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The Next Ten Years in E.U. Copyright: Making Markets Work

Dr. Tilman Liider

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The Next Ten Years in E.U. Copyright: Making Markets Work

Dr. Tilman Lüder*

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* Head of the Copyright Unit, European Commission, Brussels. My thanks to Julie Samnadda and David Baervoets for providing many of the ideas that are incorporated in this article. The views expressed here are my own and do not necessarily reflect those of the European Commission.

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I. TRADITIONAL HARMONIZATION POLICY SO FAR

Policy in the field of copyright and related rights has traditionally been part of the European Community's (hereinafter "the Community") "Internal Market" agenda. According to Article 14 of the Treaty of Rome establishing the European Community (hereinafter "the EC Treaty") the Internal Market "shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."¹ Prior to the harmonization of national laws covering copyright and related rights—so-called "related" rights refer, e.g., to the rights of phonogram or film producers—there were major differences among the laws of the European Member States in the field of copyright and related rights. Indeed, some Member States did not foresee any protection for phonogram producers at all.² Differences concerned, amongst others, the scope of exclusive rights, the proprietors of the exclusive rights, the term of protection, and the remedies available against infringement.³ Differences in the level and scope of

¹ Treaty Establishing the European Community, art. 14, Dec. 29, 2006, 2006 O.J. (C 321) 48 [hereinafter EC Treaty].

² See generally Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG*, 1971 E.C.R. 487, [1971] ECR 487 (Westlaw) (bringing to the fore the absence of protection for phonogram producers in France). A right for phonogram producers was only introduced in the French Intellectual Property Code on July 3, 1985. Collecting societies administering and enforcing phonogram producers' rights were only established in the wake of this new right and the first royalty distributions for phonogram producers took place in 1989. Germany introduced producers' rights by jurisprudence in 1936, but the precise scope of phonogram producers' rights was only codified in the Copyright Act of 1965. In contrast, the United Kingdom copyright in a sound recording was recognised in the 1911 Copyright Act and a collecting society, Phonographic Performance Ltd. (PPL) has been active in this country since 1934. See Eric Keyser, *Sound Recordings: The European Perspective*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 49, 49–52 (James M. Kendrick ed., 2002).

³ See generally *Commission Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, COM (88) 172 final (June 7, 1998) [hereinafter Green Paper].

protection, in the entities enjoying protection and in the duration of copyright terms caused considerable problems with the free movement of goods, and thus ran counter to the establishment of the Internal Market as codified in Article 14 of the EC Treaty.⁴

Several examples illustrate how disparities among national laws interfered with the free movement of goods in the Internal Market. In *Deutsche Grammophon*, a sound recording had been placed on the market in France.⁵ France, at the relevant point in time, did not protect sound recordings.⁶ A German wholesaler tried to acquire the French sound recordings and sell them in Germany, undercutting the price fixed by the manufacturer, Deutsche Grammophon, for sales in Germany.⁷ Although it could be argued that the value of the phonogram would be undermined in Germany if goods that the manufacturer had put on the market in France without the benefit of copyright protection could be resold in Germany, the European Court of Justice (hereinafter the "ECJ") gave priority to the free movement of goods.⁸ The goods could, therefore, be legally sold in Germany, undermining Germany's protection of sound recordings.⁹ In that case, the rules on the free movement of goods were detrimental to the higher level of protection for sound recordings that prevailed in Germany.

On the other hand, in *EMI Electrola v. Patricia Im-und Export*, the copyright for a sound recording had expired in Denmark, but not in Germany.¹⁰ In this case, the proprietor of the right in the sound recording could prevent the importation into Germany of the

⁴ See, e.g., Council Directive 93/98, ¶ 2, 1993 O.J. (L 290) 9 (EC), OJ 1993 L290/9 (Westlaw) (stating that "[w]hereas there are consequently differences between the national laws governing the terms of protection of copyright and related rights, which are liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market; whereas therefore with a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community").

⁵ *Deutsche Grammophon*, 1971 E.C.R. 487, Grounds ¶ 2.

⁶ See sources cited *supra* note 2.

⁷ See *Deutsche Grammophon*, 1971 E.C.R. 487, Grounds ¶ 14.

⁸ See *id.* ¶ 13.

⁹ See *id.* ¶¶ 13, 19.

¹⁰ Case 341/87, *EMI Electrola GmbH v. Patricia Im-und Export*, 1989 E.C.R. 79, Grounds ¶ 3, [1989] ECR 79 (Westlaw).

goods sold without his authorization in Denmark.¹¹ In contrast to *Deutsche Grammophon*, disparities in the term of protection were resolved in favor of the higher level of protection that was granted in Germany. In *Warner Bros. v. Christiansen*, the owner of a rental right in a film was able to enforce his right under Danish law in order to prohibit rentals of a video-cassette in Denmark, even though the video-cassette had been sold with his authorization in the United Kingdom—which at the relevant time did not recognise a right to control rentals of a film.¹² Again, disparities in national rules were resolved in favor of preserving the higher level of protection that prevailed in Denmark.

The European harmonization agenda launched in the mid-1990s introduced the higher level of protection that prevailed in some Member States across the Community. All Member States were obliged to introduce a lending right and the term of protection for authors was harmonized to life of the author plus seventy years, the standard that prevailed in Germany.¹³ European harmonization thus brought a high level of protection for a variety of proprietors of copyright and rights related to copyright.

In this vein, the European Commission proposed—and the European Council and Parliament adopted—several directives harmonizing the substantive law governing copyright at the Community level. At present, copyright is governed by six sector-specific directives: Directive 91/250, granting protection to computer programs;¹⁴ Directive 92/100, obliging Member States to introduce a rental and lending right for authors, performers, phonogram producers, and film producers and a series of rights related to copyright for performers, phonogram producers, film producers, and broadcasting organizations;¹⁵ Directive 93/83,

¹¹ See *id.* ¶ 14 (holding that a copyright holder can enforce rights in one Member State when the product was imported from a Member State where the holder is not entitled to those rights).

¹² Case 158/86, *Warner Bros. Inc. v. Christiansen*, 1988 E.C.R. 2605, Grounds ¶¶ 18, 19, [1988] ECR 2605 (Westlaw).

¹³ Council Directive 93/98, art. 1(1), 1993 O.J. (L 290) 9 (EC), OJ 1993 L290/9 (Westlaw).

¹⁴ Council Directive 91/250, 1991 O.J. (L 122) 42 (EC), OJ 1991 L122/42 (Westlaw).

¹⁵ Council Directive 92/100, 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw).

introducing a broadcasting right for satellite transmissions and a clearance mechanism for cable retransmissions;¹⁶ Directive 93/98, harmonizing the term of protection for authors, performers, phonogram producers, and broadcasting organizations;¹⁷ Directive 96/9, on the legal protection of databases;¹⁸ and Directive 2001/84, introducing the artist's resale right.¹⁹ Two more recent directives, the Information Society (2001/29)²⁰ and Enforcement (2004/48)²¹ directives, are horizontal measures that apply to a variety of rights—reproduction, communication, “making available,” and distribution rights—and a variety of right-holders—authors, performers and producers.

As the directives enumerated above show, traditional Internal Market policy was essentially concerned with substantive aspects of intellectual property. Such aspects include the beneficiaries of these rights—such as the introduction of producers' or performers' rights in Directives 92/100 and 2001/29—and the term of protection for authors and owners of related rights—e.g., performers, record labels and film producers in Directive 93/98. E.U. directives focused on substantive copyright and related rights because at the time it was thought that harmonization would eliminate legal barriers to the free movement of protected goods or services across the Community.²² The E.U. copyright directives

¹⁶ Council Directive 93/83, 1993 O.J. (L 248) 15 (EC), OJ 1993 L248/15 (Westlaw).

¹⁷ Council Directive 93/98.

¹⁸ Council Directive 96/9, 1996 O.J. (L 077) 20 (EC), OJ 1996 L77/20 (Westlaw).

¹⁹ Council Directive 2001/84, 2001 O.J. (L 272) 32 (EC), OJ 2001 L272/32 (Westlaw).

²⁰ Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC), OJ 2001 L167/10 (Westlaw).

²¹ Council Directive 2004/48, 2004 O.J. (L 157) 45 (EC), OJ 2004 L157/45 (Westlaw).

²² See, e.g., 1 DAVID T. KEELING, INTELLECTUAL PROPERTY RIGHTS IN E.U. LAW 45 (2003) (stating that “[t]he problem in *Warner Brothers* was due essentially to discrepancies in national laws. In some countries (notably Denmark and France) a separate right to control the rental of videos existed. In other countries no such right was recognised. The ideal solution to problems caused by such discrepancies would, of course, be to harmonise the national laws and ensure either that a rental right exists in all the Member States or in none of them.”). Such a solution was subsequently adopted on rental right and lending right and on certain intellectual property rights related to copyright. See Council Directive 92/100, 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw).

thus intend to end trade barriers that result from disparate national copyright rules.²³

A. What has E.U. Harmonization Achieved so Far?

While this policy of harmonization has significantly reduced the discrepancies between European copyright laws, there is still some doubt as to whether it has facilitated the free movement of goods and services across the Community.²⁴ It is, however, fair to say that European harmonization has resulted in a significant increase in the level of protection when compared to the national situations prior to harmonization. As the directives mentioned above show, Member States must now grant protection to a variety of rights-holders, such as authors, performers, audiovisual producers, record companies, broadcasting organizations, or database producers. Due to the legislative efforts of the European institutions, the Community has now, in a global comparison, one of the most comprehensive and seamless levels of copyright and related rights protection.

The European body of copyright framework laws—essentially so-called “Directives”—protects the basic copyright-relevant acts such as reproductions, communication to the public—e.g., via radio or TV broadcasting or web casting—and the “making available” online of literary, artistic or musical works, sound recordings, or films. In addition, the Community framework exceeds the international consensus level of the World Intellectual

²³ See *Green Paper*, supra note 3, at 12 (citing the need to “eliminat[e] obstacles and legal differences that substantially disrupt the functioning of the market by obstructing or distorting cross-frontier trade in those goods and services as well as distorting competition”); Council Directive 92/100 ¶ 1 (stating that the directive is meant to rectify differences in the copyright laws of Member States which “are sources of barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market”).

²⁴ See, e.g., BERNT HUGENHOLTZ ET AL., *THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY* 22 (2006) (“While successfully removing many of these disparities at the national level, the harmonisation process has left largely intact a more serious impediment to the creation of an internal market: the territorial nature of copyrights and related rights. The exclusivity that a copyright or related right confers upon its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This is a core principle of copyright and related rights, which has been enshrined in the Berne Convention and other treaties.”).

Property Organisation (WIPO) in various respects by granting exclusive rights for:

1. The rental and lending of literary, musical and audiovisual works for authors, performers, phonogram and film producers;²⁵
2. Non-original databases like telephone directories and the like—so-called “sui generis” database protection;²⁶
3. The resale of works of art;²⁷
4. The reproduction and the “making available” online of broadcasts for broadcasting organizations;²⁸
5. The reproduction and the “making available” online of audiovisual works for film producers;²⁹ and
6. The reproduction and “making available” of performances, including audiovisual performances and performances contained in a phonogram.³⁰

Arguably the most significant measure increasing copyright protection in the E.U. has come with the 1993 Directive harmonizing the term of protection of copyright and certain related

²⁵ See Council Directive 92/100, art. 1–2.

²⁶ See Council Directive 96/9, art. 7, 1996 O.J. (L 077) 20 (EC), OJ 1996 L77/20 (Westlaw).

²⁷ See Council Directive 2001/84, art. 1(1), 2001 O.J. (L 272) 32, 34 (EC), OJ 2001 L272/32 (Westlaw).

²⁸ See Council Directive 2001/29, art. 2(e), 3(2)(d), 2001 O.J. (L 167) 10, 16 (EC), OJ 2001 L167/10 (Westlaw).

²⁹ See *id.* art. 2(d), 3(2)(c).

³⁰ See *id.* art. 2(c), 3(2)(b). Protection under WIPO administered Treaties like the Rome Convention and the Performances and Phonograms Treaty (WPPT) is limited to performances fixed in phonograms. Audiovisual performances are not protected at the international level because parties to the Diplomatic Conference on a WIPO Audiovisual Performances Treaty could not agree on a provision governing the transfer of rights of performers to film producers. See Assemblies of the Member States of WIPO: Thirty-Sixth Series of Meetings, Geneva, Sept. 24-Oct. 3, 2001, *Diplomatic Conference on the Protection of Audiovisual Performances: Memorandum of the Director General*, ¶ 2, U.N. Doc. A/36/9 Rev. (Sept. 24, 2001).

rights.³¹ With this Directive, the Community has harmonized the duration of authors' rights to the longest possible level that existed at that stage—the life of the author plus seventy years for authors and composers of any type of literary or artistic work.³² On the other hand, performers, record and film producers, and broadcasters enjoy a term of protection that stretches fifty years after the phonogram or film has either been published or after the recording took place.³³

Moreover, the Community is a jurisdiction where “equitable remuneration” is due for broadcasting of commercial phonograms by wireless means and public communication of commercial phonograms.³⁴ Many Member States have also made use of the possibility granted in the Information Society Directive—Directive 2001/29—to introduce “fair compensation”—mostly administered in the form of an equipment or blank recording media levy—for any copy done by consumers in the privacy of their homes.³⁵

Currently, several E.U. Member States are extending analogue levy schemes to a variety of digital recording devices.³⁶ But the precise scope of the equipment that attracts levies often remains subject to litigation. Court cases involve the application of levies

³¹ See Council Directive 93/98, 1993 O.J. (L 290) 9 (EC), OJ 1993 L290/9 (Westlaw).

³² *Id.* art. 1(1).

³³ *Id.* art. 3(1)–(4).

³⁴ It is possible to exceed this level and grant an exclusive right covering all forms of broadcast performances. See, e.g., Copyright, Designs and Patent Act, 1988, c. 48, § 20 (Eng.), available at <http://www.opsi.gov.uk> (search for “Copyright, Designs and Patent Act 1988”; then follow “Copyright, Designs and Patents Act 1988 (c. 48)” hyperlink under “Results”).

³⁵ Stefan Bechthold, *Directive 2001/29/EC: Information Society Directive*, in CONCISE EUROPEAN COPYRIGHT LAW, 343, 374–75 (Thomas Dreier & P. Bernt Hugenholtz eds. 2006). Should a Member State elect to provide for an exception covering private copying, it is required to provide for “fair compensation” to right-holders affected by this activity. In many Member States, the fair compensation requirement is implemented by a levy system. Levy systems may cover reprographic equipment like photocopiers or fax machines, as well as audio and video recording equipment, and audio and video cassettes. *Id.* at 373–74.

