act together to find appropriate solutions, such as a system for the clearing of rights at European level. In its view, the decision also left the way open to an oligopoly of large CMOs linked by exclusive agreements to publishers belonging to the worldwide repertoire. The Parliament was convinced that the result would be a restriction of choice and the extinction of small CMOs, to the detriment of minority cultures. Finally, it asked to be involved effectively, as co-legislator, in the initiative on Creative Content Online, in which the multi-territory licensing of creative content has been identified as one of the main areas requiring EU action.<sup>82</sup>

#### 4 Impact of Recent Measures on the Market for Cross-Border Licensing of Rights

Even if the European Commission's 2005 Recommendation is a non-binding instrument, its effect on the market for cross-border licensing of rights should not be underestimated.

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<sup>82</sup> Creative Content Online initiative, <[http://ec.europa.eu/avpolicy/other\\_actions/content\\_online/index\\_en.htm](http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm)>, 6 Jan. 2010.

Within four years since its adoption, the Recommendation has brought severe legal uncertainty by putting the market for collective management of rights in turmoil, which was only aggravated by the Commission's decision in the CISAC case. As shall be seen below, the multi-territorial licensing of rights in Europe experiences tremendous difficulty in moving from a system of reciprocal representation agreements between CMOs to a 'one-stop shop' system based on the freedom of choice of the right holders, as called for by the Recommendation. At this time, neither form of system is fully functional and some of the concerns expressed against the Recommendation by the European Parliament and legal commentators seem to be materializing.<sup>83</sup>

Among the biggest concerns is the fear that the implementation of the Recommendation will lead to the emergence of monopolies or regional oligopolies for the management of online music rights which, in the long term, could have a negative effect on the cultural diversity.<sup>84</sup> By allowing right holders to assign their online rights to the CMO of their choice, competition will arise at the level of the repertoires, which leads to a segmentation of the market, favouring the establishment of monopolies and the appearance of network effects. As a result, CMOs will develop a specialized repertoire<sup>85</sup> and competition will be possible only between CMOs with substitutable repertoires.<sup>86</sup>

Competition at the repertoire level therefore means that CMOs will tend to build up a repertoire containing only the most popular works among online users. Authors of less popular works may find themselves at a disadvantage if they can assign their rights to only one CMO active in a niche market for a specialized music genre. This is not unlikely, because, although there is no obligation on CMOs to accept them as members, their requests can simply be ignored by CMOs administering popular repertoire who find their

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<sup>83</sup> A. Porcin, 'The quest for pan-European Copyright Licensing Solutions: A Series of Unfortunate Events', *Concurrences* 4-(2009): 57–64, at 60.

<sup>84</sup> Frabboni, *supra* n. 53, at 81. See also: P. Tuma, 'Pitfalls and Challenges of the EC Directive on the Collective Management of Copyright and Related Rights', *European Intellectual Property Review* 28, no. 4 (2006): 220–229, at 228; and M. Ricolfi, 'Individual and Collective Management of Copyright in a Digital Environment', in *Copyright law: a handbook of contemporary research*, ed. P. Torremans (Cheltenham: Edward Elgar Publishing, 2007), 283–314, at 297.

<sup>85</sup> This was also foreseen by the Commission, which concludes: 'Option 3 would allow CRMs [i.e. CMOs] to build up attractive genre-specific repertoires. The increasing diversity of online music services will create a demand for cross-border genre-specific licenses. Option 3 would give CRMs to specialise in line with this demand and compete for right-holders that complement their existing genre repertoires.' See Study on Cross-Border Collective Management of Copyright, *supra* n. 10, at 36.

<sup>86</sup> Drexler, *supra* n. 72, at 417.

repertoire too unprofitable to be administered. This may especially be so if CMOs start collaborating with large music publishers to offer EU-wide licenses for online use that exclusively apply to their repertoire.<sup>87</sup> As will be seen later, signs of such collaborations are currently already manifesting in the area of cross-border collective management of rights.

Under the system recommended by the Commission, therefore, the repertoire of right holders for which online users may seek a multi-territorial license will be dispersed among different CMOs. Despite the Commission's hope that the European repertoire will be split among a small number of CMOs,<sup>88</sup> it is possible that the number of CMOs offering EU-wide licenses will increase if the not too profitable local repertoire continues to be administered by the existing national CMOs (which, given the local differences in Europe is not unlikely to occur), while the management of specific repertoire, most presumably the popular repertoire, is concentrated in a few newly established CMOs that dominate the market of cross-border collective management of copyright.

