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NEW LICENSING MODELS FOR ONLINE MUSIC SERVICES IN THE EUROPEAN UNION:  
FROM COLLECTIVE TO CUSTOMIZED MANAGEMENT

**Giuseppe Mazziotti**



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*New Licensing Models for Online Music Services in the European Union:  
From Collective to Customized Management*

**GIUSEPPE MAZZIOTTI**

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**Author Contact Details**

Email: giuseppe.mazziotti@gmail.com

**Professional Status**

Assistant Professor of Intellectual Property Law, Faculty of Law, University of Copenhagen, Denmark; Visiting Scholar (2010/2011), Columbia Law School.

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## **Abstract**

This paper examines the restructuring of online rights management that the E.U. Commission recently imposed upon collecting societies and copyright holders in the online music sector in order to foster the adoption of multi-territorial collective licences covering the whole territory of the European Union. The paper examines the responses of major international music publishers and national collecting societies to the Commission's action by focusing on the emergence of distinct types of new licensing models and on the legal problems and questions that these new models have posed so far. The scenarios that have materialized in the last years show how the pan-European monorepertoire licensing models of the major multinational music groups affect the economic sustainability of national collecting societies and the online rights clearance solutions made available to commercial users. The paper also examines whether the above restructuring is of any help to rights holders and rights managers who find it convenient to combine commercial collective licences and noncommercial individual licences (e.g., Creative Commons) in the management of online rights over their works. The paper takes the conclusion that the radical modification of the structure of online music rights management recently pursued by the E.U. Commission has mainly failed its policy objectives while making online music rights clearance even more complicated, legally uncertain and discouraging. The paper also indicates what legislative amendments the Commission might consider proposing in order to rationalize and greatly simplify collective rights management in the digital environment and what the easiest and most productive model for the development of E.U.-wide music rights management could be.

## **Keywords**

Online music rights, collective management, collecting societies, multiterritorial licences, music repertoires, multinational music publishers, E.U. law, cultural diversity

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## Introduction

A few years after the enactment and the implementation in the Member States of the European Union of the most comprehensive directive for the harmonization of national copyright laws in the so-called “Information Society”, the European Commission started reviewing how copyright and related rights were being commercially exploited in the digital environment.<sup>1</sup>

Unsurprisingly, in 2005 the Commission eventually realized that copyright management gave rise to licensing practices that segmented the so-called “Internal Market” on a strictly in-territorial basis, in spite of the borderless nature of Web-based environments.<sup>2</sup> From then onwards, the Commission has been in search of solutions to tackle economic inefficiencies stemming from territorial restrictions in copyright management and to eventually boost the growth of legitimate online content services, starting with music services.

Anyone that has the opportunity to access online music or film services in both the United States and in Europe (or even in distinct E.U. countries) can easily realize how undeveloped, or more restricted territorially, the E.U. online content sector is. In the United States, the recent launch of innovative online services—e.g., Apple's iTunes, Microsoft's Zune, Rhapsody, Beatport, Pandora—has revolutionized the landscape of legitimate access to and use of online content and created a credible alternative to digital piracy. Contrastingly, in the European Union, online music services and music stores—e.g., LastFm, Spotify, iTunes—have not taken off, at least not fully. This is not only due to the still rampant phenomenon of music and film piracy on illegal file sharing platforms. The unbearable complexity of online rights clearance processes is a major problem for commercial users wishing to develop and launch pan-European online content services and to take advantage of the E.U. cultural sector as a whole.<sup>3</sup>

From a technical and infrastructural point of view, Europe seems to be ready to let online markets develop and flourish: broadband Internet access services and mobile communications are growing at a very fast pace and are increasingly widespread across the European Union. Nearly half of European citizens use the Internet every day and a significant percentage of the E.U. population has broadband access online subscriptions.<sup>4</sup>

This Article focuses on the main reasons that still make online rights clearance processes very complex and economically unsustainable on a pan-European scale. In particular, the Article examines the restructuring of online rights management that the E.U. Commission recently imposed upon

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<sup>1</sup> See Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC) [hereinafter Council Directive 2001/29].