³⁶ *Id.* at 374 (commenting that “[i]ncreasingly, levy systems are extended to digital recording equipment (scanners, CD and DVD burners, even computers) and media (hard drives as well as writable CD and DVD formats”).

on personal computers and printers³⁷ or computer hard disks.³⁸ In certain Member States, e.g., Greece, Portugal, and Spain, computer hard disks are exempted from levies by law.³⁹ Despite several attempts, private copying levies and their scope of application have never been harmonized at Community level.⁴⁰

B. Has Harmonization Benefited E.U. Right-holders?

This allows for the following conclusions—E.U. harmonization of copyright and related rights rules has increased protection for a variety of right-holders, especially for authors and publishers of music and audiovisual works. Authors and composers are, in addition, often represented by powerful collecting societies.⁴¹

³⁷ In response to the request by the German Writer's Collecting Society (VG Wort) to impose a private copying levy of €30 on PCs, the Arbitration Board of the German Patent and Trademark Office (Deutsches Patent- und Markenamt, or DPMA) decided, on February 4, 2003, to set a levy of €12 on all PC systems sold in Germany. This decision was accepted by neither VG Wort nor the German IT industry. VG Wort then proceeded to take court action in April 2003 against the IT industry to seek to recover copyright levies at its original proposed rate of €30. On December 15, 2005, the district court in Munich ruled that a €12 levy per PC should be paid. This judgment is currently under appeal. BERNT HUGENHOLTZ ET AL., INST. FOR INFO. LAW, THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT 26 (2003).

³⁸ *Id.* at 25–26. In the *GERICOM* case, the Austrian Supreme Court decided on July 12, 2005, that no levies are due on PCs since the hard disk of a PC is used in a multi-functional way. The Court reasoned that a significant proportion of the uses made of a PC hard disk were unrelated to the copying of protected works or other subject matter. In these circumstances, it would be difficult to find adequate criteria for applying the levy. The Court found that this was different for the hard disk of MP3 players, which fall under the scope of levies in Austria because MP3 players are, at least at present, overwhelmingly used to copy protected material. Oberster Gerichtshof [OGH] [Supreme Court] July, 12, 2005, 4 Ob 115/05y, 38 Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen [SZ] No. 4 (Austria) at 492.

³⁹ See Ley 23/2006 (B.O.E. 2006, 162), available at <http://www.boe.es/boe/dias/2006/07/08/pdfs/A25561-25572.pdf> (amending Spain's Law of Intellectual Property. "*Ley 23/2006, de 7 de julio, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril*").

⁴⁰ HUGENHOLTZ ET AL., *supra* note 24, at 6–7 (“[B]ut the thorny issue of levies that was already mentioned in the Green Paper of 1988, has remained on the Commission's agenda until this day.”).

⁴¹ *Commission Staff Working Document, Study on a Community Initiative on the Cross-border Collective Management of Copyright*, at 21 (July 2005), available at http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf [hereinafter *Community Initiative*]. In 2005 the Commission

The fifty-year term of protection for record companies has also benefited these industries, as broadcasting and other forms of communication to the public are subject to “equitable remuneration” under the 1992 Rental and Lending Directive—Directive 92/100.⁴² This contrasts with the United States, where broadcasters pay no remuneration for the use of commercial phonograms.⁴³ In addition, with respect to other forms of communication, wide-ranging exceptions from the obligation to pay royalties apply in favor of drinking and eating establishments and shops in the United States.⁴⁴ Some estimate that this right to collect equitable remuneration for television and radio broadcasting and for other forms of communication (“public communication”) more than makes up for the shorter term that

conducted a survey of European collecting societies active in the field of authors’ and producers’ rights in the musical sector. This survey identified 152 collective rights management societies acting on behalf of approximately 1.6 million right-holders and, in 2003, managing €4.9 billion of royalties per year. Out of this revenue collected, €3.8 billion was distributed. Cross-border distribution of royalties within the E.U. in 2003 amounted to €322 million. Distribution to third countries outside the E.U. amounted to €184 million. Out of the 152 societies identified, eleven achieve an annual turnover that exceeds €100 million. The six biggest societies were identified as the German society GEMA (€813.6 million), the French society SACEM (€708.5 million), the Italian society SIAE (€475.3 million), the U.K. society PRS (€400.4 million), the French society SDRM (€349, 8 million), and the U.K. society MCPS (€325.5 million). Eighty-percent of the revenue generated with collective rights management arises from the exploitation of musical works and is generated by the top ten societies that are active in this field. The top four societies in terms of revenue are all authors’ rights societies. Two of the top eleven societies—PPL and GVL—are not classical authors’ societies, but represent record producers. *Id.* This study was later incorporated into the Commission services staff working paper of 11 October 2005, *Commission Staff Working Document, Impact Assessment of Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services*, at 11 (Oct. 11, 2005), available at http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf (last visited Sep. 11, 2007) [hereinafter *Impact Assessment*], that preceded Commission Recommendation 2005/737. Commission Recommendation 2005/737, 2005 O.J. (L 276) 54 (EC), OJ 2005 L276/54 (Westlaw).

⁴² Council Directive 92/100, 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw). The main collection societies in this field, the German society GVL and the U.K. society PPL, in 2003, collected €147 and €114 million respectively.

⁴³ See 17 U.S.C. § 110(5)(A) (2000).

⁴⁴ See *id.* § 110(5)(B)(ii).

performers and phonogram producers enjoy in the E.U. as compared to the United States.⁴⁵

Even performers, arguably the least protected category of right-holders internationally, collect revenue—so-called “equitable remuneration”—for the broadcasting of their performances⁴⁶ and private copying levies⁴⁷ from the information and communication technology (ICT) industries. One issue remains: has this seamless web of protection also increased income levels for all right-holders that are endowed with either exclusive rights or rights to receive various forms of remuneration? In particular, collecting societies that represent performers argue that they have not earned any significant revenue from the online exploitation of their performances.⁴⁸ This raises the issue that it may not appear sufficient to put in place a comprehensive and seamless web of

⁴⁵ If the system in the United States was the same as in the E.U., a study cited in the Gowers Report suggests that European right-holders would receive \$25.5 million per year for the broadcasting of their phonograms in the United States. From this the Gowers Report appears to conclude that it may be possible that the total revenue received from the broadcasting and other communication of commercial phonograms received in the E.U. is no less than, and may be even more than, the revenue received in the United States. See ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 49–50 (2006), available at http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf.

⁴⁶ Record producers and performers have a right to equitable remuneration if commercial phonograms are communicated to the public. See Council Directive 92/100, art. 8(2).

⁴⁷ According to a study undertaken by the Association of European Performers' Organisation (hereinafter “AEPO”) collecting societies representing performing artists, in 2005, collected a total of €113.2 million in levies that compensate for private copying. According to AEPO this constitutes almost 38% of all sums collected by collecting societies administering performers' rights. The biggest percentage, almost 57%, is derived from equitable remuneration for broadcasting and other forms of communication to the public. ELS VANHEUSDEN, PERFORMERS' RIGHTS IN EUROPEAN LEGISLATION: SITUATION AND ELEMENTS FOR IMPROVEMENT 74-75 (2007).

⁴⁸ See, e.g., *id.* at 6 (“In the field of the Internet and new services, the introduction at European level in 2001 of a new right [of] making available to the public of services on demand has so far proved ineffective for performers . . . [O]ut of the 10 countries surveyed, only [one] collective [rights] management society succeeded in collecting an overall amount of €32 for all performers in 2005[.] . . . At a time when more and more commercial services for downloading are being developed, this sum highlights the obvious gap between the protection that the *acquis* [the harmonised body of Community copyright rules] intended to give to performers and the impossibility of the[m] actually enjoying it.”).

protection, these rights must also be administered in an effective manner. Rights that are not effectively administered serve little purpose to their respective proprietors.⁴⁹ In other words, the market for rights management, including rights licensing, must actually work for all the right-holders concerned. This brings us to the issue of territorial rights management in Europe.

II. A CHALLENGE REMAINS: TERRITORIALITY AND RIGHTS CLEARANCE

The ambitious drive toward harmonization of substantial rules on copyright and related rights has not ended one European phenomenon—all harmonized titles granted remain national titles.⁵⁰ In other words, there is no single E.U. title for any of the harmonized forms of protection, not even the Internet-tailored “making available” right.

A. *Territoriality of Intellectual Property Titles*

There are many scholars who believe that the territoriality of national, but substantively harmonized, copyright laws remains a major obstacle preventing an integrated European digital marketplace.⁵¹ In this context, it is often pointed out that the Commission’s 2005 Recommendation on collective cross-border management of copyright and related rights for legitimate online music services—to be discussed below—is merely a *first step*

⁴⁹ See, e.g., *id.* at 36 (“Furthermore, the royalties declaration documents handed over by producers to the main performers almost never include a line regarding “on demand” exploitation. Performers therefore have no idea about the way in which the right is exercised by producers and the revenues it generates.”).

⁵⁰ See, e.g., GOWERS, *supra* note 45, at 38 (noting the difficulty of protecting patent rights because “each European patent is a series of separate national patents subject to national jurisdictions”). See also Council Directive 2001/29, art. 3, 2001 O.J. (L 167) 10, 16 (EC), OJ 2001 L167/10 (Westlaw) (discussing requirements of Member States to provide authors the exclusive right as to “making available”).

⁵¹ See, e.g., HUGENHOLTZ ET AL., *supra* note 24, at 218 (contending that “[t]he Achilles heel of the *acquis* remains the rule of territoriality. The seven directives have smoothed out some of the main disparities between the laws of the Member States, but largely ignored the single most important obstacle to the creation of an internal market in products of creativity: the territorial nature of the economic rights. This allows for the compartmentalisation of the internal market along geographic boundaries.”).

toward E.U. licensing as it fails to overcome territorial rights management.⁵²

Others argue that E.U.-wide management is not only necessary for rights in musical works or sound recordings, but also these principles should be further extended to audiovisual works as well.⁵³ They argue that at this stage, due to inefficient licensing practices, performers in both musical and audiovisual works have not earned any significant revenue from the online exploitation of their performances.⁵⁴ Better rights management is therefore indispensable to make the Internet a source of income for these rights-holders.

B. Is Territoriality the Problem?

Many stakeholders argue that “online” rights—e.g., the exclusive rights of reproduction, communication to the public and the right of “making available” online—can no longer be exercised or enforced on a national basis and that the entire body of E.U. copyright laws should be reworked to overcome territorial management or enforcement.⁵⁵ The European Parliament has expressed a keen interest that legislation be proposed in this matter and believes that licensing principles should now be codified in an E.U. directive.⁵⁶ Hugenholtz et al., in their report, argue that it

⁵² See, e.g., *id.* at 218 (“While the Commission’s more recent Online Music Recommendation—[Recommendation 2005/737]—does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such.”).

⁵³ See, e.g., VANHEUSDEN, *supra* note 47, at 36.

⁵⁴ See *id.*

⁵⁵ LUCIE GUIBAULT ET AL., STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES’ LAWS OF DIRECTIVE 2001/29 ON THE HARMONIZATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 173 (2007). On June 9, 2006, Berlecon Research hosted a fact-finding workshop in which participants, in particular content providers and users, expressed their support for Community-wide licensing. A Community license for Internet and mobile services was seen to facilitate the emergence of innovative business models as diverging local laws were found to hinder effective cross-border licensing. See *id.* at 171–79.

⁵⁶ Report on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, EUR. PARL. DOC. A6/0053 19 (2007), available at

might be time to consider overcoming territoriality by creating a European title of copyright.⁵⁷ Some arguments in favor of a Community copyright imply that the main beneficiaries of the current practice of territory-by-territory licensing are European collecting societies tasked with administering most of these “national” rights.⁵⁸

These are some of the reasons why Internal Market policy should focus more strongly on facilitating market entry by new online service providers that disseminate works and sound recordings on an E.U.-wide scale. While the legal level of territorial protection in the E.U. is very high, the complexity of administering the system might prevent rewarding those who enjoy the protection of the law. When the Commission consulted stakeholders in July 2005, this exercise revealed that the current *management* of copyright in musical works and phonograms—within defined territories that usually are national borders—was a source of considerable inefficiency more so than the territorial scope of the legal title.⁵⁹ It was territorial management that was deemed to hinder the entry of new Internet-based services that rely on protected works and phonograms.⁶⁰

Before we examine how copyright policy can ensure that the plethora of rights that exist at E.U. level lead to tangible revenue

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0053+0+DOC+PDF+V0//EN> (inviting “the Commission to make it clear that the 2005 Recommendation applies exclusively to online sales of music recordings, and to present as soon as possible—after consulting closely with interested parties—a proposal for a flexible framework directive to be adopted by Parliament and the Council in codecision with a view to regulating the collective management of copyright and related rights as regards cross-border online music services . . .”).

⁵⁷ HUGENHOLTZ ET AL., *supra* note 24, at 219 (“Long considered taboo in copyright circles, the idea of a Community copyright modelled after the Community rights that already exist in the realm of industrial property, is gradually receiving the attention it deserves, both in political circles and in scholarly debate.”).

⁵⁸ *See id.* at 220 (“Surely, for collecting societies, the prospect of introducing a Community copyright and abolishing ‘national’ rights is unattractive, to say the least. Territorial rights are the bread and butter of most existing collecting societies.”).

⁵⁹ *See* Commission Recommendation 2005/737, 2005 O.J. (L 276) 54, 54–57 (EC), OJ 2005 L276/54 (Westlaw).

⁶⁰ *See* HUGENHOLTZ ET AL., *supra* note 24, at 218.

streams for the proprietors of these rights, we should briefly review the types of services that have the above-mentioned vocation to be supplied across the E.U., and thus constitute potential sources of considerable right-holder income.

III. EMERGING ONLINE BUSINESS MODELS

The Information Society added a variety of innovative services which are either provided electronically at a distance—e.g., webcasting, Internet-based television “IPTV”—or on specific request from the consumer—e.g., interactive “on-demand” retail services.

