



## **Collective management of music copyright in the Internet age and the EU initiatives: from reciprocal representation agreements to open platforms**

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### **Abstract :**

*As is widely known, nowadays there are new ways music is distributed (such as through Internet, mobile telephones, digital terrestrial, etc.), which permit its dissemination across national borders. There have been attempts to adapt the traditional collecting societies' representation agreements to new forms of distribution, with a view to providing users with multi-territorial copyright licences (e.g. the Simulcasting Agreement). After analysing the above attempts, the author will argue that the new ways music is now distributed in the EU require a new licensing policy at EU level.*

*The paper will then focus on the steps taken by the European Commission in the latest years for establishing a EU-wide licensing scheme as far as on-line music sales are concerned. Particular attention will be devoted to the 2005 Commission Recommendation on the licensing of on-line rights in musical works. With this "soft law" instrument the Commission recommended that copyright holders should be given the right:*

- (i) to authorize any existing collecting society to license their works across the entire EU;*
- (ii) to determine the territorial scope of the licence, irrespective of the Member State of residence or the nationality of either the collecting society or the right holder;*
- (iii) to withdraw any of the on-line rights and transfer the multi-territorial management of those rights to another collecting society.*

*The author will argue that by adopting such a system, i.e. by cutting out intermediaries (collecting societies), a more competitive environment for cross-border licensing of copyright would be created, an environment in which collecting societies would have to compete between themselves to attract copyright owners and consequently would be encouraged to provide better and diversified services.*

*The reaction of the markets after the Recommendation will also be analysed. Indeed, it seems that there has been a timid move towards EU-licensing schemes. Some expected that such a move would*

have been prompted by a competitive process being triggered by the possibility of right holders to freely approach the collecting society of their choice, as suggested by the Commission Recommendation. It seems, however, that certain EU-licensing schemes have recently been offered in another way, i.e. by creating new cross-border platforms that pool together several repertoires. Some of these platforms are conceived as “open platforms” ready to attract more and more right holders; even collecting societies might have an incentive to pool their repertoire into such new platforms. These platforms will be examined.

Finally, the author will analyse a tool which has been recently proposed and might turn out to be useful for establishing an infrastructure for multi-territorial licensing: the Global Repertoire Database. This database would be basically a central repository of copyright and related rights providing basic information that identifies (i) the relevant copyright work or sound recording, (ii) the owner of the rights in such work, (iii) the representative of that owner. This tool would also provide a link between the data relating to copyright works and the data relating to sound recordings that embody those works.

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## 1. Introduction

The paper focuses collective licensing of on line music and on the steps taken by the European Commission in the latest years for establishing an EU-wide licensing scheme. I will also look at certain business models and licensing schemes which have recently emerged with a view to boosting on-line music sales in the EU as well as other proposals such as the Global Repertoire Database.

Before analysing all the relevant aspects, I will take a look at some recent recommendations and statements which mainly relate to musical works: (a) the WIPO’s Director General statement of February 2011 and (b) the Commission Communication of May 2011.

(a) WIPO’s Director General Mr Francis Gurry on February 2011 underlined the need for collecting societies to improve their role. He noted that their present infrastructure is out-dated as “*it represents a world of separate territories [...], not the multi-jurisdictional world of the Internet or the convergence of expression in digital technology*”. In particular, he stressed that a global infrastructure which allows an easy global licensing is needed, an infrastructure “*that makes the task of licensing cultural works legally on the Internet as easy as it is to obtain such works there illegally*”.

(b) In its Communication of May 2011 the European Commission stressed the opportunity to submit a proposal to create a legal framework for the collective management of copyright to permit multi-territorial and pan-European licensing. Indeed, the Commission hopes for the creation of a European-wide rights management system which facilitates cross-border licensing.

## 2. The rationale of collective licensing and the reciprocal representation agreements

As is known, collective licensing is the system under which right holders (e.g. artists or record producers) authorise collecting societies to license their copyright to users. (e.g. discotheques, radio station and more recently digital music services, such as Spotify, i-Tunes store, etc.). Collective licensing is therefore important because it can secure relevant economic gains and economies of scale for both right holders and commercial users, as well as guarantee the distribution of copyrighted works to final consumers.