<sup>2</sup> See *Commission Study on a Community Initiative on the Cross-border Collective Management of Copyright* (July 7, 2005), available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf) [hereinafter *Commission Study of July 7, 2005*]

<sup>3</sup> See DG INFSO & DG MARKT, *Creative Content in a European Digital Single Market: Challenges for the Future*, at 2 (Oct. 22, 2009), available at [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf) [hereinafter *Creative Content*] (estimating that the EU cultural sector—which includes published content such as books, newspapers and magazines, as well as sound recordings, films, videos on demand and videogames—generates in Europe a yearly turnover of 650 billion euros, contributing to 2.6 percent of the European Union's GDP and employing more than three percent of the E.U. work force).

<sup>4</sup> See Comm'n Comm., *Broadband Access in the EU: Situation at 1 July 2009*, at 4, 6, COM (2009) 29 final (Nov. 18, 2009) (positing that subscriptions to broadband Internet access has continued across the continent in the last years, even if big divides remain). Until July 2009, twenty-four percent of the E.U. population had broadband access online subscriptions. *Id.* Even mobile broadband has been growing quickly, with a significant fifty-four percent increase between January and July 2009 and a penetration rate of 4.2 percent reported in July of the same year. *Id.* In spite of that, in 2010 digital music revenues accounted for less than twenty percent of labels' trade revenues in Europe. IFPI, *IFPI DIGITAL MUSIC REPORT 2011: MUSIC AT THE TOUCH OF A BUTTON 14* (2011), available at <http://www.ifpi.org/content/library/DMR2011.pdf>. In the same year, instead, the United States was the largest digital music market in the world, where digital channels accounted for almost half of record companies' trade revenues. *Id.*

collecting societies and copyright holders in the online music sector in order to foster the adoption of multiterritorial collective licences covering the whole territory of the European Union.<sup>5</sup>

The Article examines the responses of major international music publishers and national collecting societies to the European Commission's action by focusing on the emergence of distinct types of new licensing models and on the legal problems and questions that these new models have posed so far.<sup>6</sup> In particular, it is emphasized that the reform advocated by the E.U. Commission paved the way not only for effective competition between different collective rights managers at the European level, but also (and most importantly) for a completely new form of competition among distinct music repertoires, which are now offered to commercial users by separate licensing bodies under their own contractual conditions and at their own prices.

My analysis is mainly intended to shed light on the most important consequences that the E.U.-wide “monorepertoire” licensing models recently developed by major international music publishers have had thus far. The emergence of these new actors has inevitably altered the music licensing structure by weakening the role of small and medium size collecting societies, which can no longer manage digital uses of the most commercially successful international music repertoire (i.e., the Anglo-American repertoire) in their jurisdictions as they did before on the grounds of a well-established network of reciprocal representation agreements built up by collecting societies at the international level. In particular, the Article suggests that the new monorepertoire model for the E.U.-wide management of authors’ and music publishers’ rights is designed mostly to facilitate a vertically integrated and (almost) independent management of *all* online music rights, which include the neighboring rights of record producers and performing artists.<sup>7</sup>

The scenarios which have materialized in the wake of the restructuring of online music rights management show how the pan-European monorepertoire licensing models of the major multinational music groups impacts the economic sustainability of national collecting societies and the online rights clearance solutions made available to commercial users.<sup>8</sup> The Article also examines whether the above restructuring is of any help to rights holders and rights managers who find it suitable or commercially convenient to combine commercial collective licences and noncommercial individual licences (e.g., Creative Commons) in the management of online rights over their works.

In conclusion, I argue that the radical modification of the structure of online music rights management recently pursued by the E.U. Commission has mainly failed its policy objectives while making online music rights clearance even more complicated, legally uncertain and discouraging.<sup>9</sup> The Article also indicates what legislative amendments the Commission might consider proposing in order to rationalize and greatly simplify collective rights management in the digital environment and what the easiest and most productive model for the development of E.U.-wide music rights management could be.

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<sup>5</sup> See *infra* Sections I and II.

<sup>6</sup> See *infra* Section III.

<sup>7</sup> See *infra* Section IV.

<sup>8</sup> See *infra* Section V.

<sup>9</sup> See *infra* Section VI.