The Recommendation may therefore not have the desired outcome for online users. Although they will no longer need to obtain licenses from the CMOs in the twenty-seven EU Member States to cover the entirety of the European territory, they will still need to obtain licenses from different CMOs to cover the breadth of the repertoire they wish to use.<sup>89</sup> Especially if online users wish to obtain a blanket EU-wide license covering the entire music repertoire, the proposed system requires them to acquire licenses from all the European CMOs offering such licenses, unless these CMOs again conclude reciprocal representation agreements among themselves (which, however, is not likely to be expected if the licensing models are based on administering the rights of competing music publishers). Users may very well find this too burdensome and choose rather to obtain licenses from the few CMOs in which the popular repertoire is concentrated. This implies that the local repertoire would remain highly unrepresented in the online environment, which would be very detrimental for European cultural diversity.

A tendency toward a concentration of the market can already be felt as the European Commission itself reports on the appearance of a number of initiatives where major

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<sup>87</sup> To the extent that a CMO exclusively administers the repertoire of a single music publisher, it arguably can be maintained that it no longer concerns collective licensing but rather individual licensing disguised as collective licensing.

<sup>88</sup> Study on Cross-Border Collective Management of Copyright, *supra* n. 10, at 41.

<sup>89</sup> Porcin, *supra* n. 83, at 61.

publishing and record companies together with selected CMOs are bundling their efforts to act as a one-stop shop for the licensing of online rights.<sup>90</sup> CELAS, a joint venture between EMI Music Publishing and two of the larger national CMOs in Europe, GEMA and PRS, is one such example for the multi-territorial licensing of online and mobile uses of EMI Music Publishing's repertoire in forty European countries. Warner/Chappell Music, GEMA, MCPS-PRS, and STIM have teamed up to offer EU-wide digital licenses for Warner's entire repertoire. Universal Music Publishing Group, another publishing giant, has signed an agreement with SACEM that will allow SACEM to administer EU-wide licenses covering Universal Music Publishing's repertoire.<sup>91</sup>

The consequence of such a restructuring of activities of the CMOs involved in these initiatives is that the music publishers have withdrawn their online rights from all other CMOs in Europe that are not part of the deal. These are often the smaller European CMOs that attract a rather local repertoire. The economic impact on the CMOs that are left out is significant, for these CMOs may lose an important portion of their revenues. Assuming that the aggregate administration costs of these societies remain the same (and arguably will become even higher in the future), the remuneration that individual right holders who are represented by these CMOs receive from the use of their works will be lower than in the situation before. This may negatively affect the creation of works by local authors and therefore once more jeopardizes European cultural diversity. Also, if the financial situation of these CMOs worsens dramatically or even reaches the point that they have to end their operations, who will engage in the promotion of local talent?

Interestingly, on 25 June 2009, in the case *MyVideo v. CELAS*, the District Court of Munich invalidated the license system set up by CELAS for use of content on the Internet.<sup>92</sup> After a period of unsuccessful negotiations between MyVideo, which hosts a streaming website for user-provided video content, and CELAS and foreseeing the

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<sup>90</sup> European Commission, *Monitoring of the 2005 Music Online Recommendation*, Brussels, 7 Feb. 2008 [Online Music Recommendation Monitoring Report], <[http://ec.europa.eu/internal\\_market/copyright/docs/management/monitoring-report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf)>, 6 Jan. 2010).

<sup>91</sup> *Ibid.*, at 6.

<sup>92</sup> *MyVideo Broadband S.R.L. v. CELAS GmbH*, District Court of Munich (*Landgericht München*), No. 7 O 4139/08 (25 Jun. 2009), <[http://openjur.de/u/31093-7\\_o\\_4139-08.html](http://openjur.de/u/31093-7_o_4139-08.html)>, 6 Jan. 2010 (for an English language summary, see M. von Albrecht & J.N. Ullrich, 'Munich District Court Holds Pan-European Copyright Licensing Model of Joint Venture CELAS Invalid', 20 Jul. 2009, <[www.klgates.com/newsstand/Detail.aspx?publication=5793](http://www.klgates.com/newsstand/Detail.aspx?publication=5793)>, 6 Jan. 2010).