In particular, on the supply side economies of scale are guaranteed, since societies undertake licensing negotiations and enter into agreements on behalf of many right holders collectively: this lessens the marginal cost of the licensing activity to the benefit of right holders.

On the demand side too, collective licensing produces economies of scale. Indeed, such a system offers a cost-efficient and effective market structure by:

- (i) providing users willing to get licences with a single point of reference; and
- (ii) guaranteeing users access to the whole society's repertoire.

Having said that, can collecting societies grant users licences which cover foreign repertoires, *i.e.* music which is administered by foreign societies? Yes, they can: thanks to the reciprocal representation agreements which have been signed between many national collecting societies in the last decades. Indeed, national collecting societies have built up a network of reciprocal agreements providing each collecting society ("management society") the right to license, in its own territory, music works which belong to the repertoire of other collecting societies ("affiliate societies"): such agreements allow users to obtain "multi-repertoire" licences. In such a manner, collecting societies are all participants of a supranational network of reciprocal representation agreements and are able to offer a more extended repertoire to their licensees.

However, pursuant to most old reciprocal agreements, collecting societies can only license the exploitation of music for their own territory. Therefore, according to this first generation of representation agreements, a commercial user willing to sell music in several countries should approach each national society and obtain in each State a licence (this is the "territorial restriction clause").

In other words, such traditional agreements permit users to obtain "multi-repertoire", but not "multi-territorial", licences. These agreements may therefore be rather expensive to copyright owners, as right holders are obliged to pay all the societies involved<sup>1</sup>.

### 3. *The second generation of reciprocal representation agreements*

In the last decade, however, some collecting societies have entered into different types of reciprocal representation agreements, which permit users to obtain, not only "multi-repertoire", but also "multi-territorial" licences. According to this second generation of reciprocal representation agreements – which do not contain a "territorial restriction clause" - a user can obtain a licence which is valid in any country party to the agreement. Indeed, multi-territorial licences are very useful, especially from a commercial user's perspective, as they exempt such user from having to obtain a licence from as many collecting societies as the countries where he wishes to distribute music.

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<sup>1</sup> What about the legality, under EU competition law, of the old reciprocal representation agreements (which were not multi-territorial)? In the *Tournier and Lucazeau* cases the ECJ held that they comply with Art. 101 TFEU, provided no concerted action was demonstrated. Indeed, in those days (late 80s) these agreements were economically justified in a context where physical (and not digital) monitoring of copyright usage was required. The ECJ held, in particular, that the parallel behaviour adopted by all collecting societies (refraining from granting licenses valid in other countries) could be justified by the practical difficulty they would face, if they had to "organize their own management and monitoring system in another country".

Such a system seems is more suitable to the development of the Internet, which entails a massive use of music beyond territorial boundaries. It appears, moreover, to be more suitable to the broadcasting industry, considering that satellite TV broadcast often originates from a Member State which is different from the one in which viewers are resident.

However, this second generation of representation agreements – depending on how they are devised – may raise competition issues and, accordingly, some of them have been closely scrutinized by the European Commission. Let's see a few examples of these reciprocal agreements.

*(a) The Simulcasting Agreement*

The Simulcasting Agreement was signed on November 16, 2000 by collecting societies of 31 countries, including the whole European Economic Area (except for Spain and France)<sup>2</sup>. Simulcasting means “simultaneous broadcasting” and takes place when broadcasters simultaneously transmit radio or TV programmes over the Internet.

The Simulcasting Agreement has allowed broadcasters to obtain from just one collecting society a single licence, which was not only multi-repertoire, but also multi-territorial: broadcasters have therefore been allowed to transmit terrestrial programmes simultaneously over the Internet into numerous countries by virtue of a unique single licence<sup>3</sup>.

The European Commission praised the multi-territorial approach of said licences, but could not accept a specific clause which was included in the Agreement: the so-called “customer allocation clause”, according to which a collecting society had the power to issue a multi-territorial licence only to broadcasting stations, whose signals originated in its territory. That meant that broadcasters in the EEA could not obtain such a licence from a society of their choice and that accordingly they were obliged to approach the collecting society in their own country of origin in order to acquire said licence. The Commission took the view that such clause wasn't in conformity with EU competition rules and in particular with ART. 101 TFEU, and imposed the removal of such clause<sup>4</sup>.