## **I. Online Exclusive Rights in the E.U. Copyright System: Preliminary Remarks**

Politically speaking, E.U. law has a long way to go before it can establish a single copyright system which—in principle—would be the best way to establish a truly common (i.e., unique) market for copyright based goods and services. Philosophical and cultural diversities are widely mirrored in the intrinsic differences that exist between the U.K. and U.S. notions of copyright and the continental European notion of author's right (*droit d'auteur*).<sup>10</sup>

These differences still matter and raise complex issues because collecting societies have developed different models and rules for the transfer and the management of the Anglo-American and the continental-European music repertoires.<sup>11</sup>

As things stand, an online service provider or a digital music retailer wishing to use music works for its online or mobile exploitations needs to clear two categories of rights conferred to authors (i.e., composers and lyricists) under copyright laws: mechanical (reproduction) and public performance rights.<sup>12</sup>

The advent of digital technologies has increasingly blurred the distinction between these two categories that, in the offline world, to the contrary, address wholly separate types of activities. Even if the category of “online” rights already exists on the market and in the day-to-day practice of collecting societies, the category has not been legally codified yet.<sup>13</sup> This circumstance stems mainly from the decision of the drafters of the 2001 Information Society directive not to create a new type of right and to extend the scope of the pre-existing rights of reproduction and communication to the public in order to cover online exploitations.<sup>14</sup>

Unfortunately, the definition of the exclusive right of the author to make her protected works available interactively (i.e., the right of making works available “in such a way that members of the public may access them from a place and at a time individually chosen by them”) was provided without any further clarification about whether the clearance of such a right would have sufficed to clear online on-demand exploitations.<sup>15</sup> Since acts of reproductions are a technical necessity for

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<sup>10</sup> See generally ALAIN STROWEL, *DROIT D'AUTEUR ET COPYRIGHT* (1993); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* (Brad Sherman & Alain Strowel eds., 1994).

<sup>11</sup> For the purpose of this Article, the notion “Anglo-American repertoire” broadly refers to music works registered with the collecting societies of the United Kingdom and of the United States, irrespective of the nationality of the authors and of the language of the lyrics of songs or other kinds of vocal works. The Article often compares this notion to that of the “continental-European repertoire,” which broadly refers to music works registered with the collecting societies of countries such as Italy, Spain, France, Germany, Belgium and the Netherlands. See Case 4404, *Universal/BMG Music Publishing*, Eur. Comm'n Competition, at 10, *available at*:

[http://ec.europa.eu/competition/mergers/cases/decisions/m4404\\_20070522\\_20600\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4404_20070522_20600_en.pdf) [hereinafter *Universal/BMG Music Publ'g Decision*] (relying upon this distinction in the analysis of the music market in Europe for the purpose of a merger review).

<sup>12</sup> See *id.* at 6 (arguing that online rights constitute a specific combination of mechanical and performance rights for online applications, such as music downloading services).

<sup>13</sup> See *Universal/BMG Music Publ'g Decision*, *supra* note 11, at 7 (defining online rights as applying to a wide range of online and mobile applications, all of which require a license combining both mechanical and performance rights: online (audio) download, online (audio and video) streaming, mobile (audio) download, mobile (audio and video) streaming, ringtones, mastertones and ringbacktones).

<sup>14</sup> See *Commission Green Paper on Copyright and Related Rights in the Information Society*, at 17, COM (1995) 382 final (July 19, 1995). The Green Paper argues:

The class of existing rights was felt to be adequate, both to permit new exploitation and to maintain satisfactory protection for the right-holders. However, it was underlined that *certain concepts were going to move in new realms and that it would be necessary to “adjust” them as a result*. The rights of reproduction, communication to the public and rental were all suggested to be likely to take on *new characteristics*.

*Id.* (emphasis added).

<sup>15</sup> See Council Directive 2001/29, *supra* note 1, art. 3.2.

whatever form of digital content transmission, the holders of mechanical rights for music works have managed to enforce their digital reproduction rights by successfully claiming the clearance of such rights in order to make any on-demand transmission of copyrighted works legitimate.