possibility that CELAS institute proceedings against it for copyright infringement, MyVideo filed for a declaratory judgment, saying that CELAS had no injunction claim against it concerning the reproduction of copyright protected works for online uses. CELAS, on the other hand, claimed that MyVideo infringed the mechanical reproduction rights for online uses of the EMI repertoire that it administers. CELAS invoked no rights of making its repertoire available to the public, because it confirmed that these rights were managed by national CMOs, such as GEMA.<sup>93</sup>

MyVideo's main argument was that CELAS was not mandated for the management of the mechanical reproduction rights for online uses of the EMI repertoire, because the management of these rights had not been validly transferred and therefore remained in the hands of the GEMA.<sup>94</sup> Moreover, even if the rights had been validly transferred, it argued that the separate management of mechanical reproduction rights for online uses was unlawful because these rights are inseparably connected with the right of making available to the public.<sup>95</sup> This argument was upheld by the Munich court. It considered that, in general, the making available of copyright-protected works online cannot technically take place without making a reproduction. In such a case, in which the acts in relation to copyright-protected works cannot be clearly separable and constitute no economically and technically autonomous and unitary use, German copyright law does not allow a splitting of online rights into rights of making available to the public and rights of mechanical reproduction.<sup>96</sup> If this were allowed, it could lead to significant legal uncertainty for online users.<sup>97</sup> As a consequence, the court ruled that EMI could not have validly transferred only the mechanical reproduction rights for online uses to CELAS while leaving the making available rights with GEMA. CELAS therefore had no right to prohibit reproductions of the EMI repertoire for online uses in Germany.

Also as a consequence of the adoption of the Recommendation, CMOs are heavily engaged in litigation against each other, thus impeding progress toward a competitive market for the cross-border licensing of online rights. CMOs are not unanimous about the

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<sup>93</sup> *Ibid.*, no. 36.

<sup>94</sup> *Ibid.*, no. 42.

<sup>95</sup> *Ibid.*, no. 46.

<sup>96</sup> *Ibid.*, nos 54 and 65 et seq.

<sup>97</sup> *Ibid.*, no. 71.

preferred licensing model and, in some instances, question other societies' mandate to license their repertoire on an EU-wide basis.<sup>98</sup>

The Dutch CMO Buma/Stemra was involved in such litigation following its decision, announced on 21 July 2008, to grant the US-based online electronic music retailer Beatport a pan-European license allowing the latter to offer the entire worldwide repertoire of music online throughout the EU.<sup>99</sup> Buma/Stemra's initiative followed by less than a week the European Commission's decision in the CISAC case. It was the only CMO for music copyright so far to issue such a pan-European license. The license model offered by Buma/Stemra provided online music service providers with a one-stop shop for authors' rights for music for 27 European countries. The licensing model was based on retaining the world's music repertoire for every European CMO for music copyright. According to the press-release of Buma/Stemra, the royalty rates applied through this multi-territorial license were the tariffs set in the country where the copyright was to be exploited.

In other words, music used in Germany will be accounted for on the basis of the tariffs in use in Germany; music used in Spain will be subject to royalty payments on the basis of the tariff in use there. The advantage of this model is that competition between collecting societies offering multi-territorial licenses takes place on the basis of the costs and services of the music copyright organisations and not on the royalty rates paid to rightsholders. The income of authors, composers and music publishers is thus safeguarded from any downward pressure which might occur in the case of unbridled competition.

Other European CMOs were not pleased with Buma/Stemra's action. The British PRS instituted a court proceeding before the District Court of Haarlem in the Netherlands to stop Buma from applying its pan-European license.<sup>100</sup> PRS argued that pursuant to the reciprocal representation agreement it had concluded with Buma, Buma had not obtained any rights to the repertoire of works administered by PRS beyond Dutch territory. Accordingly, it had no right to grant licenses the territorial scope of which was not limited to this territory. Buma argued that the territorial restriction clause as to the rights

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<sup>98</sup> Online Music Recommendation Monitoring Report, *supra* n. 90, at 7.

<sup>99</sup> Buma/Stemra Press Release, 'Buma/Stemra issues Beatport.com a Pan-European License', Amsterdam/Denver (CO), 21 Jul. 2008, online: <[www.bumastemra.nl/en-US/Pers/Persberichten/Beatport\\_press+release.htm](http://www.bumastemra.nl/en-US/Pers/Persberichten/Beatport_press+release.htm)>, 6 Jan. 2010.