A. Digital Sales

Screen Digest estimates that consumer spending on online music more than doubled between 2005 and 2008.⁶¹ In 2006, digital retail services created revenue of €281 million, 90% of which Screen Digest attributes to online retail services.⁶² According to IFPI there are currently 320 online music services in Europe.⁶³

The online retail market for music downloads in the United States still by far exceeds the European market⁶⁴—this in spite of the fact that there are more broadband connections in Europe than in the United States.⁶⁵ In the U.S. consumers “downloaded” more than half a billion single tracks in 2006 while the E.U. figure stood at roughly one fifth of that amount.⁶⁶ On the other hand, the E.U. is ahead of the U.S. with respect to mobile phone subscriptions.⁶⁷

⁶¹ *The Rise of the Online Music Market*, SCREEN DIGEST, Jan. 2007, at 13, 14.

⁶² *Id.* at 13.

⁶³ INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI: 07 DIGITAL MUSIC REPORT 5 (2007) [hereinafter IFPI 2007], available at <http://www.ifpi.org/content/library/digital-music-report-2007.pdf> (last visited September 21, 2007).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

	U.S.		E.U.	
	2005	2006	2005	2006
Global Digital Music Market(m)				
Broadband lines	43	57	68	94
Single tracks downloaded	353	582	62	111
Mobile phone subscriptions	174	194	622	656
3G mobile subscriptions	3	15	6	27

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B. Download Versus Subscription

The introduction of new digital transmission platforms, such as web-based and other online delivery solutions, will lead to more cross-border provision of online music services. These new technologies have also led to the emergence of a new generation of service providers, ranging from “download-to-own” online shops, subscription services and web casters.⁶⁹

“Among the major brand names, two distinct business models have emerged in digital music: [i] pay-per-download and [ii] subscription services. Pay-per-download services meet consumer demand to ‘own’ music, but with greater flexibility than CDs as tracks can be selected and downloaded on the spot.”⁷⁰ According to Screen Digest, pay-per-download services still dominate the European digital market and, in 2006, accounted for over 90% of online music spending.⁷¹

Subscription services offer a wide choice of music for a monthly fee, allowing users to access all the music they want with the option to purchase selected tracks. [Subscription services] offer streaming and radio-play access for a monthly fee Downloads and burns are available for an extra per-track fee Some subscription services . . . allow[] ‘tethered downloads’ which are

⁶⁸ *Id.*

⁶⁹ See, e.g., *The Rise of Online Music in Europe*, *supra* note 61, at 14.

⁷⁰ INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI: 05 DIGITAL MUSIC REPORT 7 (2005) [hereinafter IFPI 2005], available at <http://www.beatsuite.com/pdfs/digital-music-report-2005.pdf> (last visited September 21, 2007).

⁷¹ *The Rise of the Online Music Market*, *supra* note 61, at 13.

transferable to portable players for as long as the consumer remains a subscriber.⁷²

Another subscription-based service is so-called “podcasting,” i.e., services that distribute syndicated programmes for consumption on portable devices, such as iPods—hence the term “podcasting.”

But various other new business models are emerging as well. In 2006, advertising-supported services became a new revenue stream for record companies. “Internet advertising is forecast by Forrester Research to overtake traditional radio advertising in 2010.”⁷³

IV. MAKING MARKETS WORK: THE CASE FOR E.U.-WIDE ONLINE LICENSING

In the era of online exploitation of works and sound recordings, commercial Internet shops that engage in retail of protected works or sound recordings need a licensing policy that is in line with the ubiquity of their respective on-line services. In 2004 record companies digitized and made available their repertoire in bulk. Now, they have started to market, promote and sell music for online applications such as download and subscription, across Europe.⁷⁴ These services can be accessed across Europe and, in consequence, legal certainty for users requires copyright to be cleared throughout Europe.

A. What is at Stake?

While the provision of music in the online environment has become international in scope, the traditional collective rights management structure in the E.U. has remained national and thus territorial in scope.⁷⁵ But online retailers see the requirement of territory-by-territory management as an impediment to the roll-out

⁷² IFPI 2005, *supra* note 70, at 7.

⁷³ IFPI 2007, *supra* note 63, at 12.

⁷⁴ See *The Rise of the Online Music Market*, *supra* note 61, at 14.

⁷⁵ See GUIBAULT ET AL., *supra* note 55, at 173 (stating that “[e]xclusive rights are still drawn along national borders”).

of new cross-border online services.⁷⁶ Rights-holders state that complications inherent in the licensing process deprive them of online revenue.⁷⁷ Online retailers therefore require cross-border or trans-national copyright clearance in line with their international reach and clearance services. These services cannot be provided effectively or efficiently when copyright clearing services remain mostly national in scope.⁷⁸

In light of the new online service offerings, Community copyright policy has now shifted toward streamlining the copyright licensing process. Simple and efficient rights clearance not only enables online service providers to achieve economies and efficiencies of scale, but it also leads to market entry by innovators, the development of new online services and, most importantly, has the potential to increase the revenue stream that flows back to the right-holders.⁷⁹

B. Is There a Need for New Policy Tools?

In order to achieve these goals, E.U. policy tools as well as the management of copyright should also become more flexible. In 2005, the Commission decided to test a new instrument—the Commission recommendation. After conducting a preparatory study and an impact assessment of various options,⁸⁰ the Commission, on October 18, 2005, adopted a recommendation on

⁷⁶ See *id.* at 174 (noting that each E.U. Member State's individual understanding of copyright limitations has forced content providers to ascertain the exact status of the law in every Member State, a process that undermines the flexibility that providers need to pursue online activities).

⁷⁷ *Impact Assessment*, *supra* note 41, at 6.

⁷⁸ See *id.*

⁷⁹ As mentioned above, the economic and societal impact of collective rights management in the musical sector in Europe is considerable. The Commission's most recent survey identified 152 collective rights management societies, acting on behalf of approximately 1.6 million right-holders and, in 2003, managing €4.9 billion of royalties per year. *Community Initiative*, *supra* note 41, at 21. Copyright, in Europe is to a large extent characterised by the activities of collecting societies who "turn rights into money." Walter Dillenz, *Functions and Recent Developments of Continental Copyright Societies*, 12 EUR. INTELL. PROP. REV. 191, 192 (1990).

⁸⁰ See *Impact Assessment*, *supra* note 41, at 32; see generally *Community Initiative*, *supra* note 41 (examining problems posed by the traditional collective management system and predicting the impact and feasibility of various remedial options).

collective cross-border management of copyright and related rights for legitimate online music services (hereinafter “the Recommendation”).⁸¹

A recommendation is a non-binding instrument introduced under Article 211 of the Treaty Establishing the European Community (hereinafter “EC Treaty”).⁸² To that extent, it is introduced as part of the Better Regulation agenda.⁸³ The Recommendation opted to interpret E.C. Treaty rules that apply to the cross-border management of certain “online” rights.⁸⁴ It also recommends measures on transparency and governance.⁸⁵ For obvious reasons of inter-institutional balance and its own participation in the decision-making process, the European Parliament would have preferred a binding legal instrument.⁸⁶ A recommendation does not exclude recourse to legislation. It is often seen as a first step in preparing a subsequent legislative approach.

“As the Recommendation opted for a ‘light touch’ non-binding approach to the matter of E.U.-wide online licensing,” the Commission has now published a “call for comments” with the aim of monitoring commercial developments.⁸⁷ The Recommendation has triggered a consultative process not unlike a sector enquiry. Such an enquiry should allow all relevant

⁸¹ Commission Recommendation 2005/737, 2005 O.J. (L 276) 54 (EC), OJ 2005 L276/54 (Westlaw).

⁸² EC Treaty, art. 211.

⁸³ See Better Regulation Conference, September 22–23, 2005, Edinburgh, Scot., *Competitiveness and Consultation: Business at the Heart of Europe*, at 7 (Nov. 2005), http://www.swyddfa-cabinet.gov.uk/regulation/documents/europe/pdf/conference_report.pdf.

⁸⁴ See Commission Recommendation 2005/737, *passim* 81.

⁸⁵ See *id.* at 56.

⁸⁶ See Report on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, EUR. PARL. DOC. A6/0053 4 (2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0053+0+DOC+PDF+V0//EN> [hereinafter Report on the Commission Recommendation].

⁸⁷ European Commission Call for Comments of 17 January 2007, http://ec.europa.eu/internal_market/copyright/docs/management/monitoring_en.pdf [hereinafter Call for Comments].

policymakers to better understand what is happening in the marketplace and to better appreciate the technical features of collective licensing of online rights. If the monitoring reveals the necessity of adopting binding rules with respect to certain features of the licensing process, the monitoring would indicate what sort of rules are most suitable and wished for by the relevant operators in the different online markets. In order to increase the general understanding of the online licensing markets, the “call for comments” touches upon the following issues:

1. What are the tenders that are underway which envisage E.U.-wide licensing arrangements?
2. What are the E.U.-wide licensing arrangements that have been set up?
3. Which online service providers benefit from E.U.-wide licenses for their pan-European retail or other activities?
4. What types of online services are most interested in obtaining E.U.-wide licenses?
5. What legislative or other types of obstacles have been encountered in setting up E.U.-wide licensing arrangements?

V. WHAT ARE THE RELEVANT “ONLINE” RIGHTS?

A. The Legal Framework for Copyright and Related Rights in the Digital Environment

The legal framework for copyright in the digital environment is the Information Society Directive 2001/29/EC⁸⁸ (hereinafter “the Directive”). The stated aim of the Directive is to implement the

⁸⁸ Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC), OJ 2001 L167/10 (Westlaw).

Community's obligations under the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"), both adopted in 1996.⁸⁹ These Treaties update copyright for the digital environment.⁹⁰ Another aim was to harmonize certain aspects of copyright and related rights,⁹¹ including the exceptions to those rights.⁹²

The Community's international obligations in the area of copyright and related rights flow principally from the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement").⁹³ The other relevant conventions are the Berne Convention, the Rome Convention, the WCT, and the WPPT.⁹⁴ Although the Community is not a party to the Berne Convention—

⁸⁹ *Id.* at 11. Recital 15 of the Directive states that the those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so called "digital agenda" and improve the means to fight piracy worldwide. *Id.*

⁹⁰ *See id.*

⁹¹ *See* Opinion of Advocate General Sharpston, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, Case C-306/05, [2006] E.C.R. ¶ 43, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0306:EN:HTML>. "It is clear that the Copyright Directive is intended to be a harmonising directive, designed above all to 'help to implement the four freedoms of the internal market' and 'provid[e] for a high level of protection of intellectual property.'" *Id.* The Court of Justice meanwhile confirmed this conclusion in Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 E.C.R. I-11519 ¶ 36.

⁹² *See, e.g.*, Council Directive 2001/29, recital 31, at 12 (speaking to the balance of interests between the different categories of right-holders themselves, as well as between the different categories of right-holders and the users of protected works or sound recordings). This recital further mentions that existing differences in the exceptions and limitations to the rights granted by the Member States could have negative effects on the functioning of the internal market and that these differences could well become more pronounced with the further development of cross-border exploitation of copyright protected works. *Id.* For a critical evaluation of this harmonization approach, see GUIBAULT ET AL., *supra* note 55, at 63. ("In view of the optional character of the list of limitations contained in articles 5(2) to 5(5) of the Directive, [the articles that govern exceptions and limitations], the harmonising effect is very modest at best In view of this mosaic of limitations in place throughout the European Community, it is safe to say that the aim of harmonisation has hardly been achieved and legal uncertainty persists.")

⁹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 1(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 [hereinafter TRIPs].

⁹⁴ *See id.*

and indeed could not be, since membership of the Berne Union is confined to the countries of the Union—it is required to comply with Articles 1–21 of the Berne Convention by virtue of Article 9 of the TRIPs agreement.⁹⁵

In order to comply with the obligations introduced under the WCT and the WPPT, the Directive harmonizes:

- the exclusive right of *reproduction* which fully applies in the digital environment (Article 2 of the Directive and Article 1(4) WCT; Article 7, 11 and 16 WPPT and Agreed Statements);⁹⁶
- The exclusive right of *communication to the public* (Article 3 of the Directive and Article 8 WCT);⁹⁷ and
- the right of *making available* (Article 3 of the Directive and Article 8 WCT; Article 10, 14 WPPT and Agreed Statements).⁹⁸

B. *Who Owns the Relevant “Online” Rights?*

There are many right-holders—e.g., authors, composers, publishers, record producers and performers—and rights—e.g., communication to the public, reproduction and “making available”—that are involved in a single transaction involving the electronic provision of music. A separate license has to be sought from a different collective rights manager, i.e. an authors’ society, record producer’s society, and, possibly, a performing rights society, for every single transaction.⁹⁹ It should also be noted that a license granted by a collecting society for one form of exploitation does not mean that any other form of exploitation is

⁹⁵ *Id.* art. 9(1).

⁹⁶ *See* Council Directive 2001/29, art. 2, at 16.

⁹⁷ *Id.* art. 3(1).

⁹⁸ *Id.* art. 3(2).

⁹⁹ *See Impact Assessment, supra* note 41, at 8.

authorized. A separate license has to be negotiated for each form of exploitation.¹⁰⁰

In the online environment *authors'* rights comprise: (1) the right of reproduction; (2) the right to communicate musical works to the public including; (3) the "making available" of these works to the public.¹⁰¹ "Rights of *performers*, and *record producers* (record labels) are related rights and remunerate the producers and the performing artists for use of a sound recording."¹⁰²

- *Performers* have the exclusive right to allow: (1) the reproduction of fixations of their performances;¹⁰³ (2) the right to receive equitable remuneration if a commercial phonogram is broadcast by wireless means or communicated to the public;¹⁰⁴ and (3) the right to make their fixed performance available.¹⁰⁵
- *Record producers* have the right to authorize reproduction and the right to make available sound recordings.¹⁰⁶

C. Who Administers the Relevant "Online" Rights?

"Rights of *authors* [of musical works] are administered collectively by authors' societies."¹⁰⁷ Authors, composers and publishers own the rights in the composition of the lyrics and/or the music.¹⁰⁸ In most Member States, a single society administers the *authors'* reproduction, public performance, and "making

¹⁰⁰ *Id.*

¹⁰¹ Commission Recommendation 2005/737, 2005 O.J. (L 276) 54, 55 (EC), OJ 2005 L276/54 (Westlaw).

¹⁰² *Impact Assessment*, *supra* note 41, at 8.

¹⁰³ Council Directive 92/100, art. (7)(1), 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw).

¹⁰⁴ *Id.* art 8(2).

¹⁰⁵ *Id.* art. 9(1).

¹⁰⁶ *Id.* art. 7(1), 9(1).

¹⁰⁷ *Impact Assessment*, *supra* note 41, at 7.