Almost insurmountable problems in the clearance of online rights have stemmed from the fact that collecting societies have traditionally organized their work by clearly keeping acts of reproduction and communication to the public distinct, and by developing different rules and practices for the transfer and management of the respective exclusive rights.<sup>16</sup>

Consequently, the two above mentioned categories of rights are often held by distinct (and sometimes multiple) rights holders. This is true especially for music works whose ownership was defined and split contractually between the author and the publisher before the advent of the digital environment. The result of old-fashioned copyright ownership regimes is that E.U. collecting societies, which represent both authors and music publishers, continue to rely on different categories of rights in today's online rights management.<sup>17</sup> The distinction is also mirrored in the different shares that collective societies reserve to holders of reproduction and public performance rights by distributing revenues coming from online and mobile music services.<sup>18</sup>

## II. The Restructuring of Online Music Rights Management in the European Union

In the last few years, the European Commission advocated a structural change in the collective management of online music rights and in the relationship between rights holders and collecting societies based in the European Union. Before reviewing the new licensing models which have emerged as a result of such change, it is necessary to briefly review the legal sources which caused the above mentioned major change and the most relevant measures undertaken by the European Commission from 2004 onwards.

### A. The 2005 Commission Recommendation

In 2004, the European Commission started focusing on crucial aspects of cross-border collective management that were neglected and underestimated by the drafters of Council Directive 2001/29.<sup>19</sup> Even if its main objective was to facilitate the creation of a European Internal Market in the businesses enabled by new technologies, the 2001 directive turned out to be mostly an instrument of industrial policy aimed at strengthening national copyright protection and adapting it to the digital character of copyright's subject matter.

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<sup>16</sup> In countries like the United Kingdom, for example, the distinction between mechanical and performing rights was even reflected in the creation and operation of two distinct collecting societies, i.e., the Mechanical Copyright Protection Society ("MCPS") and the Performing Right Society ("PRS"). In the United States, the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc., are entitled to manage only the so-called "small" rights of public performance over musical compositions (i.e., the nondramatic performance of nondramatic music). The "grand" (i.e., dramatic) rights of public performance and the reproduction rights, instead, are licensed by copyright holders on an individual basis. See JANE C. GINSBURG & ROBERT A. GORMAN, *COPYRIGHT: CASES AND MATERIALS* 678–79 (7th ed. 2006).

<sup>17</sup> See Violaine Dehin, *The Future of Legal Online Music Services in the European Union: A Review of the EU Commission's Recent Initiatives in Cross-Border Copyright Management*, 32 EUR. INTEL. PROP. REV. 220, 211 (2010) (positing that collecting societies have created, in parallel to legal definitions, different categories of rights (known as "GEMA categories"), each of which refers to a specific form of exploitation of music works and to the conditions under which the permission for such exploitation is granted).

<sup>18</sup> For instance, music downloads are widely assimilated to reproduction based services whereas music streaming transmissions are viewed as performance based services.

<sup>19</sup> See *Communication from the Commission, The Management of Copyright and Related Rights in the Internal Market*, at 9, COM (2004) 261 final (Apr. 16, 2004).

In its 2004 Communication on *The Management of Copyright and Related Rights in the Internal Market*, the Commission disclosed its objective of fostering the E.U.-wide licensing of certain rights concerning activities with a cross-border reach.<sup>20</sup> The Commission displayed uncertainty concerning the most appropriate legal measure to be adopted to achieve this goal. In particular, there were discussions about whether E.U. institutions should have intervened by mandating collecting societies to issue E.U.-wide licences or by simply focusing on good governance rules for the functioning of the same entities and their modalities of collective management instead. A year later, the Commission decided to accelerate the pursuit of its objective with specific regard to the recently emerged market for online music services. Indeed, the release of a Commission Staff Working Document on the cross-border licensing of online copyrighted music in July 2005 preceded the adoption of the Recommendation of October 18, 2005.<sup>21</sup>

The main objective of the recommendation was that of establishing a multiterritorial licensing policy corresponding to the ubiquity of the online environment, to the benefit of new commercial users, such as online music service providers.<sup>22</sup> The recommendation departed from the assumption that licensing of the exclusive rights covering online exploitations (i.e., the reproduction and communication to the public rights) was often restricted by territory, in such a way that commercial users were forced to negotiate in each member state with each of the respective collective rights management organizations.<sup>23</sup>

Before adopting its Recommendation of October 18, 2005, the Commission had the opportunity to take into consideration (and to review from an antitrust perspective) the rights clearance solutions that collecting societies had developed in the meantime, within the legal context of their “reciprocal representation agreements,” negotiated and signed under the shield of umbrella associations such as the International Confederation of Societies of Authors and Composers (“CISAC”) and *Bureau International des Sociétés Gérant les Droits d’Enregistrement et de Reproduction Mécanique* (“BIEM”).