<sup>100</sup> *The Performing Rights Society Limited v. Vereniging BUMA*, District Court of Haarlem (*Rechtbank Haarlem*), 148418/KG ZA 08-410 (19 Aug. 2008), LJN: BE8765, <[www.rechtspraak.nl/ljn.asp?ljn=BE8765](http://www.rechtspraak.nl/ljn.asp?ljn=BE8765)>, 6 Jan. 2010 (for an English language translation of the case, made available by Pauline Kuipers (Bird & Bird), see <[www.boek9.nl/index.php?/Prs+vs.+Buma///20609/](http://www.boek9.nl/index.php?/Prs+vs.+Buma///20609/)>, 6 Jan. 2010; B9 7021).

granted did not apply to online music sales, because these have by definition a cross-border reach, and that such a clause should therefore not be taken into account. In addition, Buma argued that considering the date when the reciprocal agreement was signed, neither party could have envisaged the grant of a license on online rights. According to Buma, the agreement therefore could not be interpreted as applying territorial restrictions to online rights. On this point, the judge stressed that a reasonable interpretation of the agreement leads to the conclusion that the reciprocal agreement in its entirety is not applicable to online rights and that the parties need to come to a new agreement in this matter.

Buma also relied on the European Commission's invalidation of reciprocal agreements as a result of the CISAC decision. Here, the judge emphasized the fact that the CISAC decision did not invalidate territorial restriction of licenses per se, but rather concerted practices between CISAC members which de facto lead to a situation where only a single CMO in each EU Member State is able to offer multi-repertoire licenses. Finally, Buma pleaded that both PRS and Buma had continued the business practice of cross-border licensing for online exploitation, which they had agreed upon in the framework of the yet expired Santiago Agreement (i.e., a trial reciprocal agreement permitting the participating societies to issue multi-territorial licenses of music performing rights for online use). However, since Buma could by no means substantiate that PRS had licensed Buma's repertoire outside of the United Kingdom, this argument also failed. The preliminary injunction granted in the Dutch ruling thus orders Buma to refrain from granting, concluding or executing license agreements for the online exploitation 'outside of the Netherlands' of musical works administered by PRS. The order precludes Buma from offering such licenses to online music stores that are accessible from outside the Netherlands.<sup>101</sup> This ruling was affirmed on appeal.<sup>102</sup>

The same set of facts also gave rise to a court ruling in Germany. On 25 August 2008, the District Court of Mannheim granted an interim injunction against both the online electronic music retailer Beatport and Buma/Stemra. The injunction prohibits Beatport

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<sup>101</sup> K. Neefs, 'Collecting Societies Collide over pan-European Online Music Licensing', *Journal of Intellectual Property Law and Practice* 3, no. 12 (2008): 758–759.

<sup>102</sup> *Vereniging BUMA v. The Performing Rights Society Limited*, Court of Appeal of Amsterdam (*Gerechtshof Amsterdam*), 200.016.122/01 KG (19 Jan. 2010), LJN: BL4289, <[www.rechtspraak.nl/ljn.asp?ljn=BL4289](http://www.rechtspraak.nl/ljn.asp?ljn=BL4289)>, 4 May 2010..

from making musical works that are administered by GEMA available to the public over the Internet in the territory of Germany without having obtained prior consent from GEMA. Buma/Stemra is prohibited from issuing such licenses for the German territory.<sup>103</sup> From GEMA's perspective, Buma/Stemra is not entitled to grant EU-wide licenses of its repertoire, because it had granted Buma/Stemra the right to license the GEMA repertoire for uses only within Buma/Stemra's own administrative territory.<sup>104</sup>

What all these recent developments show is that, despite the Recommendation of 2005 and the CISAC decision, the path to multi-territorial multi-repertoire licenses in Europe is still a long way ahead.

## 5 Conclusion

In summary, the collective management of rights at the European level is in a state of chaos. Instead of cooperating through bilateral agreements to optimize the licensing of copyright at the international level, as they previously did, national CMOs in Europe are currently involved in litigation to prevent each other from issuing pan-European licenses of their respective repertoires. Moreover, under the system proposed by the 2005 Recommendation, small CMOs are threatened to be overrun by a few big conglomerates of CMOs administering the online rights of major music publishers for the European territory. This may affect the income of individual right holders who are represented by these small CMOs, puts the online availability of local repertoire at risk and jeopardizes cultural diversity in Europe. A well-functioning system of multi-territory, multi-repertoire licensing at the European level, which online content providers in Europe languish for and which the 2005 Recommendation has aimed to achieve, has not yet been established.