¹⁰⁸ *See id.* (stating that "[a]uthors hold the rights in the composition of the lyrics/music").

available” rights on a territorial basis.¹⁰⁹ In some Member States, the right of reproduction and the rights of communication to the public are administered by separate societies—again, on a territorial basis.¹¹⁰ In most Member States, the *performers’* and *record producers’* right to receive equitable remuneration is administered by a collecting society.¹¹¹ “*Record producers . . . manage their ‘making available’ right for online on-demand services on an individual basis.*”¹¹²

D. Are Too Many Rights Involved in an Online Transaction?

The multitude of rights and right-holders (and collecting societies) that are involved in online retail transactions have raised the issue of whether online retail transactions involve too many

¹⁰⁹ See Nanette Rigg, *The European Perspective: Collective Management of Rights in Europe from 1777 to 2002: Why is it Necessary?*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE, *supra* note 2, at 18, 22 (explaining how societies emerged in a “patchwork fashion” in Europe). In Germany and Switzerland societies tend to manage authors’ public performance, broadcasting and mechanical reproductions rights in one society while Britain or France have developed separate societies for authors’ performance rights—e.g., public performance and broadcasting—and mechanical reproduction rights. Spain and Italy, on the other hand, have each developed one society that operates on behalf of all right holders and all rights. *Id.*

¹¹⁰ See, e.g., *Impact Assessment*, *supra* note 41, at 41. (listing the collecting societies for each Member State, and the respective categories of rights and right-holders which they administer).

¹¹¹ VANHEUSDEN, *supra* note 47, at 27 (stating that “[i]n all [European] countries the right to remuneration is exercised through a collecting society”).

¹¹² *Impact Assessment*, *supra* note 41, at 8. Individual management of copyright and related rights is not covered by the scope of the 2005 Commission Recommendations on online licensing. “With regard to the making available right necessary to be cleared for the provision of on demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof,” Recital 26 of the Copyright Directive “states that collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.” Council Directive 2001/29, recital 26, 2001 O.J. (L 167) 10, 12 (EC), OJ 2001 L167/10 (Westlaw). On this basis, the European Broadcasting Union (EBU) advocates mandatory collective management of making available rights of producers and performers in commercial phonograms, in so far as such commercial phonograms are an integral part of TV or radio productions. *Initial EBU Comments on ‘Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright,’* 19.8.2005/MB/HR 1, 2 (2005), available at <http://www.ebu.ch> (follow “Position papers” hyperlink; follow hyperlink dated 19.08.2005).

different rights and right-holders (and collecting societies). Most recently, Hugenholt et al. criticized that the Community legislator's drive for harmonization of copyright and related rights has introduced too many (overlapping) layers and categories of different rights.¹¹³ Indeed, a download service would need to license both the reproduction and the "making available" right from all right-holders who enjoy these rights separately.¹¹⁴ In these circumstances there are calls for streamlining and consolidating the different rights.¹¹⁵ Two solutions are often mooted for this scenario: statutory presumptions on transfer of ownership and joint administration of different categories of rights.

Statutory presumptions of transfer of rights are sometimes mooted as a tool to enhance efficiency of the clearance process.¹¹⁶ While transfer-of-ownership rules might facilitate the rights clearance process by introducing a "one stop shop" principle in rights management, a debate on the transfer of copyrights would almost certainly generate fierce political opposition. Many of the smaller and "weaker" rights holders—categories of authors or performing artists—are represented by collecting societies which trace their origins back to the perceived necessity to defend their interests independently from other right-holders. If rights would be systematically transferred to corporate entities, such as under the United States "works for hire" rule, collective representatives

¹¹³ See, HUGENHOLTZ ET AL., *supra* note 24, at 164. "New categories of rights, introduced initially at national level and later confirmed in the copyright 'acquis', have added new layers of protection to existing cultural productions, and have brought new categories of right-holders into the realm of copyright and related rights. . . . As a result, a single object may now be protected by various layers of overlapping rights, each of which will be held by a different right owner." *Id.*

¹¹⁴ See, *Impact Assessment*, *supra* note 41, at 8. "[T]here are many right-holders and rights that could be involved in a single transaction in the music industry. A licence granted by a CRM for one form of exploitation does not mean that any other from [sic] of exploitation is authorised and so a separate licence has to be sought from a different collective rights manager i.e. an authors' society, record producer's society and performing rights society for any single transaction. Management of online exploitation of musical works is complicated by the fact that a multitude of rights (e.g., communication to the public, reproduction and making available) belonging to a multitude of right-holders (e.g., authors, composers, publishers, record producers and performers) need to be cleared." *Id.*

¹¹⁵ Some of these initiatives are described in HUGENHOLTZ ET AL., *supra* note 24, at 170.

¹¹⁶ See *id.*

of these categories of right-holders would lose their role as an essential intermediary between individual right-holders and commercial users of protected material. Collecting societies therefore often describe their role as the defence of their members' interests against "powerful corporate players."¹¹⁷

Another solution proposed to address the variety of copyrights that need, *e.g.*, to be cleared for downloading a music track is contained in the *Gowers Review of Intellectual Property*.¹¹⁸ According to Gowers, the public performance rights and mechanical reproduction rights of all rights holders—authors, performers, and record companies—should be managed by one entity and the respective rights should be licensed by means of a single license.¹¹⁹ A similar approach already bore some fruit with respect to the administration of private copying levies, where central umbrella societies administer private copying levies on behalf of a variety of beneficiaries and their collecting societies.¹²⁰

However, joint administration of rights as advocated by the Gowers review, has to surmount considerable hurdles. Often different categories of right-holders are in an antagonistic relationship¹²¹ and the joint administration of their rights would create issues as to: (1) who is represented on the board of the joint management entities; (2) how would voting power be attributed to the various right-holders; and (3) how would revenue be distributed among the different right-holders.¹²² In addition, at least for copyright and related rights in the digital environment, the

¹¹⁷ See, *e.g.*, Thierry Desurmont, *The Future of Collective Licensing*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE, *supra* note 2, at 203, 205 (describing how authors have very little power against powerful users).

¹¹⁸ GOWERS, *supra* note 45.

¹¹⁹ See *id.* at 94 (explaining that an agreement between collecting societies could benefit users).

¹²⁰ See HUGENHOLTZ ET AL., *supra* note 24, at 176. "To alleviate some of the problems that arise with respect to the accumulation of rights in a single work, rights clearance centres have been set up in various Member States This greatly facilitates the rights clearance of multimedia works." *Id.*

¹²¹ See, *e.g.*, VANHEUSDEN, *supra* note 47, at 34 (describing the relationship between performing artists and their collecting societies on the one hand and record producers on the other hand).

¹²² See, *e.g.*, *id.* at 23. (Table 1.2 gives the rules on revenue allocation between performing artists and record labels in the different E.U. Member States).

structure and scope of exclusive rights is such that each right-holder owns a specific right, even if these rights might overlap for certain online transactions.

In these circumstances, the Recommendation did not argue for transfer of presumptions of the overownership or joint administration of different rights that pertain to different right-holders. Rather, this instrument focuses on practical issues on how to streamline the current multi-layered management of copyright.¹²³

E. How Does the Recommendation Deal with the Online Rights?

The Recommendation refrains from inviting right-holders and collecting societies from “consolidating” the management of different exclusive rights. It takes a pragmatic approach in inviting right-holders and their representatives to streamline the management of “online” rights while acknowledging their distinct and independent character.¹²⁴

The Recommendation refers to the above rights as the relevant “online” rights not in order to create new categories of rights, but because these rights are already harmonized at Community level with a view of facilitating cross-border exploitation of copyright protected works or phonograms.¹²⁵ Therefore, the term “online

¹²³ See Commission Recommendation 2005/737, 2005 O.J. (L 276) 54, 54 (EC), OJ 2005 L276/54 (Westlaw) (explaining how commercial users must negotiate in each Member state, with each collective rights manager, for appropriate rights and stating the “need for a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial”).

¹²⁴ See *id.* This view appears to be in line with Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶ 6.173 WT/DS152/R (June 15, 2000) (asserting that “in our view, normal exploitation would presuppose the possibility for right-holders to exercise separately all three exclusive rights guaranteed under the three subparagraphs of Article 11*bis*(1), as well as the rights conferred by other provisions, such as Article 11, of the Berne Convention (1971”).

¹²⁵ See Commission Recommendation 2005/737, art. 1, at 55. See also Council Directive 2001/29, recital 2, 2001 O.J. (L 167) 10, 10 (EC), OJ 2001 L167/10 (Westlaw) (stating that an earlier European Council meeting “stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, *inter alia*, the existence of an internal market for new products and services.”).

rights” refers to those categories that are already present in the relevant body of Community directives.¹²⁶

According to the Recommendation, the following exclusive rights are implicated in the provision of protected works or other subject matter electronically at a distance.

1. The Exclusive Right of Reproduction

This right is defined in Article 2 of the Directive¹²⁷ and “covers all reproductions made in the process of . . . online distribution.”¹²⁸ The right of reproduction includes the right to reproduce the work by making intangible copies.¹²⁹ Intangible copies include those made by digital means;¹³⁰ for example, upload and download, transmission in a network, or storage on a hard disk. Certain temporary copies are, however, exempted from the reproduction right by virtue of Article 5(3)(1) of the Directive.¹³¹

¹²⁶ See Commission Recommendation 2005/737 at 55 (“[O]nline rights’ means any of the following rights: (i) the exclusive right of reproduction that covers all reproductions provided for under Directive 2001/29/EC in the form of intangible copies, made in the process of online distribution of musical works; (ii) the right of communication to the public of a musical work, either in the form of a right to authorise or prohibit pursuant to Directive 2001/29/EC or a right to equitable remuneration in accordance with Directive 92/100/EEC, which includes webcasting, internet radio and simulcasting or near-on-demand services received either on a personal computer or on a mobile telephone; (iii) the exclusive right of making available a musical work pursuant to Directive 2001/29/EC, which includes on-demand or other interactive services.”).

¹²⁷ Council Directive 2001/29, art. 2, at 16.

¹²⁸ See Commission Recommendation 2005/737, at 55.

¹²⁹ See *id.* (stating that the exclusive right of reproduction provided in Directive 2001/29 applies to “intangible copies”); see also Directive 2001/29, art. 2, at 16 (stating that the reproduction right applies to a production “in any form”).

¹³⁰ *Follow-Up of the Commission of the European Communities to the Green Paper and Related Rights in the Information Society*, at 12, COM (96) 568 final (Nov. 20, 1996), available at http://aei.pitt.edu/939/01/copyright_gp_follow_COM_96_568.pdf [hereinafter *Follow-Up to Green Paper*] (stating that the Commission sought to “define the exact scope of the acts protected by the reproduction right . . . [and] clarify that the digitisation of works and other protected matter, as well as other acts such as scanning, or uploading and downloading of digitised material are, in principle, covered by the reproduction right. It would also cover for the same reasons, transient or other ephemeral acts of reproduction.”).

¹³¹ See Council Directive 2001/29, art. 5(3)(1), at 16.

European courts tend to interpret the scope of the reproduction right widely and in a way that covers many activities taking place on the Internet. In a case concerning a personalised video recording service, the Cologne Court of Appeal held that both (1) digitizing the captured signal and (2) storage of that signal on the defendant's server constituted infringing reproductions.¹³² The defendant operated a website that allowed subscribers to view the programmes of 20 German broadcasters at a time and place individually chosen by the subscribers. In order to offer such a service, the defendant captured the broadcaster's signals and stored a digitized version of these signals on its server. Each subscriber then was allocated a space on the defendant's server, the so-called personal video recorder (PVR). In *Copiepresse v. Google*,¹³³ a collecting society representing French and German language newspaper publishers brought an action for copyright infringement against Google on the grounds that Google's cache memory enabled users to access press articles which were no longer available for free on publishers' web-sites. The Google cache memory enables the users to search and display the contents of a web-page by clicking on the link "cached," even if the original page is no longer accessible (the cache version displays the contents of a web-site as last visited by the Google indexation robot). The Brussels Court of First Instance held that copying and storage of news articles and press photographs in the cache memory of Google servers infringed the reproduction right. The copy of a web-page stored in the memory of Google servers and the display of a link making the cached copy accessible to the public were held to constitute a material reproduction of protected works. While Google argued that it reproduced only the HTML code and not the images, the court reasoned that the only relevant fact was that a fixation of the webpage, in whatever form, had occurred. The Court thus held that authorization of the

¹³² Oberlandesgericht (Köln) (6 U 133/05) (September 9, 2005), GRUR-Rechtssprechungs Report, 2006/1, p5-7, for an English comment on this judgment, (2006) 17:2 Entertainment Law Review p. 17.

¹³³ Google v. Copiepresse, Tribunal de 1ere instance de Bruxelles, Feb. 13, 2007.

rightholders was needed¹³⁴ to operate such a fixation. According to a German line of cases reproductions of small images on the Internet, known as thumbnails infringe the images owners' exclusive right of reproduction.¹³⁵ In its "thumbnails" judgment, the Regional Court of Hamburg held that storage of "thumbnails" made available by a search engine on the Internet on a user's computer in the German territory would entail the exclusive right of reproduction as guaranteed by the German Copyright Code (*Urheberrechtsgesetz*). Although it was each user who triggered the copy when visiting the search engine's website, the search engine was held to have "initiated" the reproduction by making the thumbnails available on a website.

2. The Exclusive Right of Communication to the Public

This right is set out in Article 3 of the Directive and covers all communications of *authors'* works to members of the public not present at the place where the communication originates, such as broadcasting, cable, and online transmissions.¹³⁶ As evidenced by recital 23 of the Directive, this right does not cover local communication to the public such as public performances, recitations or the like.¹³⁷

Apart from authors, only *performers* have an exclusive right of communication to the public, but the performers' right is limited to *live* performances only.¹³⁸ Performances that have already been broadcast or broadcasts from earlier fixations are specifically

¹³⁴ In the U.S., in *Field v. Google*, 412 F. Supp 2d. 1106 (D. Nev. 2006), a court found that the making available of a cached copy amounted to fair use.

¹³⁵ LG Bielefeld, Nov. 8, 2005, JurPC Web-Dok. 106/2006; LG Hamburg, Oct. 5, 2003, JurPC Web-Dok 146/2004.

¹³⁶ *See id.* art. 3. The Court of Justice had interpreted the notion of public as an indeterminate number of potential spectators. *Cf.* Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 E.C.R. I-11519 ¶ 37 (stating that "the term public[] refers to an indeterminate number of potential television viewers").