In order to respond to technological advances and to provide commercial users with workable multiterritorial licensing solutions for Web based exploitations of music works, collecting societies had developed two standard (or model) agreements amending their pre-existing agreements and including the management of the rights of online public performance (Santiago Agreement) and of digital reproduction (Barcelona Agreement) into their scope.<sup>24</sup>

Reciprocal representation agreements are crucially important in order to understand the traditional architecture of copyright collective management at the international level. These agreements have traditionally allowed national collecting societies to administer in their territories the repertoires of the affiliated, foreign collecting societies that participated in the agreements, as well as administering their own national repertoires.<sup>25</sup> Through a complex network of bilateral agreements implementing model

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<sup>20</sup> *Id.*

<sup>21</sup> Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, 2005 O.J. (L 276) 54, 55 [hereinafter Recommendation of Oct. 18, 2005]; *Commission Study of July 7, 2005, supra* note 2, at 5.

<sup>22</sup> Recommendation of Oct. 18, 2005, *supra* note 21, at 54.

<sup>23</sup> *Id.*

<sup>24</sup> See Maria M. Frabboni, *Collective Management of Copyright and Related Rights: Achievements and Problems of Institutional Efforts Towards Harmonisation*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 373, 382–84 (Estelle Derclaye ed., 2009); Tanya Woods, *Multi-Territorial Licensing and the Evolving Role of Collective Management Organizations*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 105, 115–18 (Daniel Gervais ed., 2d ed. 2010). The Santiago Agreement was signed by five collective rights management organizations which developed the agreement after having negotiated unsuccessfully, with other CISAC members, a major adjustment of the CISAC Model Contract. *Id.* The five organizations were: BMI (United States), BUMA (Netherlands), GEMA (Germany), PRS (UK) and SACEM (France). *Id.* The Barcelona Agreement, instead, was a standard bilateral agreement concluded in 2002 by the members of the BIEM, i.e., the umbrella organization representing and coordinating the activities of mechanical rights collecting societies. *Id.* This standard agreement was conceived as an amendment of the pre-existing reciprocal representation agreements concluded by the BIEM members. *Id.*

<sup>25</sup> In the traditional system of managing copyright and related rights, if copyrighted works registered with a collecting society

agreements developed under the aegis of CISAC and BIEM, every society acquires the right to represent the worldwide music repertoire into its territory of operation.

In short, the Santiago Agreement and Barcelona agreements sought to enable commercial users to obtain a licence for online exploitations (e.g., webcasting, streaming and online music on demand) of the worldwide music repertoire from their national collecting society. By obliging users to resort to the collecting society of their country of residence, both agreements implemented a clause of “economic residence” (or “customer allocation”) that all European collecting societies received very well, but that raised, at the same time, the criticism of the European Commission.<sup>26</sup>

In 2004, after having started antitrust proceedings in response to the notification of the Santiago Agreement, the Commission issued a statement of objections that was a kind of death sentence for single multiterritorial licences granting access to the global music repertoire for online exploitations.<sup>27</sup> In particular, the Commission found that the above mentioned clauses of economic residence were anticompetitive because, in contrast to former EC Treaty art. 81 (today’s Treaty on the Functioning of the European Union, hereinafter TFEU, art. 101), they made it impossible for the users to obtain a licence from a society of their choice.<sup>28</sup> The Commission eventually found that this prevented the market from evolving in different directions and preserved the territorial exclusivity enjoyed by each of the participating societies.<sup>29</sup> Both agreements were not renewed and were no longer in force when the recommendation was adopted (the Santiago Agreement expired in 2004).