Indeed, according to the Commission, what should be avoided is that collecting societies are given monopolistic rights for their territories with regard to the granting of multi-territorial licences. Broadcasters, on the contrary, should be allowed to request any collecting society – also outside their own country of origin - to obtain such licences: commercial users should, therefore, be free to choose the most efficient society in Europe for the delivery of the licence. The removal of the above clause from the Simulcasting Agreement was therefore imposed with a view to promoting and spreading competition amongst societies with reference to the cost and quality of collective licensing.

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<sup>2</sup> It regarded recorders' producers rights.

<sup>3</sup> Before this agreement, broadcasters originating from the EU were obliged to ask for a licence in each territory where their signal was accessed and the copyright-protected material was channelled, which turned out to be very difficult, cumbersome and costly. However, as we have seen, that was in line with the old model of the above mentioned reciprocal agreements, which allowed collecting societies to grant licences only for their own national territory.

<sup>4</sup> Article 101 TFEU prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, in particular, agreements which limit or control markets.

As requested by the Commission, the “customer allocation clause” was removed and the Simulcasting Agreement was finally accepted<sup>5</sup>. This is the first decision by the European Commission concerning collective licensing for the purposes of commercial exploitation of on-line music (decision of October 8, 2002, OJ L 107/58).

(b) *The Santiago Agreement*

The European Commission tried to apply the same condition as in the “Simulcasting Agreement” (elimination of the “customer allocation clause”) to another multi-territorial licensing accord, the so-called “Santiago Agreement”.

This agreement was signed in October 2000 by five collecting societies and subsequently joined by all societies in the EEA (except for the Portuguese society). It related to authors’ rights in respect of public performances of their repertoires over the Internet. Licences covered webcasting, streaming, online music on demand, as well as music videos transmitted online<sup>6</sup>.

As the first version of the Simulcasting Agreement, this accord provided that users wishing to obtain multi-territorial licences should do so from a collecting society in their own country (again, the “customer allocation clause”). According to the Commission, the practical result would have been a lock up of national territories, transposing into the Internet the national monopolies collecting societies have traditionally held in the off-line world: such result might have constituted a breach of (what is now) Art. 101 TFEU<sup>7</sup>.

Accordingly, the Commission recommended applying the same condition as in the Simulcasting case, *i.e.* the removal of the customer allocation clause. No final decision was reached by the Commission and the Santiago Agreement expired at the end of 2004<sup>8</sup>.

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<sup>5</sup> The Commission considered the agreement to be exempted under (what is now) article 101(3) TFEU. It was justified by “the 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.” In its view, the agreement presented a number of pro-competitive elements which could significantly contribute to technical and economic progress in the field of collective management of copyright and neighbouring rights” (October 2002). Another condition which was imposed by the Commission was the following: the collecting societies were required to split out royalties from administrative expenses and fee fixing was only permitted in respect of the royalties. This condition would have allowed users to shop around for the cheapest and most efficient collecting society with the lowest administrative costs.

<sup>6</sup> As with the Simulcasting Agreement, also the Santiago Agreement tried to adapt the traditional licensing framework to the on-line world by allowing each of the participating societies to grant multi-repertoire and multi-territorial licences.

<sup>7</sup> For example, according to the Commission, a UK company that wishes to offer music on the Internet should be permitted to acquire rights from any collecting societies in the EU rather than from the national one. Indeed, the lack of competition between national societies in Europe hampers the achievement of a genuine single market in the field of copyright licensing to the detriment of commercial users and final consumers. Collecting societies – the Commission said - should be obliged to compete for the benefit of companies which offer on-line music and to final consumers which listen to it. The Commission, in particular, argued that the territorial exclusivity afforded by the Santiago Agreement to each of the participating societies was not justified by technical reasons and was irreconcilable with the world-wide reach of the Internet

<sup>8</sup> In response to the Commission’s objection, the collecting societies claimed that the territorial restriction was necessary to prevent forum shopping for the best deal. Ironically, the Commission’s action resulted in the societies abandoning the multi-country service. Instead, on-line service providers were forced to go to each national society for copyright clearance, significantly increasing the burden on pan-European online music services.