¹³⁷ Bechtold, *supra* note 35, at 360.

¹³⁸ *See* Council Directive 92/100, art. 8(1), 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw).

excluded.¹³⁹ Arguably, performers therefore have no exclusive right of communication to the public that would apply to the online streaming of sound recordings.¹⁴⁰ They do, however, have the exclusive right of “making available,” which would apply to online downloads.¹⁴¹

Some commentators appear to assume that the authors’ exclusive right of communication to the public only covers situations where the transmitter determines the timing of the communication.¹⁴² This would include webcasting,¹⁴³ simulcasting, Internet radio, IPTV, and “near-on-demand”

¹³⁹ See *id.* art. 8 (stipulating that performers and phonogram producers possess a right to equitable remuneration with regard to broadcasting performances fixed in a commercial program *by wireless means*, thereby excluding cable broadcasts). But see *id.* recital 20, 1992 O.J. (L346) (Westlaw) (stating that Member States are free to provide performers broader protection and require “equitable remuneration” for cable or other wire-based broadcasts, such as webcasting or simulcasting of broadcasts on the internet).

¹⁴⁰ See *id.* art 8(1); Council Directive 2001/29, ¶ 25, 2001 O.J. (L 167) at 12. The Copyright Directive grants neighbouring rights holders no exclusive right with respect to services such as webcasting or simulcasting, which are not *fully* interactive. See Council Directive 2001/29, recital 25, at 12. These rights are covered by national rules on neighbouring rights. In most countries, phonogram producers and performers only enjoy a right to receive equitable remuneration for the secondary use of phonograms, which may include webcasting. With respect to broadcasting *by wireless means*—but not cable-casting, simulcasting or webcasting—Directive 92/100, therefore, requires Member States to provide at least a right to ensure that equitable remuneration is paid for the secondary use of a phonogram by a broadcaster.

¹⁴¹ See discussion *infra* Part 5.5.3.

¹⁴² Compare Bechtold, *supra* note 35, at 361 (positing that “[i]f the work is offered in a way that the member of the public does not have individual control over when and from where to access the work (for example, normal TV and radio broadcasting, streaming content over the Internet, Internet radio stations and possibly near-on-demand pay TV), the right of making available to the public does not apply”), with GUIBAULT ET AL., *supra* note 55, at 28 (“[I]t is difficult to give a definite interpretation of what constitutes ‘on demand,’ i.e. delivery at a time and place individually chosen by the user Precisely what level of interactivity it implies is not quite clear. In practice, dissemination on-line is done through models along a sliding scale of interactivity.”).

¹⁴³ See *Community Initiative*, *supra* note 41, at 6 n.1. “A simulcast is a ‘simultaneous broadcast’, and refers to programs or events broadcast across more than one medium at the same time. Streaming allows data to be transferred in a stream of packets that are interpreted as they arrive for ‘just-in-time’ delivery of multimedia information. A webcast is similar to a broadcast television program but designed for internet transmission. A person/computer receiving information via a computer refers to it as a download. Online music provided on demand is a downloading service of musical works on demand against or without payment.” *Id.*

services.¹⁴⁴ Communication to the public would occur irrespectively of whether musical works are communicated via personal computers, a television set or mobile telephones. In the “multi-channel” case, the Court of Appeal in Munich held that the transmission of music tracks without any commentary or advertising via cable and satellite was to be cleared as a communication to the public (broadcast transmission) and not as a non-physical delivery of music tracks, a form of online exploitation, which would nowadays have to be cleared under the “making available” right.¹⁴⁵

3. The Exclusive Right of “Making Available”

This right covers fully interactive “on-demand” services, such as making a work available by allowing for its downloading.¹⁴⁶ The “making” available right also seems to apply to downloading on a portable device, such as “podcasting”¹⁴⁷. As opposed to the

¹⁴⁴ *But see Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, COM (1998) 628 final (Jan. 21, 1998), E.U.: COM(97) 628 (Westlaw) [hereinafter *Proposal*] (stating that near-video-on-demand, pay-per-view and pay-TV are not acts of making available).

¹⁴⁵ Judgment of 20 April 2000 – Case no. 6 U 3729/99.

¹⁴⁶ *See Council Directive 2001/29*, art. 3, 2001 O.J. (L 167) 10,16 (EC), OJ 2001 L167/10 (Westlaw); *see also Follow-Up to Green Paper*, *supra* note 130, at 13 (stating Member State preference “to cover ‘on-demand’ transmissions—without prejudice to any acts of reproduction which are covered by a separate right – by a widely interpreted form of a right of communication to the public”). Electronic delivery would therefore form part of the family of “communication to the public” rights and not part of the family of other rights, such as the distribution right. The aim was to grant this right of communication to the same beneficiaries who enjoy the exclusive right of reproduction in the same digital environment. The stated objective was therefore that both the right of reproduction and the right of communication to the public would coexist alongside each other. *But see Proposal*, *supra* note 144 (stating in regard to protecting “on demand” transmission, “[i]n economic terms, the interactive on-demand transmission is a new form of exploitation of intellectual property. In legal terms, it is generally accepted that the distribution right, which only applies to the distribution of physical copies does not cover the act of transmission.”).

¹⁴⁷ Dr. Joachim v.Ungern-Sternberg, in *URHEBERRECHT KOMMENTAR* para. 20 n.46, at 403 (Professor Dr. Dr. h. c. mult. Gerhard Schrickler ed., C.H. Beck’sche Verlagsbuchhandlung 1999) (1987). There are estimates that “50% of mobile content revenues will be from music.” IFPI 2005, *supra* note 70, at 3. Music services provided to mobile telephones also include the market for ring-tones and real-tones. *See id.* at 8.

exclusive right of communication to the public, which is only granted to authors, the “making available” right is accorded to authors, performers and record producers.¹⁴⁸

It is, in particular, the right to “make available” works or other subject matter “in such a way that members of the public may access them from a place and at a time individually chosen by them” that has introduced the “digital agenda” to copyright policy.¹⁴⁹ The “making available” right, as it is known, is a right formulated with the Internet and cross-border exploitation of copyright in mind and thus most closely reflects the potential of the online environment and “on-demand” services made available online.¹⁵⁰

In the realm of Internet services, the “making available” right was tailored to cover not only permanent “downloads”—potential substitutes for retail sales—but also “on-demand” streaming of works that can be permanently stored in the process.¹⁵¹ The legislative history of the Directive is very clear on this point. In the Explanatory Memorandum of the original proposal for the Directive, the Commission states:

A range of such ‘on-demand’ services has already emerged in the European market, starting in 1995 and 1996, particularly in the United Kingdom, France and Germany, although still at the prototype or trial stage. Interactive ‘on-demand’ services are characterised by the fact that a work or other subject matter stored in digital format is made *permanently* available to third parties interactively, i.e. in such a way that users may order from a database the music or film they want; this is then relayed to their computer as digital signals over the Internet or other high-speed networks, for display or for

¹⁴⁸ See Council Directive 2001/29, art. 3, at 16.

¹⁴⁹ *Id.*

¹⁵⁰ See Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 E.C.R. I-11519.

¹⁵¹ See *Proposal*, *supra* note 144.

downloading, depending on the applicable licence.¹⁵²

Interestingly enough, this remains a valid description of the online market for music or film “downloads.” Downloads are still the predominant way in which consumers access music online.¹⁵³ The Memorandum also shows that the Commission, already in 1997, had in mind to deal specifically with online delivery of music or films—activities which were already known at that time.

There appears to be an emerging trend to interpret the “making available” right broadly. The Court of Appeal in Hamburg recently ruled that an act of making phonograms available did not even require that the download of a copy of the phonogram.¹⁵⁴ The court qualified an act of on-demand streaming as covered by the “making available” right.¹⁵⁵ The Court, by qualifying the “making available” as a sub-set of the right of “communication to the public”, concluded that “making available” of a sound recording did not require that the user obtained or retained ‘possession’ of a download. In another case, the Court of Appeal in Cologne ruled that an Internet service provider’s offer to save selected digitized television programmes for the user’s deferred viewing constituted an act of “making available.”¹⁵⁶ The use of peer-to-peer software to distribute works over the Internet has also been held to be covered by the right to make available. In *Polydor Ltd and others v Brown and others*,¹⁵⁷ proceedings were brought in the High Court of England and Wales against an Internet user who had used peer-to-peer software to offer more than four-hundred files for download. Under section 20 of the UK Copyright, Designs

¹⁵² *Id.* (emphasis added).

¹⁵³ See *The Rise of Online Music in Europe*, *supra* note 61, at 13 (“Music is being consumed in increasingly diverse ways, ranging from ringtones to free-to-listen and podcasts. However, the digital retail model continues to dominate as it has since . . . 2004.”).

¹⁵⁴ Oberlandesgericht [OLG] [Court of Appeal] July 7, 2005, Case No 5 U 176/04 BeckRS 2005 09130.

¹⁵⁵ *Id.*

¹⁵⁶ Oberlandesgericht [OLG] [Court of Appeal] Oct. 9 September 2005 Case No 6 U 90/05 BeckRS 2005 12216.

¹⁵⁷ [2005] EWHC 3191 (Ch.D.).

and Patents Act 1988,¹⁵⁸ communication to the public includes broadcasting and “making available” to the public of the work by “electronic transmission.”¹⁵⁹ The judge held that connecting a computer running P2P software to the Internet, and in which music files are stored in a shared directory, falls within section 20. The mere fact that the files were present and made available was sufficient to constitute infringement of this section. Similarly, the Dublin High Court held that peer-to-peer software allowed copyright infringement by “making available” to the public a significant volume of sound recordings.¹⁶⁰ This case law may reflect the fact that the “making available” right is the one right formulated in the Directive that specifically had Internet-based services and online infringements in mind.

The above jurisprudence appears significant. Internet radio services that would traditionally be considered as web-casting or streaming-type services are increasingly competing with interactive services or “electronic retail” services, as envisaged by the “making available” right. For example, filtering software might well enable listeners of digital radio to screen a broadcast so as to obtain recordings which can later be digitally stored on mobile listening devices. The digital storage of selected songs would then fall under the “making available” right.¹⁶¹

¹⁵⁸ An unofficial, consolidated version of the Copyright, Designs and Patents Act 1988 is available at: <http://www.ipso.gov.uk/copy/c-law/c-legislation.htm>.

¹⁵⁹ Cf. Section 20(2) of the Copyright, Designs and Patents Act 1988: “References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—(a) the broadcasting of the work; (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”

¹⁶⁰ *EMI Sony Universal and others v. Eirecom, BT Ireland* [2006] ECDR 5, Dublin High Court, July 8, 2005. The proceedings were brought against the ISP for disclosure of information regarding certain customers, and the existence of copyright infringement was not challenged.

¹⁶¹ Such a service was the subject of a recent German judgment by the Regional Court in Cologne in Case 28 O 16/07, judgment of 28 February 2007, BeckRS 2007 04401. In the case at issue, the service provider digitally stored radio programmes for later listening at a time chosen by its subscribers. This element of the service was offered for free. However, the service provider charged a subscription fee of €0.99 per day, if the online subscriber decided to download more than five tracks of the stored radio programmes per day. For a monthly fee of €2.99, the user could download an unlimited number of music

*F. Is a More Granular Approach Necessary in Defining
“Online” Rights?*

As seen above, the Recommendation defines “online” rights by reference to the harmonized terminology used in the E.U. directives.¹⁶² In line with the E.U. directives, “the Recommendation defines the types of rights in terms of the legal qualification of the right,”¹⁶³ using the terminology of the relevant directives.¹⁶⁴ “The Recommendation does not address the [potential] necessity for collective rights managers to further define the categories of ‘online rights’ by (1) specific forms of [‘near-on-demand’] exploitation”—e.g., . . . webcasting, IPTV, mobile transmissions, mobile television, video-on-demand, etc or (2) by reference to the type of [‘on-demand’] service offered (e.g., “download-to-own” or subscription-based services).¹⁶⁵ Further monitoring must determine whether it was correct that the Recommendation used the term “online rights” in a way that refrained from defining specific forms of exploitation or even specific services that are offered online.

It might become necessary—for example, when rights are assigned to a rights manager—to further delineate “online” rights according to forms of exploitation. For example, right-holders may well wish to be able to assign some forms of exploitation, e.g. some types of online service, to a collecting society while retaining other forms of exploitation without assigning them to a collective rights manager. This might become relevant for users of Creative Commons licenses, according to which only some forms of use may be reserved while other forms of exploitation are allowed. This “some rights reserved” approach makes it difficult for collecting societies to manage Creative Commons licensed

tracks. As the service provider had failed to clear copyright for the use of the sound recordings, the court mentioned a possible infringement the right of ‘making available’ but left the matter unresolved because it held that, in any case, the service infringed the reproduction right in the sound recording.

¹⁶² See *supra* note 126.

¹⁶³ Call for Comments, *supra* note 87, at 2.

¹⁶⁴ See generally Commission Recommendation 2005/737, 2005 O.J. (L 276) 54, 54 (EC), OJ 2005 L276/54 (Westlaw).

¹⁶⁵ Call for Comments, *supra* note 87, at 2.

works.¹⁶⁶ It is alleged that collecting societies' current management mandates do not provide right-holders the possibility to exclude specific forms of exploitation from the scope of collective management.¹⁶⁷ Therefore, artists who are members of collecting societies often remain unable to use a Creative Commons license. The same might be true for the purposes of the withdrawal of rights. Rightholders may wish to withdraw only certain forms of exploitation while leaving others to be managed collectively.¹⁶⁸

The principle of a more granular delineation of rights for the purposes of withdrawal from and entrustment of these rights to collecting societies has been studied recently in the *rapport Levy-Jouyet on l'économie de l'immatériel*.¹⁶⁹ The report advocates that right-holders have the choice to withdraw all of their rights or only certain categories or forms of exploitation from collective managers.¹⁷⁰ The third principle of the French recommendations goes even further in advocating that even a commercial user be given the choice to license only certain repertoire or "types of music" that he finds interesting—as opposed to receiving a

¹⁶⁶ See, e.g., GOWERS, *supra* note 45, at § 5.66 ("Collecting Societies in the U.K. generally hold an exclusive license to collect royalties for the copyright works that they represent. Therefore, artists who are members of collecting societies are generally unable to license Creative Commons licensed individual works."). But see Euan Lawson, *Live Performances: Collecting Societies and the Public Performance Right*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE, *supra* note 2, at 89, 93 (stating that the Performing Right Society Ltd. ("PRS") in the United Kingdom does allow members to "contract out of exclusivity for particular live concert tours where the composer or publisher concerned can generate a royalty of £1,000 or more per event").