Remarkably, the European Commission states, in its monitoring report prepared by DG Internal Market, that the Recommendation seems to have produced an impact on the

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<sup>103</sup> *Gema v. Beatport and Buma/Stemra*, District Court of Mannheim (*Landgericht Mannheim*), No. 7 O 224/08 (25 Aug. 2008), <[http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Landgerichte&Art=en&Datum=2008-8&nr=11180&pos=3&anz=8](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Landgerichte&Art=en&Datum=2008-8&nr=11180&pos=3&anz=8)>, 5 Jan. 2010.

<sup>104</sup> GEMA Press Release, 'Interim injunction against Buma/Stemra and beatport', Munich, 10 Sep. 2008, <[www.gema.de/en/press/press-releases/press-release/browse/16/?tx\\_ttnews%5Btt\\_news%5D=756&tx\\_ttnews%5BbackPid%5D=73&cHash=68709ff6b5](http://www.gema.de/en/press/press-releases/press-release/browse/16/?tx_ttnews%5Btt_news%5D=756&tx_ttnews%5BbackPid%5D=73&cHash=68709ff6b5)>, 5 Jan. 2010.

licensing marketplace and is endorsed by a number of collective rights managers, music publishers and users. Therefore the Commission sees no immediate need to intervene in the market for cross-border licensing of rights or for the introduction of clear and binding rules of good governance. The Commission merely proposes to follow further developments and to repeat the monitoring, should a clear need to do so arise.

Meanwhile, the question is far from settled. Given the strong criticism expressed by both the European Parliament and various stakeholders in the field, it seems that there is ongoing pressure on the European legislator to come up with adequate solutions to address the problems in the field of cross-border collective management of rights. What such solutions might encompass and what legal instrument would be most suitable to implement them is still unclear. So far, a clear policy cannot be detected. Nevertheless, several departments within the Commission are studying the issue. At this time, the responsibility for the regulation of issues relating to collective rights management seems to lie with DG Internal Market, who has adopted a 'wait-and-see' approach to the issue. By contrast, DG Competition keeps a close eye on the collective management and licensing of rights in music and audiovisual content because licensing practices can obstruct the development of cross-border services on the Internet, radio and television. Moreover, any legislative measure or policy to be elaborated in this area must comply with the European rules on competition law.

To support the cross-border delivery of online content, DG Information Society has launched the 'Creative Content Online in the Single Market' initiative.<sup>105</sup> This initiative aims to enhance the availability of online content and ensure that all players in the value chain receive adequate revenues. The multi-territory licensing of creative content has thereby been identified as one of the main areas requiring EU action. In the short term, these goals may be realized through pragmatic solutions, but the Commission is examining whether, in the medium term, regulatory intervention is needed.<sup>106</sup> The Commission is also preparing a Second Commission Communication on Creative Content, in which the findings and results of the Creative Content Online initiative will be summarized and analysed. Moreover, it shall define a set of principles for action by

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<sup>105</sup> *Supra* n. 82.

<sup>106</sup> European Commission, *Final Report on the Content Online Platform*, May 2009, online: <[http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_platform\\_report.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf)>, 6 Jan. 2010.

stakeholders and public authorities and offer a continuing framework for discussions with stakeholders. Finally, the Commission has mandated a study on multi-territory licensing of audiovisual content, the results of which are expected in early 2010.<sup>107</sup>

Studying the issue alone is not enough, however: Action is needed! In the absence of a coherent framework for the multi-territorial multi-repertoire licensing of works supported by binding rules on good governance applicable to CMOs, legal uncertainty will persist in the market for cross-border licensing of works. Where stakeholders are not competing on a level playing field because of the lack of uniform rules governing CMOs' activities, the risk is that the market crystallizes in its current form or takes an undesirable direction. The negative impact of such a situation would be felt not only by right holders but also by users of copyright protected material.

Hence, the cross-border rights clearance remains a problematic issue. Online environments such as the Internet and mobile services by definition allow content services to be made available across the single European market. However, the lack of multi-territory copyright licenses – allowing the use of content in several or all EU Member States – makes it difficult for online services to be deployed across Europe and to benefit from economies of scale. Although it is first for right holders to appreciate the potential commercial benefits of multi-territory licensing, there is an underlying need, also from a consumer perspective, to improve existing licensing mechanisms.

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<sup>107</sup> S. van Gompel, 'European Commission Final Report on the Content Online Platform', IRIS 6, no. 4/4 (2009).