### (c) *Barcelona Agreement*

The same “customer allocation clause” was contained in the BIEM Barcelona Agreement<sup>9</sup>, which was adopted in 2001 and established a multi-country licensing system between collecting societies for the licensing of mechanical reproduction rights for the exploitation of their combined repertoires by electronic means, including webcasting and on-demand transmission by streaming or downloading over the Internet. The Commission objected to the customer allocation clause. The Agreement was however subsequently abandoned<sup>10</sup>.

#### 4. *Towards a EU-wide licensing system in the on-line music field*

From the above we can infer the following.

- (i) the traditional licensing system that requires authorizations for each country where products are exploited has become anachronistic
- (ii) Indeed, as opposed to 10-15 years ago, there are new ways music is distributed, such as through Internet, mobile telephones, digital terrestrial, etc., which permit its dissemination across national borders. These new distribution channels are relevant nowadays: for example mobiles now account for about 16% of digital music revenues.
- (iii) There have been attempts to adapt the traditional societies’ representation agreements to new forms of distribution, with a view to providing users with multi-territorial copyright licences (e.g. the Simulcasting Agreement).
- (iv) the new ways music is now distributed in the EU require a new licensing policy at Community level.
- (v) EU wide licensing schemes would reduce costs for those companies wishing to operate and sell music on the Internet at international level.

The above concerns are more and more pressing if we take into consideration the deep gap between EU and US music industries. For example, already back in 2004 on-line music revenue in Western Europe amounted to € 27,2 million, whereas in the USA revenue reached € 207 million, making US on-line revenues almost eight times higher than those achieved in Western Europe<sup>11</sup>.

The European Commission has recently addressed these issues.

In particular, in April 2004 the Commission released a Communication to the Council and European Parliament, recognizing that many media operators were generally calling “for more Community-wide licensing”<sup>12</sup>. Such expression may be used as “an umbrella term to describe the grant of a

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<sup>9</sup> Bureau International des Sociétés gérant les droits d’enregistrement et de reproduction mécanique (BIEM). It is an organisation coordinating statutory license agreements among different countries. BIEM is based in Neuilly-sur-Seine, France, and represents 44 societies, from 42 countries.

<sup>10</sup> The Agreement was abandoned, again subjecting on-line service providers to the additional burden of seeking country-by-country clearances.

<sup>11</sup> The following figures also confirm this trend and in particular they show that only 8% of online Europeans buy music on the net compared to 15% in the US. While digital sales make up 5% of EU sales, the corresponding figure in the US is 13% (but the UK leads Europe, contributing 44% of all digital music revenue<sup>11</sup>). Moreover, the 2010 IFPI Music Report shows that an average European spends less than 2 Euros on digital music, whereas an average American spends almost 8 Euros and a Japanese 7 Euros.

<sup>12</sup> The proposal for a direct licensing across EU borders is not a new idea. For example, in the 19<sup>th</sup> century the French collecting society SACEM operated in this way in the UK. The practice of collecting royalties and other fees for the performances of French repertoire in the UK only ceased when the UK established its own

*licence by a single collecting society in a single transaction for exploitation through the Community*". Hence, the Commission recognized that – in order to safeguard the functioning of collective management and licensing throughout the internal market – a legislative approach at Community level was required.

Subsequently, in July 2005 the Commission released a working document entitled "*Study on a Community Initiative on the Cross Border Collective Management of Copyright*" (the "Study"), which highlighted the main problems affecting collective licensing of on-line music in the EU. In this document, the Commission confirmed that the main target should be to make a move towards pan-European licences. To this end, the Commission substantially took into consideration three main policy options.

- (a) The first option is to do nothing. This option was immediately ruled out by the Commission.
- (b) The second option would entail eliminating territorial restrictions and customer allocation provisions in the traditional reciprocal agreements entered into by collecting societies. This choice is basically founded on the system of multi-repertoire and multi-territorial licences envisaged by the last version of Simulcasting Agreement. This is an option which focuses on the "down-stream" level, i.e. the level of commercial users (eg , iTunes, Spotify, etc.).
- (c) The third option is to give right holders the choice to authorise a collecting society of their choice to license their works across the entire EU. This is an option which focuses on the "up-stream" level, i.e. the level of right owners.

The Study concluded that the most suitable solution for achieving new structures for cross-border licensing in the on-line field is the third option.