¹⁶⁷ See Things to Consider Regarding Creative Commons Licensing, <http://creativecommons.org/about/think> (last visited Sept. 10, 2007).

¹⁶⁸ This issue is addressed in *Call for Comments*, *supra* note 87, at 2 ("[S]hould rightholders be able to retain some types of use or forms of exploitation without assigning them to a collective rights manager?").

¹⁶⁹ See generally Rapport de la Commission sur l'économie de l'immatériel, Minefi (December 2006), available at http://www.minefi.gouv.fr/directions_services/sircom/technologies_info/immatériel/immatériel.pdf [hereinafter Rapport de la Commission].

¹⁷⁰ *Id.* at 129 ("Premier principe, le créateur doit rester maître de ses droits. Comme c'est déjà le cas dans certaines sociétés telle la SACD, libre droit pour les créateurs de sortir des sociétés au bout d'un délai qui ne saurait dépasser deux ans ; aucune autre formalité ou condition n'est opposable à la demande, la sortie pouvant porter sur l'ensemble des droits ou sur certains d'entre eux seulement.").

“blanket license”¹⁷¹ covering all types of music. It is interesting to note that the report therefore seems to favor granular choice both at right-holders’ and at users’ levels.

G. The Relationship Between Broadcasting and “Online” Rights

One form of exploitation that is not included in the Recommendation is broadcasting, including transmissions or retransmission by cable or satellite.¹⁷² This is because broadcasting and satellite or cable transmissions are not considered forms of “online” retail or “downloading” of music. The reason for this is as follows.

For broadcasters, music has a function and value that may be different from the value of music for an online retail store. While online retail stores sell music downloads to the general public as their primary line of business, broadcasters only use music as background to their scheduled programmes. In other words, an online shop selling music is active on the “primary” music market, while a broadcaster exploits music on a “secondary” market.

The Recommendation aims to facilitate E.U.-wide licensing for the primary market for music downloads.¹⁷³ It may appear less tailored to creating new licensing models for the “secondary market” when music is used incidentally as background in broadcast programmes.¹⁷⁴ In this latter case, most jurisdictions in

¹⁷¹ *Id.* (“Troisième principe, l'utilisateur doit pouvoir choisir la fraction du répertoire pour laquelle il souhaite obtenir une licence. L'utilisateur pourrait ainsi n'obtenir une licence que sur une partie du catalogue géré par la SPRD. Pour éviter une gestion trop fine de ces licences partielles, une « partie » pourrait ne s'appliquer qu'à un type de musique ou à un ayant droit plutôt que titre par titre et il reviendrait à l'utilisateur de mettre en place les outils de vérification nécessaires à la SPRD. Dans tous les cas, le prix de la licence partielle ne saurait dépasser le montant d'une licence complète.”).

¹⁷² See generally Commission Recommendation 2005/737, 2005 O.J. (L 276) 54 (EC), OJ 2005 L276/54 (Westlaw).

¹⁷³ See the early focus on “pay-per-download” services in *Community Initiative*, *supra* note 41, at 6. “In 2004, online music revenue in Western Europe amounted to €27.2 million (23.4 million attributable to “downloads” and €3.8 million to subscription-based services). The U.S. market amounted to €207 million (€155.9 million attributable to downloads and €51.1 million to subscription-based services).” *Id.*

¹⁷⁴ See generally Commission Recommendation 2005/737. As mentioned above, this “secondary market,” in many E.U. Member States, is not covered by an exclusive right, at least as far as performing artists and phonogram producers are concerned. See *supra*

the Community grant phonogram producers and performing artists only a right to claim “equitable remuneration.”¹⁷⁵ In these circumstances, traditional territorial rights management might well persist.¹⁷⁶

As terrestrial broadcasting, satellite transmissions or cable retransmissions are not covered by the Recommendation, debate has arisen on how broadcasters or satellite operators should license the “on-demand” “making available” of earlier broadcasts for later viewing.¹⁷⁷ Some commentators argue that the “on-demand” delivery of scheduled programming is a form of “time shifting.”¹⁷⁸ This would imply that later viewing, even at a time individually chosen by the viewer, should be covered by the—often national—broadcast license. On the other hand, should the later programming viewed “on-demand” be covered by the “making available” right, broadcasters would benefit from the option of E.U.-wide right clearance as stipulated by the Recommendation. This is because the “making available” right is the only right that has a true pan-European vocation and is arguably the easiest right to administer at the E.U. level. In this way, on-demand versions of broadcasts could be transmitted for an audience that is wider than the original broadcast.

The Recommendation does not specifically address the issue of how broadcasters license “on-demand” use of scheduled

note 139. The “equitable remuneration” due for the use of a commercial phonogram in broadcasting is administered at a national level.

¹⁷⁵ See *supra* note 139.

¹⁷⁶ See HUGENHOLTZ ET AL., *supra* note 24, at 220–21 (suggesting that “[o]ne possibility, which would comply with the Commission’s current policy of creating a Community-wide market for online rights, would be to create a distinction between traditional rights of public performance and broadcasting that might remain territorial . . . and rights of making available online that need not be managed locally and would become Community-wide”).

¹⁷⁷ The practical significance of this debate lies in its repercussion on E.U. right clearance. See GUIBAULT ET AL., *supra* note 55, at 27. While broadcasting licenses or remuneration schemes are administered collectively, the phonogram producer’s rights involved in “on demand” services are cleared individually. See *id.* at 25–27.

¹⁷⁸ See *id.* at 27 (defining “time-shifting” as “view[ing] or listen[ing] to content at a time other than that of the original delivery” and suggesting that “[d]igital video recorders greatly enhance this capacity [to time-shift] and also offer other control over content, e.g. allowing the user to pause or fast forward through a broadcast”).

programme content.¹⁷⁹ If the “on-demand” service covers a wider territory than the initial broadcast, a separate E.U.-wide or multi-territorial license might be the cheaper option.

Some broadcasters might, however, be able to demonstrate that the audience interested in programmes made available “on-demand” after the initial broadcast has taken place is located in the same territory as the one watching the scheduled programme. In this case, negotiations could take place to include the “on-demand” time-shifts in the original broadcast license. This is an issue that parties will have to decide when negotiating the broadcast license.

VI. HOW ARE “ONLINE” RIGHTS LICENSED?

A. Reciprocal Representation Agreements

Cross-border cooperation among E.U. collecting societies for the exploitation of works that are in the repertoire of a particular E.U. society by a society in another Member State is conducted via “reciprocal representation agreements.”¹⁸⁰ As the above groups of right-holders—authors, composers, publishers, performers, and, for “secondary uses,”¹⁸¹ also the record companies—tend to entrust their rights to collective rights management societies established in their home territory, these right-holder[s] [sic] works become[]

¹⁷⁹ See generally Commission Recommendation 2005/737; see also *Call for Comments*, *supra* note 87, at 2 (“The Recommendation defines the types of rights in terms of the legal nature of the right. The Recommendation does not address the necessity for collective rights managers to further define the categories of “online rights” by (1) type of use or (2) form of exploitation.”).

¹⁸⁰ See *Community Initiative*, *supra* note 41, at 8 & n.10 (“The term “reciprocal” in the context of these private agreements means ‘in return for [sic] an identical grant’. It does not connote ‘reciprocity’ for which there is a specific meaning in international law especially in the international copyright conventions i.e. where rights are granted by one country to its nationals, the nationals of another country can only have the benefit of those rights where there is commensurate recognition of these rights by the other country.”).

¹⁸¹ The right to equitable remuneration if commercial phonograms are broadcast by wireless means or communicated to the public as contained in Council Directive 92/100/EEC is a secondary use of a commercial phonogram. See Council Directive 92/100, art. 8(2), 1992 O.J. (L 346) 61 (EC), OJ 1992 L346/61 (Westlaw).

[sic] part of the repertoire of the collecting society in the territory where [they are] domiciled (the ‘management society’).”¹⁸²

“If copyright works are [performed or sold online] in another territory, the [collecting] society active in that territory (the ‘affiliated society’) will enter into reciprocal agreements with the management society” that manages the work at issue.¹⁸³ This allows the affiliated society to commercially exploit the management society’s repertoire, but only in its own territory.¹⁸⁴ The management society still remains empowered to exercise the rights to this repertoire in its own territory and is able to entrust other societies to manage its repertoire in their respective territories.¹⁸⁵ In effect, this means that along with its own national repertoire, an affiliate always obtains the right to license, in its own territory, the repertoire of the management society with which it has a bilateral arrangement.

Via a network of bilateral reciprocal agreements, each local collective rights manager represents both its own repertoire and the repertoire of the collective with which has entered into a bilateral reciprocal agreement. But the representation mandate of the affiliated society is always limited to its national territory.¹⁸⁶

In order to facilitate the creation of a network of the above bilateral reciprocal agreements, collective societies have formed alliances—e.g., CISAC¹⁸⁷ for authors’ rights in musical works, BIEM¹⁸⁸ for authors’ rights in mechanical reproduction, and

¹⁸² *Study on Community Initiative*, *supra* note 41, at 9.

¹⁸³ *Id.*

¹⁸⁴ *Id.* See also Lawson, *supra* note 166, at 91, for a brief discussion of the implications of reciprocal agreements (“Performing right societies have . . . developed networks of interlocking agreements by which music is cross-licensed between societies in different states. In this way, so the theory goes, the composer can sit at home and watch all of his income flow back through his membership of one society.”).

¹⁸⁵ See *Community Initiative*, *supra* note 41, at 9.

¹⁸⁶ See *Impact Assessment*, *supra* note 41, at 6.

¹⁸⁷ CISAC is the International Confederation of Societies of Authors and Composers. See Rigg, *supra* note 109, at 22. It was founded in 1926 and initially represented eighteen collecting societies from eighteen countries. *Id.* Membership was limited to authors’ societies. *Id.* The organization currently includes 200 societies from ninety-eight countries, representing over 2 million authors. *Id.*

¹⁸⁸ BIEM, the Bureau International des Sociétés Gérant Les Droits d’Enregistrement et de Reproduction Mécanique, was established in 1929 by Alphonse Tournier and currently

SCAPR and IMAE¹⁸⁹ for performers' rights in musical works. Most collective societies belong to one of the principal umbrella organizations mentioned above. These alliances have led to model agreements which cover cross-border licensing, collecting and distribution of royalties.¹⁹⁰ On the basis of these model agreements, collective societies have concluded bilateral reciprocal representation agreements.¹⁹¹

Cross-border collective management of the rights thus entails management services that one collective rights manager, the affiliate society, provides on behalf of another collective rights manager, the management society.¹⁹² However, the model agreements and the corresponding bilateral reciprocal representation agreements apply a series of restrictions which are contrary to the fundamental E.U. principle that services, including collective management of copyright or individual services associated with the collective management of copyright, should be provided across national borders without restriction based on nationality, residence, or place of establishment.¹⁹³

represents forty-one societies in thirty-eight countries. *See id.* at 23. The organization negotiates a standard agreement with representatives of the recording industry (IFPI). *Id.* *See also Community Initiative, supra* note 41, at 12–13 (analyzing CISAC and BIEM model representation agreements).

¹⁸⁹ SCAPR is the Societies' Council for the Collective Management of Performers' Rights and IMAE is the Institut pour la tutelle des artistes-interprètes et exécutants. *See Community Initiative, supra* note 41, at 13 (defining SCAPR and IMAE, and analyzing their respective model agreements and restrictive provisions).

¹⁹⁰ *See Rigg, supra* note 109, at 22–24 (stating the role collective societies serve in issuing agreements and the functions of such societies according to the WIPO).

¹⁹¹ *See Community Initiative, supra* note 41, at 9.

¹⁹² *See id.*

¹⁹³ *Id.* The Court of Justice has dealt with, and essentially accepted as compatible with the anti-cartel provisions of the EC Treaty, reciprocal representation agreements in the context of licensing of physical premises. *See, e.g.,* Case 395/87, *Ministère Public v. Jean-Louis Tournier*, 1989 E.C.R. 2521, para. 16–24; Joined Cases 110/241 & 242/88 1989 *Lucazeau v. Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM)*, 1989 ECR 2811. There is no jurisprudence on whether such provisions would also be allowed for online licensing. Nor is there jurisprudence on how such provisions affect the freedom to provide and receive cross-border services.

B. *Transaction Costs in Reciprocal Arrangements*

“The current practice of collective management of copyright on a national territorial basis . . . requires that each commercial user obtain a license from each and every relevant collective rights manager in each territory of the E.U. in which the work is accessible.”¹⁹⁴

In order for these reciprocal representation agreements to cover at least the aggregate repertoire of all European collective societies for one particular form of exploitation of one particular right in all European territories—e.g. the making available right that has to be cleared to sell musical works online—it is necessary that European collective societies conclude among themselves a minimum of 351 bilateral reciprocal representation agreements.¹⁹⁵

This figure is based on the hypothesis that there would be a minimum of one collecting society per Member State that is responsible for the “making available right.”¹⁹⁶ This society would have to have a reciprocal representation agreement with all twenty-six other societies that administer this right in the other Member States.¹⁹⁷

In order to determine the minimum total number of bilateral combinations necessary among twenty-seven European collecting societies, one needs to calculate the number of agreements among each of the twenty-seven entities—as “management societies”—with each of the other twenty-six societies—as “affiliate societies”—i.e., $27 \times 26 = 702$. However the result must be divided by two because the agreement between societies A and B

¹⁹⁴ *Community Initiative*, *supra* note 41, at 8.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* (stating that each Member State would be represented by one collective society for each right). The study employs a different number because there were fewer Member States in 2005, but the principle behind the calculation is constant.

¹⁹⁷ *See id.* Of course, in reality there is more than one collecting society in each Member State as often each category of right-holder is administered by a separate society and sometimes a particular right (reproduction) is administered by a society distinct from that which administers the right to communicate to the public.

is the same as the agreement between societies B and A—i.e., $702/2 = 351$. Maintaining this network of reciprocal arrangements among twenty-seven societies comes at a considerable management cost.

The description above shows that legal complications, more than technical hurdles, stand in the way of an efficient and seamless online licensing of protected works. That is because the arrangements in which copyright and related rights are managed never contemplated the plethora of new platforms of distribution that have emerged in the digital era. Indeed, there were no digital services when reciprocal arrangements that bind each collecting society to limit its activities to its national territory were set up.¹⁹⁸ As reciprocal arrangements tend to oblige the partner collectives to limit their activities to one particular territory, they do not accommodate international business models. But most of the above-mentioned new digital services are potentially international in scope and therefore need to clear music rights in order to operate legally.