5. *The European Commission Recommendation on collective cross-border management of copyright for legitimate online music services.*

Following the Study, in October 2005 the Commission adopted a Recommendation on the licensing of on-line rights in musical works. In doing so, the Commission chose a "soft law" instrument (i.e. a Recommendation), instead of a legislative approach (such as a Directive or a Regulation). The Recommendation basically concluded that copyright owners should be given the right to choose the collecting societies of their choice. It therefore endorsed the third option system. In particular, the recommendation provides that right holders should have the right:

- (iv) to authorize any existing collecting society to license their works across the entire EU;
- (v) to determine the territorial scope of the licence, irrespective of the Member State of residence or the nationality of either the collecting society or the right holder;
- (vi) to withdraw any of the on-line rights and transfer the multi-territorial management of those rights to another collecting society.

In particular, what would happen if right holders were given the right to approach a collecting society of their choice? By giving right holders such freedom of choice, the third option system would:

- (a) marginalize the role of reciprocal representation agreements; and
- (b) introduce choice and competition at the "up-stream" level (i.e. at the level between right holders and collecting societies).

The main principle which lies behind such a system is that a collecting society's on-line repertoire and territorial licensing power should not derive from the reciprocal representation agreements between collecting societies, but from right holders concluding contracts directly with a society of their choice. By cutting out such intermediaries in favour of direct membership in a single collecting society, this system would be beneficial to right owners: for example, this system would not expose right owners to pay as many deduction fees as the societies involved and accordingly allow them to receive a higher amount of revenue.

Furthermore, it is believed that such a system could create a more competitive environment for cross-border licensing of copyright, an environment in which collecting societies would have to compete to attract right holders and consequently would be encouraged to provide better and diversified services<sup>13</sup>.

Firstly, it is held that a truly competitive environment could be created, an environment in which – if a society offers inefficient or too expensive services - right holders could move to another society which renders better services more in line with their individual needs.

Secondly, this system would also allow societies to build up genre-specific (or niche) repertoires, by specializing in certain fields (which is not encouraged, for example, by the Simulcasting Agreement, in which CSs offer commercial users identical repertoires). It might happen, for example, that right holders entrust the society “A” to license Latin-American music to be distributed via mobile telephones, the Society “B” to license Anglo-American music to be distributed via streaming and downloading, the Society “C” to license other works via simulcasting, and so on and so forth. Such a system, therefore, would be a dynamic one and provide collecting societies with the opportunity to develop niche markets by virtue of the specific nature of both their repertoire and the forms of music distribution and exploitation.

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<sup>13</sup> As the 2005 Study pointed out, the system at issue should be more “competitive-oriented” than the one envisaged by the Simulcasting Agreement. Indeed, according to the Study, agreements such as the final version of the Simulcasting accord (which the Commission anyway approved), introduce just a “static” service, which is capable of freezing, and not promoting, competition amongst collecting societies. Why do accords such as the Simulcasting agreement introduce just a “static” service? I give you the following simple example (which is also outlined by the Study).

Let us assume that the 27 national societies of the EU countries enter into reciprocal representation agreements, which do not provide any “territorial restriction” or “customer allocation” clauses (as in the Simulcasting case). Such accords would certainly give all 27 societies the unlimited ability to grant users multi-repertoire and multi-territorial licences, which cover all 27 EU countries (and users would be free to approach any CSs in the EU). However, there would be no variation as to the multi-repertoire and multi-territory services offered by the 27 societies, with no society having an attractive and specific repertoire of its own: indeed, all these collecting societies – by virtue of a network of “symmetrical” reciprocity – would offer an identical repertoire to commercial users. Such users, therefore, will have no incentive to switch from one society to another, because the service rendered by all the 27 societies would remain forever identical. That is why competition among collecting societies would be merely “static”.

On the other hand – as pointed out by the 2005 Study - giving right holders the possibility to freely choose and move amongst societies could create a competitive environment, that obliges societies to effectively compete among themselves and in particular to offer better and diversified services to right holders.



## 6. Critical considerations of the “third option system”

The above analysed “third option system” is hailed by several operators and commentators as the most appropriate one. Others, however, have criticized this system for the following reasons.

(i) First of all, the benefits to right holders would be outweighed by the costs certain commercial users would incur. Indeed, we must take into consideration that there are still users that require an extended repertoire and would like to obtain a multi-repertoire blanket licence from a single collecting society: such users, therefore, are not attracted by specialized repertoires, but would prefer to obtain an EU-wide licence covering an aggregate and all-inclusive repertoire.

On the contrary, by adopting this system, said users might incur higher transaction costs, because – in order to obtain an enlarged repertoire - they would have to approach more than one collecting society: in other words, these commercial users would lose their usual single point of reference. Instead, the system in question favours a “*repertoire fragmentation*” (which, to a certain extent, occurred after the Recommendation, as we will see in the next paragraph).

(ii) Secondly, as a consequence of fierce competition for attracting right holders, collecting societies might tend to charge copyright owners the lowest possible price (a “*race to the bottom*”). This might eventually be to the detriment of right holders that might be exposed to a low-quality management of their works and low remuneration as well: and this, in turn, might have negative effects on incentives to create new music<sup>14</sup>.

(iii) Thirdly, it has also been questioned whether the “third option system” duly takes into consideration the interest of minor artists, for example those artists known only nationally. Indeed, such artists might not be able to afford to license their rights to collecting societies in other Member States: in this regard, language barriers and organizational difficulties could represent insuperable obstacles<sup>15</sup>. Some believe, therefore, that the proposed system might carry the risk of small national right holders being discriminated. These concerns have also been expressed by the European Parliament in a Resolution (adopted on 13 March 2007). According to the Parliament, collecting societies should not lose their role in protecting smaller copyright holders.

(iv) Finally, some have also pointed out that the system at issue might marginalize small national collecting societies, to the benefit of 3 or 4 big collecting societies: let’s think, for example, about collecting societies from small EU members, which would be disadvantaged, as opposed to the French, the UK, the German or the Spanish society (which have a strong bargaining power, sufficient facilities for monitoring the use of their repertoire throughout the whole EU, and are therefore capable of attracting many copyright owners). Well, small national collecting societies are concerned that their role could be marginalized by following the system recommended by the Commission. With the result that music production and variety from those countries would be impoverished: indeed, as I said before, we have to consider that one of the purpose of collecting societies is the promotion of social and cultural activities<sup>16</sup>.

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<sup>14</sup> In the CISAC case the Commission refused this argument, referring to the price mechanism of the Simulcasting Agreement where the royalties to right holders are guaranteed in a fixed amount.

<sup>15</sup> For example, the Swiss collecting society believes that “proximity matters to individuals”, and that it is important for individuals to be in direct contact with their local society, with whom they share a common language and have developed trust.

<sup>16</sup> And what about individual management? Can nowadays right holders individually manage their rights without the help of collecting societies? According to a first school of thought Digital Rights Management (DRM) would now enable individual management. But collecting societies consider this assumption to be short-sighted, as DRM systems are expensive to put in place and individuals cannot afford them.

## 7. *The aftermath of the Recommendation: the timid rise of EU licensing “platforms”*

What happened after the Recommendation?

On 3<sup>rd</sup> January 2008 the Commission released the Communication “*Creative Content Online in the Internal Market*”, which highlighted the need to improve the existing licensing mechanisms to allow the development of multi-territory licensing (note that such communication does not only concern music, but it extends to any on-line content).

What has been the reaction of the markets? It seems that there has been a timid move towards EU-licensing schemes. Some expected that such a move would have been prompted by a competitive process being triggered by the possibility of right holders to freely approach the collecting society of their choice, as suggested by the Study and the Recommendation.

It seems, however, that certain EU-licensing schemes have recently been offered in another way, *i.e.* by creating new cross-border platforms that pool together several repertoires. Some of these platforms are conceived as “open platforms” ready to attract more and more right holders; even collecting societies might have an incentive to pool their repertoire into such new platforms<sup>17</sup>.