In several E.U. jurisdictions, releasing or re-releasing music on the Internet on an international scale is not covered in the traditional licensing of musical works.¹⁹⁹ This means that online

¹⁹⁸ The first collecting society for copyright in musical works was the French *Société des auteurs, compositeurs et éditeurs de musique* (SACEM). SACEM was established in 1851 and collected royalties for the public performance of music in bars, cafés and other local concert venues. See Rigg, *supra* note 109, at 19. SACEM, at times, collected royalties for the French repertoire it represented in Switzerland, Belgium and the United Kingdom. About SACEM, <http://www.sacem.fr> (follow “English” hyperlink; then follow “SACEM” hyperlink; then follow “History” hyperlink) (last visited Sept. 14, 2007). The practice of direct collection only ceased once the United Kingdom, in 1914, established its own society, the Performing Rights Society (PRS), which then collected on behalf of the French repertoire in the United Kingdom. Rigg, *supra* note 109, at 22. (“SACEM had caused resentment in Britain by attempting to enforce direct payment for the performance of French works in Britain. Instead of collecting directly, it made sense for SACEM to enter into arrangements with the U.K. societies to collect the U.K. income streams from the use of French works and vice versa.”). The practice of reciprocal representation agreements was born. For a brief review of the history of collective rights management, see Martin Kretschmer, *The Failure of Property Rules on Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, 24(3) EUR. INTELL. PROP. REV. 126, 129 (2002).

¹⁹⁹ See, e.g., Urheberrechtsgesetz [UrhG][German Copyright Act], May 8, 1998, § 31 no.4 (F.R.G.) (stating that an assignment of rights for new (future) types and means of

music stores or broadcasters who want to offer services on the Internet need to return to the authors' societies and the record companies to renegotiate licensing contracts or conclude new ones for the new digital platforms. Instead of negotiating Internet or mobile use on an E.U.-wide basis, the clearance of rights was again done territory-by-territory. But territorial rights management has an effect on the timeline of the launching of online services.²⁰⁰

C. Reciprocal Arrangements in the Online Environment

Due to the technical accessibility of an online service throughout the European territories, providers of online services require multi-territorial licenses for all of the "online" rights mentioned above.²⁰¹ The market segment in which this appears most important is the growing market in interactive and on-

exploitation which were not known at the time the contract was drafted is considered null and void). The aim of this provision is to protect authors against buy-outs for such new and unknown forms of exploitation and to prevent authors from losing revenue associated with these forms of exploitation. There is a certain trend to relax the strict interpretation of this provision. Recently, the German Supreme Court held that exploitation of a film on DVD did not constitute a new form of exploitation. See Günter Poll, *New Types of Exploitation "The Magic Mountain" on DVD*, 28(6) EUR. INTELL. PROP. REV. 355, 355 (2006).

²⁰⁰ The iTunes music store and its staggered introduction can be cited as evidence in this respect. This service was launched on 28 April 2003 in the all of the U.S. Apple Launches the iTunes Music Store, <http://www.apple.com/pr/library/2003/apr/28musicstore.html> (last visited Sept. 12, 2007) There was no single launch date for the European Union in 2003. Instead, the service was introduced over a year later in the United Kingdom, Germany and France on 15 June 2004. Apple Launches iTunes Music Store in the UK, France & Germany, <http://www.apple.com/pr/library/2004/jun/15itunes.html> (last visited Sept. 14, 2007). Consumers in Belgium, the Netherlands, Luxembourg, Spain, Italy, Portugal, Finland, Austria and Greece had to wait until 26 October 2004. Apple Launches EU iTunes Music Store, <http://www.apple.com/pr/library/2004/oct/26itmseu.html> (last visited Sept. 14, 2007). In Denmark, Norway and Sweden the service only became available on 10 May 2005—over two years after the U.S. launch date. iTunes Music Store Launches in Denmark, Norway, Sweden & Switzerland, <http://www.apple.com/pr/library/2005/may/10itms.html> (last visited Sept. 12, 2007). It appears that iTunes is still not available in some of the 10 States that joined the Community in May 2004, such as Slovenia, the Slovak Republic, Hungary, Poland or the Czech Republic. Download iTunes - Apple (UK and Ireland), <http://www.apple.com/uk/itunes/download/?ipod.html> (see copyright notice indicating availability of iTunes Music Store) (last visited Sept. 12, 2007).

²⁰¹ Commission of the European Communities, Decision No. 2003/300/EC, O.J. L 107/58 (2003).

demand services²⁰² with an array of options for the users which are provided electronically at a distance. As mentioned above, most of these services appear to be governed by the “making available” right.²⁰³ Ensuring that optimal conditions exist for the proper management of the new “making available” right will ensure its smooth transition into the marketplace.

Digital technology is fast rendering the old territorial system of managing intellectual property obsolete.²⁰⁴ New digital services mean easier delivery than in the analogue era. This includes easier delivery of services across the E.U. However, under the current system, content destined for the entire continent’s consumption may be subjected to clearance twenty-seven times through twenty-

²⁰² See *The Rise of the Online Music Market*, *supra* note 61.

²⁰³ See *supra* text accompanying Part I.E.3.

²⁰⁴ See, e.g., David Wood, *Collective Management and E.U. Competition Law*, in COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE, *supra* note 2, at 169, 170.

Indeed, the issues in the *Tournier* case were discussed on the basis of a set of facts established in the early nineteen-eighties. Put simply, this narrow interpretation is that given the practical impossibility for a collecting society in one Member State to duplicate its necessary monitoring and control activities in another Member State, collecting societies are not competitors in respect of these activities. . . . However, the question arises whether this analysis holds true if there are users in respect of whom monitoring and enforcement activities can feasibly be carried out by a collecting society in another Member State. . . . We have been told that since there is a simultaneous Internet broadcast or because the activity can be monitored by telephone, there is no technical reason why the monitoring cannot be carried out by a collecting society in another Member State to the Member State of reception.

Id. Note, however that SACEM, the first European collecting society established in 1851, did not rely on reciprocal representation agreements to collect royalties on behalf of the French repertoire in other territories than France. At times SACEM collected royalties for the French repertoire it represented in Switzerland, Belgium and the United Kingdom. The practice of direct collection only ceased once the United Kingdom, in 1914, established its own society, the Performing Rights Society (PRS), which then collected on behalf of the French repertoire in the United Kingdom. See Rigg, *supra* note 109, at 22. As mentioned above, the main argument for reciprocal arrangements was resentment of foreign societies attempting to enforce direct payments abroad and not the duplication of monitoring and control activities. See *id.*; see also *supra* note 198 (discussing SACEM’s attempt to enforce direct payment in Britain). This would cast some doubt on the *Tournier* case law, even before electronic communications allowed for “distance monitoring.”

seven different national authorities. For online operators this constitutes a considerable administrative burden and in some Member States popular online services are not even available.²⁰⁵

Due to the technical accessibility of an online service throughout the European territories, innovative content providers require multi-territorial licenses as a way of insurance against copyright infringement claims in the different jurisdictions in which the services may be accessed.

D. How Would the Market Have Evolved Without the Online Recommendation?

In 2005 the Commission reviewed how copyright and related rights are being commercially exploited across the E.U.²⁰⁶ This review focused on how the new “making available” right was licensed.²⁰⁷ Stakeholders were consulted in July 2005.²⁰⁸

This exercise revealed that the current management of [copyright in musical works and phonograms]—within defined territories that usually are national borders—is a source of considerable inefficiency. And it also hinders the entry of new Internet-based services that rely on [protected works and phonograms].

Stakeholders [stated] that for most forms of exploitation—in particular the new making available right—the Internal Market has become the appropriate [reference point]. The effect of digitisation which allows a protected work to be transmitted cross-border has been felt across all the copyright industries. This implies that, in the emerging multi-territorial environment of online exploitation of copyright-protected works, access to these works needs to be as efficient and simple as

²⁰⁵ See *supra* note 200.

²⁰⁶ See generally Commission Recommendation 2005/737, 2005 O.J. (L 276) 54, 54 (EC), OJ 2005 L276/54 (Westlaw).

²⁰⁷ *Id.* at 55.

²⁰⁸ See *Impact Assessment*, *supra* note 41, at 4.

possible, while maximising the revenue that is transferred to right-holders.

Stakeholders also stated that the ubiquity brought about by the Internet, as well as the digital format of products such as music files, are difficult to reconcile with traditional reciprocal agreements. The traditional reciprocal agreements among collecting societies did not foresee the possibility that the affiliated society would grant a licence beyond its home territory. As a consequence, the traditional reciprocal agreements require a commercial user wishing to offer e.g.[,] a musical work, online or offline to its clients to obtain a copyright licence from every single relevant national society.²⁰⁹

Before issuing the Recommendation, the Commission looked whether there were alternatives.²¹⁰ In particular, previous attempts to amend traditional reciprocal agreements to make them a suitable basis for supplying multi-territorial copyright licenses were assessed.²¹¹

Multi-territorial licensing has been introduced through the Santiago Agreement for the authors' right of online *communication to the public* including "making available" for the provision of music downloading or streaming use of authors' rights.²¹²

²⁰⁹ Tilman Lüder, Head of the Copyright Unit, European Commission, Working Toward the Next Generation of Copyright Licenses, Speech Presented at the 14th Fordham Conference on International Intellectual Property Law & Policy 13 (April 20–21, 2006), available at http://ec.europa.eu/internal_market/copyright/docs/docs/lueder_fordham_2006.pdf.

²¹⁰ See *Impact Assessment*, *supra* note 41, *passim*.

²¹¹ Lüder, *supra* note 209, at 13.

²¹² The Agreement was notified to the Commission in April 2001 by the collecting societies of the U.K. (PRS), France (SACEM), Germany (GEMA), and the Netherlands (BUMA), which were subsequently joined by all societies in the European Economic Area—except for the Portuguese society SPA—as well as by the Swiss society (SUISA). See Commission of the European Communities, Notice 2005/C200/05, O.J. C 200/11 (2005). See also <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Sept. 12, 2007).

Multi-territorial licensing has been introduced via the BIEM/Barcelona Agreement for online *reproduction*, which covers webcasting, on demand transmission by acts of streaming and downloading.²¹³

But the structure put in place by the parties to the Santiago and BIEM/Barcelona Agreements results in commercial users being restricted in their choice to the collecting society established in their own Member State for the grant of the multi-territorial licence. This restriction is described in the Agreements as the so called “authority to licence” and has the effect of allocating customers to the local collective [in the territory where] . . . the content provider has its economic residence or URL[.] . . . [The] “customer allocation clause” [is] . . . contrary to the fundamental freedom to seek cross-border services²¹⁴

In addition, the Santiago Agreement expired at the end of 2004 and has not been renewed.²¹⁵ This means that authors’ rights currently need to be cleared on a territory-by-territory basis. Furthermore, authors’ societies remain reluctant to adopt an E.U.-wide licensing model. They argued that authors are best served by

²¹³ For a description of both the “Santiago” and the “BIEM” agreements, see, Thierry Desurmont, *The Future of Collective Licensing*, in COLLECTIVE LICENSING: PAST PRESENT AND FUTURE, REPORTS PRESENTED AT THE MEETING OF THE INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, MIDEM 2002, CANNES, *supra* note 117, at 206. *See also Impact Assessment*, *supra* note 41, at 9.

²¹⁴ Lüder, *supra* note 209, at 14.

²¹⁵ “According to GESAC [the European umbrella organization for authors’ collecting societies], the signatory societies to the Santiago and [BIEM/]Barcelona Agreements chose not to extend them further in 2005, because although never having been the subject of an official Commission decision, they were aware that the Commission was highly critical of the so-called ‘economic residence’ clause in them, which was in GESAC’s opinion, necessary to prevent the risk of ‘forum shopping’ by commercial users. As a result, GESAC acknowledges, authors’ societies are only able to give copyright exploiters clearance for the use of their own repertoire worldwide, and the world repertoire within the territory in which they carry on their own activity.” *Impact Assessment*, *supra* note 41, at 9; *see also Community Initiative*, *supra* note 41.

a collective rights manager with physical proximity to the user.²¹⁶ Collecting societies argue that enforcement cannot properly be provided at a distance, even with the use of digital technology.

VII. THE ONLINE RECOMMENDATION

This is why the European Commission, on 18 October 2005, adopted a Recommendation on the management of online rights (the “Recommendation”).²¹⁷ The Recommendation implies that one way toward achieving E.U.-wide coverage is to aggregate rights into attractive packages—“repertory.”²¹⁸ This repertory can then be licensed to online music shops by one collecting society on an E.U.-wide basis in a single transaction.²¹⁹ Instead of twenty-seven local licenses, the Recommendation seeks to foster a single package comprising access to attractive repertoire at little overhead.

²¹⁶ The antitrust implications of territory-by-territory collective rights management are addressed by David Wood. “Indeed, the issues in the *Tournier* case were discussed on the basis of a set of facts established in the early nineteen-eighties. Put simply, this narrow interpretation is that given the practical impossibility for a collecting society in one Member State to duplicate its necessary monitoring and control activity in another Member State, collecting societies are not competitors in respect of these activities However, the question arises whether this analysis holds true if there are users in respect of whom monitoring and enforcement activities can feasibly be carried out by a collecting society in another Member State We have been told that since there is a simultaneous Internet broadcast or because the activity can be monitored by telephone, there is no technical reason why the monitoring cannot be carried out by a collecting society in another Member State to the Member State of reception.” Wood, *supra* note 204, at 169. See also Press Release, Groupement Européen des Sociétés d’Auteurs et Compositeurs (July 7, 2005), available at http://www.gesac.org/ENG/NEWS/COMMUNIQUESDPRESSE/download/COMMUNIQUESEN_20050707_Collective%20Management%20of%20Copyright.doc.

²¹⁷ See Commission Recommendation 2005/737, 2005 O.J. (L 276) 54 (EC), OJ 2005 L276/54 (Westlaw).

²¹⁸ *Id.* at 56.

²¹⁹ This solution is inspired by Ariel Katz, who describes the formation of “cleared parcels” which greatly overcome fragmentation of copyright in a single song and thus render licensing much more efficient. See generally Ariel Katz, *The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights*, 2(23) J. COMPETITION L. & ECON. 245 (2006).