Let’s analyse these platforms:

a) *Centralised European Licensing and Administrative Service (CELAS)*. CELAS GmbH is an entity established in 2007, based in Munich, and is jointly owned by the German collecting society *Gema* and the UK collecting society *PRS for Music*. CELAS was set up to provide cross-border licensing and administration services on a pan-European basis for on-line and mobile telephone exploitations (so a specific market). At the beginning, the entity was theoretically “*open for all types of right holders*”; however, currently it only licenses the mechanical rights of EMI music Anglo-American repertoire. The licences cover all interactive and some non-interactive forms of exploitation, including ringtones, downloads, streaming and web-casting. In 2008 CELAS entered into agreements with several commercial users, including 7Digital, iTunes, Nokia, Real and Omnipone. By the end of January 2009, for example, licences have been granted to more than 20 of the largest digital providers in Europe. On 26 January 2008, e.g., CELAS signed the very first EU-wide licensing arrangement with the mobile operator OMNIFONE.

b) *The Pan-European Digital Licensing Initiative (PEDL)*. The PEDL initiative was launched in June 2006 by Warner Chappell Publishing. Some collecting societies have joined the initiative: PRS for Music (UK), STIM (Sweden), SACEM (France), SGAE (Spain), BUMA-STEMRA (the Netherlands), SABAM (Belgium) and SPA (Portugal). These collecting societies have been designated as non-exclusive licensing agents of Warner/Chappell Music and offer digital and mobile related licences with reference to Warner/Chappell Anglo-American repertoire. In principle, any European collecting society may join the initiative, provided it complies with a set of specific criteria intended to ensure transparency, efficiency and accountability.

c) *The ARMONIA initiative*. In January 2007 SGAE and SACEM (the Spanish and French collecting society) signed a Memorandum of Understanding for the establishment of a joint framework, for the licensing of works for on-line and mobile telephone exploitations. Later, the Italian collecting society, SIAE, joined the initiative. The ARMONIA platform – which is jointly managed by SGAE, SACEM and SIAE – is meant to grant EU-wide licences. Armonia currently represents the repertoires of the French, Spanish and Italian collecting societies in Europe and Latin America, jointly with Anglo-

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<sup>17</sup> See also the above quoted statement of the International Confederation of Music Publishers, sent to the European Commission on 23 April 2010 (available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/hearing20100423/panel\\_1\\_icmp\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/hearing20100423/panel_1_icmp_en.pdf))

American works of Universal Music Publishing and Latin works of Sony, EMI Music Publishing and Peer Music.

The rise of these platforms confirm that a new trend has timidly emerged, *i.e.* the trend to grant music licences, not via any of the existing collecting societies, but via new growing platforms in which not only collecting societies but also right holders pool their repertoire<sup>18 19</sup>.

#### 8. What will be the next step in the EU?

Will the above trend be encouraged by the EU? Or will the EU confirm the option chosen by the 2005 Recommendation, *i.e.* giving right holders the right to choose the collecting society of their choice? We still do not know. On 22 January 2011, Michel Barnier, EU Internal Market Commissioner, stressed that a legislative instrument will soon be proposed with a view to facilitating a “*move towards more fluid and simpler collective management structures, for the benefit of citizens, creators and innovative services: towards rules of governance ensuring more transparency in the relationship between collecting societies, users and right holders*”. On the other hand, in the May 2011 Communication the European Commission noted that the new mechanism should permit the establishment of European “rights brokers” capable of licensing and managing the world’s musical repertoire on a multi-territorial basis. And in doing so the Commission seems to praise and favour the platforms I’ve mentioned before. What remains to be seen, however, is whether the instrument (which the Commission will finally adopt) will be an harmonising Directive or a soft law instrument (such as a recommendation).

In my opinion, the Commission will make such a move after the decision on the appeal proceedings in the CISAC Agreements case, which is due to be released very soon. What are the CISAC Agreements? They are a series of reciprocal representation agreements concluded by 24 EEA-based collecting societies members of CISAC (“*Confédération Internationale des Sociétés d’Auteurs et Compositeurs*”) (“*International Confederation of Societies of Authors and Composers*”). A general framework of these agreements was first established back in 1936. More recently these Agreements have allowed licensing with reference to new forms of copyright exploitation: namely satellite, cable and Internet broadcasting of music. Such CISAC representation agreements basically contained the clauses that I have mentioned at the beginning: *i.e.* the “territorial restriction clauses”, which prevent collecting societies from offering licences to commercial users outside their domestic territory. The effect of such clauses for commercial users that wanted to offer a pan-European media service (such as the broadcasting group RTL and the UK on-line music provider Music Choice, which

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<sup>18</sup> However, so far only the CELAS initiative seems to be really working: we do not have, instead, precise information about the number of licences granted by the other platforms.

<sup>19</sup> In some of these cases, while distribution and membership would remain local, *i.e.* at the level of national society, only the licensing function is centralised. There are also negative aspects related to such platforms.

(i) First, the consequence of such a move is that access to a worldwide repertoire is not available from a one-stop-shop anymore, and therefore commercial users need to negotiate individual licences with each of the news platforms for providing a comprehensive music offer to consumers (this is again “*repertoire fragmentation*”).

(ii) Moreover, it has been noted that that these platforms involve just major publishers. In particular, it has been stressed that we have witnessed a shift of market power from collecting societies to major publishers. And on-line music providers are more and more dependent on the repertoire of major publishers, as they would not provide an acceptable offer to consumers if they lacked more than one of the large major’s repertoire. Indeed, major repertoires are “must-have repertoires” for commercial users. This would lock in most commercial users, who have no choice but to accept the terms (and possibly anti-competitive prices) imposed by the new platforms

(iii) It has also been stressed that these platforms only involve big collecting societies, and not the smallest ones, *e.g.* collecting societies of small EU countries. In this regard, the European Parliament Resolution of 2007 stressed the risks associated with these platforms, especially with reference to small collecting societies, and in particular the threat that poor representation of less popular repertoires in the new joint ventures poses to cultural diversity.

were the complainants in this case) is that they could not receive a licence covering several Member States, but had to negotiate with each individual national collecting society. The CISAC agreements also contained a “membership clause”, which prevented copyright owners from choosing or moving from a collecting society to another collecting society.

Of course, the European Commission was not so happy with the above clauses. Accordingly on July 2008 the Commission had found that these agreements restricted competition, by limiting the ability of both right owners and users to offer their services outside their domestic territory. The Commission held, in particular, that this was a violation of Art. 101 TFEU and asked for a modification of these agreements and practices. This decision has been appealed before the General Court and its ruling should be released soon<sup>20 21</sup>.

#### 9. *A possible global response: the Global Repertoire Database*

A tool which might turn out to be useful for establishing an infrastructure for multi-territorial licensing worldwide is the Global Repertoire Database. The music industry is currently working to create such a database, in order to make it easier and faster for new online music services to come to market.

This Global Repertoire Database, lobbied by several music publishers such as Universal Music Publishing, would be basically a central repository of copyright and related rights providing basic information that identifies (i) the relevant copyright work or sound recording, (ii) the owner of the rights in such work, (iii) the representative of that owner, (iv) and provides a link between the data relating to copyright works and the data relating to sound recordings that embody those works.

Such a database would allow users to easily identify (i) the rights they are exploiting in the context of any service and (ii) the owners or representatives they should approach for licences in order to operate their services legitimately. The database would also provide data necessary to administer licences, including the user’s reports of exploitation and distribution of royalties to right holders. This Database would substantially improve the transparency, efficiency, simplification and harmonization of copyright licensing.

Indeed, by doing so the industry estimates that 100 million Euros each year could be saved in copyright administration fees and returned to song writers and the industry.

The need for something similar to such database has also recently been affirmed by the WIPO Director Mr Francis Gurry in the above mentioned statement of February 2011: “*an international music registry would be a very valuable and needed step in the direction of establishing the infrastructure for global licensing*”. It is argued that it should be the World Intellectual Property Organization which must create and administer an international repertoire database, compiling information about who owns what rights related to specific music works.

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<sup>20</sup> In particular, the Commission was convinced that the removal of these restrictions would allow copyright owners to choose which collecting society should manage their copyright, for example on the basis of quality of service, efficiency of collection and level of management fees deducted. It would also make it easier for users to obtain licences for broadcasting music over the internet, by cable and by satellite in several countries from a single collection society of their choice.

<sup>21</sup> The decision was also challenged by organizations which were not addressed in the decision, namely CISAC and EBU (European Broadcasting Union), representing the interests of broadcasters. The latter requested to intervene next to CISAC and the Slovenian collecting society Sazas. After the file of the appeal, in the meantime the General Court and the ECJ refused to grant interim measures requested by the Hungarian collecting society, which had sought suspension of the operative parts of the Commission’s decision.