A. *Rightholders' Choice*

In order to achieve this goal, the Recommendation stipulates that right-holders should have the choice to authorize any existing collecting society, or even a newly created licensing platform, with managing their works directly across the entire E.U.²²⁰ Right-holders' choice should offer the most effective model for cross-border management because free choice gives right-holders an incentive to entrust their repertoire to the best E.U.-wide licensing platform available.²²¹

In a first phase, existing societies or new licensing platforms compete to be the authors', composers' or publishers' online licensing platform of choice.²²² They do this by offering an efficient service, adopting a transparent policy on deductions and governance and by offering negotiating skill and even clout vis-à-vis commercial users.²²³

This first phase can be described as the “tender phase”—existing or new societies compete vigorously to be selected as the E.U.-wide music licensor of choice. Authors, composers and publishers have the choice of either mandating one society with the E.U.-wide management of their works or giving a mandate to several societies who again compete to license the entrusted repertoire to commercial users.²²⁴ In the “tender phase” competition therefore takes place “upstream” when societies compete for attractive repertoire. Naturally, authors or their publishers are free to re-tender their repertoire in regular intervals.

²²⁰ See Commission Recommendation 2005/737 at 56.

²²¹ See *id.* at 55.

²²² In a series of decisions referring to the German collecting society GEMA, the European Commission established the principle that any author should be free to assign only particular categories of rights—e.g., public performance, broadcasting, mechanical reproduction, and rights resulting from future technical developments or changes in the applicable laws—for collective administration or withdraw such categories from administration by GEMA. In particular, authors should be free to join collecting societies in other Member States to manage their rights directly. See O.J. L 134/20 (2007); O.J. L 166/24 (2007).

²²³ See Commission Recommendation 2005/737 at 56.

²²⁴ *Id.*

B. Users' Choice

In a second phase, as good quality service is measurable and a reputation for good service travels quickly, this author expects that an efficient licensing platform will quickly assemble an attractive repertoire for E.U.-wide online licensing. In this second phase, competition will shift “downstream” because societies, on the basis of representing attractive repertoire, attempt to attract the business of important online users.

This might well provide most authors, composers and publishers with an incentive to pool their repertoire into a major online licensing platform.²²⁵ To be commercially attractive, these platforms could well be structured as “open platforms,” which means that smaller publishers or smaller collective societies can pool their repertoire into the platform as well. If necessary, there could be an obligation for major platforms to also include so-called difficult or “niche” repertoire into the platform.

It would then appear possible that the new E.U. online platforms could conclude “second tier” reciprocity arrangements among themselves in order to create one “single entry point” for E.U.-wide commercial users. This development would have an added efficiency benefit because a single entry point among three E.U. licensing platforms will come at a lower cost than a single entry point that has to be organised among twenty-seven collective societies.

C. Transaction Cost in the New Model

As stated above, the total number of bilateral combinations necessary to create a single entry-point among twenty-seven European collective societies would, by means of reciprocal arrangements, be 351.²²⁶ Now, if you look at an online licensing

²²⁵ On January 21, 2007, the U.K. Music Publishers Association (MPA), representing small and medium sized music publishers, announced that their repertoire would be available for E.U.-wide online licensing through “Alliance digital,” run by the U.K. society MCPS/PRS. Press Release, The MCPS-PRS Alliance, MPA Unveils New Pan-European Digital Licensing Solution (Jan. 21, 2007), available at http://www.mcps-prs-alliance.co.uk/about_us/press/latestpressreleases/mcpsprsalliance/Pages/MPA.aspx.

²²⁶ See *supra* text accompanying note 194–197.

market that only comprises three societies—to be determined in the competitive tendering process described above—only three possible agreements among three entities—AB, BC and AC—would be necessary to create a single entry point for E.U. licenses.

What is, however, most important with the proposed new licensing platforms is that the emergence of these platforms will be the result of a competitive tendering process.²²⁷ This will be good for enhancing or maintaining the value of copyright and related rights in musical works. Allowing right-holders to choose a collecting society outside their national territories for the E.U.-wide licensing of the use made of their works considerably enhances right-holders' earning potential.

In this way the Recommendation focuses on striking the right balance between rewarding creators and fostering new digital platforms for the delivery of music.²²⁸ In lowering transaction costs of access to protected content, it will not compromise right-holders' income. Better management of rights across the E.U. does not therefore need to lead to a “race to the bottom” with respect to the value of musical works and IP protection for creators.

VIII. GOVERNANCE AND DISPUTE RESOLUTION

The Recommendation also includes rules on governance, transparency, dispute settlement, and accountability of collective rights managers, whether they manage rights directly or by virtue of reciprocal arrangements.

A. Governance

Governance is not an end in itself. The Recommendation is based on the premise that governance rules setting out the duties that collective rights managers owe to both right-holders and users will introduce a culture of transparency and good governance.²²⁹

²²⁷ See *supra* Parts I.A, I.B.

²²⁸ See Commission Recommendation 2005/737 at 55.

²²⁹ *Id.* The Commission agrees with this analysis and believes that Option 3 can create a higher level of good governance and transparency for right-holders because the collective

Better governance should stimulate E.U.-wide licensing and promote the growth of legitimate online music services.

Certain collective rights managers have begun to implement some of the provisions linked to governance—points 10–15 of the Recommendation.²³⁰ “In some cases, music publishers are being offered greater representation on the board.”²³¹ In other instances, payments to right-holders, including music publishers, “switched from a yearly to a quarterly basis.”²³² There appears to be an increased willingness to acknowledge or discuss deductions made by the rights manager for purposes other than the management services provided. The “*rapport Levy-Jouyet*” on “*l’économie de l’immatériel*” also stresses the link between more competition and better governance.²³³

B. Dispute Resolution

Closely linked to the issue of governance is the effectiveness of dispute resolution. The Recommendation invites Member States to provide for effective dispute resolution mechanisms at national level.²³⁴ Effective dispute resolution should be available in relation to (1) tariffs; (2) licensing conditions; (3) entrustment; and (4) withdrawal of online rights. The applicable rules and

rights manager of their choice is accountable for all use made of works across the Community and for the redistribution of royalties in exact proportion to this use. *Impact Assessment*, *supra* note 41, at 37–38. “If the right-holder is not satisfied with the functioning of the relationship he has the choice to seek Community-wide clearance services elsewhere, a strong incentive to carry out optimal and transparent clearance and royalty payment services. In these circumstances, in order to retain or attract business, CRMs will have to adapt their business practices and become more efficient in relation to their management of services.” *See Impact Assessment*, *supra* note 41, at 21.

²³⁰ Lüder, *supra* note 209, at 18.

²³¹ *Id.*

²³² *Id.*

²³³ Rapport de la Commission, *supra* note 169, at 129. (“Deuxième principe, les coûts de la gestion collective doivent être transparents. La qualité des informations financières transmises aux créateurs doit être améliorée, notamment sur les frais de gestion bruts, le coût des différentes activités de collecte et les flux financiers entre sociétés. De même, à l’égard des utilisateurs, les critères de calcul des droits à payer pour l’usage des œuvres gérées par la SPRD devraient être affichés sur le site des SPRD.”).

²³⁴ *See* Commission Recommendation 2005/737 at 57.

principles in relation to dispute resolution might need to be strengthened in the future.

As evidenced by its “Call for Comments,” the Commission is now minded to assess whether the Recommendation brought about changes in relation to transparency of rights management and whether it increased the effectiveness of dispute resolution.²³⁵ It is also necessary to assess whether the Recommendation brought about sufficient safeguards for individual right-holders with respect to (1) tariffs; (2) licensing conditions; (3) entrustment; and (4) withdrawal of online rights. Further analysis will be necessary to see whether the Recommendation should further address right-holders participation in setting deductions for purposes other than for the management services provided and whether it provides sufficient safeguards for commercial users.

IX. FIRST EXPERIENCE WITH THE RECOMMENDATION

First experience with the Recommendation shows that E.U.-wide online licensing will be offered by newly created platforms that are jointly operated by existing collecting societies. These platforms pool several publishers’ or societies’ repertoires and license them in one transaction across the E.U.²³⁶ Recent platforms include one for Anglo-American and German repertoires and another one for the French and Spanish repertoires.²³⁷ A further announcement involves small and medium sized publishers mandating a collecting society to set up an E.U. online licensing platform for them.²³⁸

²³⁵ See *supra* note 87 and accompanying text.

²³⁶ Lüder, *supra* note 209, at 17, 19.

²³⁷ On January 20, 2006, EMI Music Publishing and CELAS—a new online licensing joint venture set up by GEMA and MCPS/PRS—signed the E.U.-wide licensing arrangements. On January 20, 2006, the French society SACEM and the Spanish society SGAE announced the setting up of a joint venture for the E.U.-wide licensing of their respective repertoires. *Id.* at 18.

²³⁸ On January 21, 2007, the U.K. Music Publishers Association (MPA), representing small and medium sized music publishers, announced that their repertoire would be available for E.U.-wide online licensing through “Alliance digital,” run by the U.K. society MCPS/PRS. See Press Release, The MCPS-PRS Alliance, *supra* note 225.

In addition, emerging E.U. licensing platforms do not appear to be limited to the repertoire of international music publishers.²³⁹ Despite all fears in this respect,²⁴⁰ E.U. direct licensing is *not* developing into the exclusive domain of Anglo-American music publishers. As mentioned above, platforms for the repertoire of small and medium sized publishers are emerging alongside those of the big music publishers. In addition, other platforms comprise the entire repertoire of existing collecting societies—big and small.²⁴¹ That means that big and small repertoire will be available online at equal terms. The two examples above show that E.U. licensing, far from being a threat, can actually be a motor for cultural diversity.

In light of this it is sometimes difficult to understand why direct licensing or tendering of repertoire for such a purpose would be perceived as a threat to cultural diversity. If a right-holder wishes for certain forms of exploitation, to license his repertoire directly by means of an intermediary of his choice, this should be a commercial option available in a market economy. His choice will be motivated by the attempt to safeguard the value of his music in the online space. Experience shows that direct licensing can nowadays be exercised by small and big publishers alike.²⁴² Direct licensing is also an option that can be exercised both by Anglo-American publishers and Continental collecting societies—both the MCPS/PRS and SACEM/SGAE have set up licensing platforms. Cultural diversity does not appear in danger.

²³⁹ *Id.*

²⁴⁰ The European Parliament appears especially afraid that the Recommendation's prime beneficiaries are major, international music publishers that control the repertoire that is essential for successful online licensing. The Recommendation is seen as an instrument favouring large repertoire and allowing music majors to better exploit the Internet. *See* Report on the Commission Recommendation, *supra* note 86, at 11.

²⁴¹ *See* Lüder, *supra* note 209, at 19–20.

²⁴² On January 21, 2007, the U.K. Music Publishers Association (MPA), representing small and medium sized music publishers, announced that their repertoire would be available for E.U. wide online licensing through "Alliance digital," run by the U.K. society MCPS/PRS. *See* Press Release, The MCPS-PRS Alliance, *supra* note 225.

On the other hand, the Recommendation does not force any right-holders to engage in direct licensing.²⁴³ In a functioning internal market, one should respect the freedom of those who choose this option. It is one way to safeguard the value of music in the online sphere.

Finally, it appears prudent to wait and see how the tendering of repertoire for direct online licensing will develop in the future before extending this principle to other forms of exploitation. As the Recommendation is not a binding act, the national legislator is free to act in this respect, if he wishes to do so.²⁴⁴

On the governance front, “[t]he international confederation of music publishers is working with GESAC, the E.U. umbrella of collectives, towards developing online E.U.-wide licensing activities within the framework of the Recommendation. The Recommendation has also triggered dialogue on improving governance principles with respect to all collective management of copyright.”²⁴⁵

Collecting societies have “also embraced some of the governance elements of the Recommendation.”²⁴⁶ In some cases, music publishers are being offered more seats on the board—in line with Point 13 of the Recommendation and the “economic weight” criteria—and accounting vis-à-vis publishers is being switched from a yearly to a quarterly basis—a concession which goes beyond the Recommendation.²⁴⁷

Of course, the emergence of a major online platform will require effective dispute resolution. Point 15 of the

²⁴³ See Commission Recommendation 2005/737, 2005 O.J. (L 276) 54 (EC), OJ 2005 L276/54 (Westlaw).

²⁴⁴ See EUR-Lex – Process and Players, <http://eur-lex.europa.eu/en/index.htm> (follow “Process and players” hyperlink under heading “About EU Law” on left of page) § 1.3.5.1 (last visited Sept. 16, 2007) (stating that “[a] recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed . . .”).

²⁴⁵ Lüder, *supra* note 209, at 18; see also ICMP/CIEM GESAC, *Common Declaration on Governance in Collective Management Societies and on Management of Online Rights in Musical Works*, July 7, 2006, available at <http://www.smff.se/pdf/ICMPGESACDeclaration070706.pdf>.

²⁴⁶ Lüder, *supra* note 209, at 18.

²⁴⁷ See Call for Comments, *supra* note 87.

Recommendation addresses this issue.²⁴⁸ In the absence of an E.U. arbitration panel, Member States are invited to provide for adequate and effective means for resolving disputes, especially those that arise with respect to online tariffs.²⁴⁹ As evidenced by point 4 of its “Call for Comments,” the Commission remains inclined to further strengthen the Recommendation in this respect.²⁵⁰

CONCLUSION—THE YEARS AHEAD

The 2005 Recommendation on E.U.-wide online licensing and the cross-border collective management of copyright across the E.U. is one example of the paradigm shift away from harmonizing rights, toward improving the way these (harmonized) rights are exploited commercially in the digital sphere across Europe. This approach should reduce the cost of music licensing without reducing income for Europe’s creators.

The new focus on fostering market entry for interactive and on demand services will influence the way in which the Commission approaches copyright policy in the future. In order to foster innovation and market entry, policy makers must create a framework in which entrepreneurship, new business models, and risk-taking are rewarded. Policy regarding intellectual property should facilitate the development and dissemination of new interactive and on demand services.

It is therefore essential that the framework for obtaining works that are protected by these intellectual property rights be organised as efficiently as possible. Licenses, as a default option, should comprise a territorial scope that is in line with emerging business strategies. But it is equally important that efficient online licensing gives creators an economic incentive to make their work available online. In order to achieve efficiency and market entry the Commission should, in the years ahead, focus on the management of intellectual property rights and engage in regular evaluation of

²⁴⁸ See Commission Recommendation 2005/737 at 57.

²⁴⁹ See Call for Comments, *supra* note 87.

²⁵⁰ *Id.*

the existing harmonized rights, especially the “making available” right.