The 2005 recommendation relied upon the fact that the Santiago and Barcelona agreements were not renewed by European collecting societies. The recommendation drew on the assumption that reciprocal representation agreements (in their pre-Santiago and pre-Barcelona versions) gave rise to territorial restrictions in the administration of the rights involved in the online exploitation of copyrighted music.

Generally speaking, the nonbinding recommendation advocated multiterritorial licensing by urging E.U. member states to grant copyright holders the right to assign the management of online rights, on a territorial scope of their choice, to a collecting society of their choice, irrespectively of nationality and residence considerations.<sup>30</sup> To this end, member states were invited to screen their national legislation in order to prohibit all territorial restrictions created by reciprocal representation agreements and membership contracts that ultimately restricted each collecting society from managing online rights for the whole territory of the European Union, regardless of the residence of the authors and regardless of the economic location of the commercial users.

In addition to that, the recommendation established a set of recommended practices with a view to enhancing the degree of efficiency and transparency of collecting societies and enabling effective competition among them.<sup>31</sup> Such practices concerned crucial aspects such as equitable

(Contd.)

active in country A are accessible in country B, the society active in country B normally enters into a reciprocal representation agreement with the society active in country A, which holds the repertoire on behalf of the copyright holder.

<sup>26</sup> See Frabboni, *supra* note 24, at 383–84; Woods, *supra* note 24, at 117.

<sup>27</sup> See Commission Notice Published Pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152—BUMA and COMP/C2/39151 SABAM (Santiago Agreement—COMP/C2/38126), 2005 O.J. (C 200) 11 [hereinafter *Commission Notice on the Santiago Agreement*].

<sup>28</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sep. 5 2008, 2008 O.J. (C115) 47, 88 [hereinafter TFEU].

<sup>29</sup> See *Commission Notice on the Santiago Agreement*, *supra* note 27, at 11.

<sup>30</sup> See Recommendation of Oct. 18, 2005, *supra* note 21, at 54. See also *Commission Study of July 7, 2005*, *supra* note 2, at 28. The Commission Study clarified the legal basis for the proposed E.U. action:

The EU’s mandate to act results from the fact that collective rights management services are provided (1) cross-border, (2) to nationals of other Member States; (3) under reciprocal representation agreements which contain restrictions which limit the provision of these services, inter alia: (i) by territory; (ii) by nationality; (iii) by Member State of economic residence.

*Id.*

<sup>31</sup> See Recommendation of Oct. 18, 2005, *supra* note 21, at 54.

royalty collection and distribution without discrimination on the grounds of residence, nationality or category of right holder; increased collective rights managers' accountability; fair rights holders' representation in the collective rights managers' internal decision-making; and effective dispute resolution procedures.

In conclusion, the recommendation made it clear that rights holders should enjoy the right to withdraw any of their online rights from their current collecting society and to transfer such rights to another collective rights management entity of their choice.<sup>32</sup>

## **B. The E.U. Parliament Reaction**

It was inevitable that the recourse to a soft law instrument for such a sensitive and delicate matter raised a strong conflict with the European Parliament, which openly criticized the adoption of the recommendation without its prior consultation and formal involvement. Even if the Parliament acknowledged that copyright holders should in principle be free to choose a collecting society for the management of their rights, it expressed concern about the risks of rights concentration in the hands of the biggest collecting societies that the recommendation entailed, to the detriment of local and niche repertoires.

In a resolution in 2007 following the release of an official report on the 2005 recommendation, the Parliament argued that a fair and transparent competitive system among national collecting societies could have been created through a flexible framework directive, which could have regulated copyright collective management for cross-border online music services.<sup>33</sup> Through this proposal to the Commission, the Parliament made it clear that urging national collecting societies to compete with one another without having harmonized their highly heterogeneous legal status, institutional mission and services would not have been fair. This would have inevitably endangered the economic sustainability of those societies that, according to their national laws, not only try to maximize licensing revenues (acting as pure copyright holders' agents), but also pursue cultural goals and a certain degree of solidarity among their members.<sup>34</sup>

Despite these observations and criticism, the Commission took the view that a "wait and see" approach would have been more beneficial than regulation in a fast-developing environment. A more cautious approach, it was said, would have allowed the Commission to observe how markets develop and what online licensing trends eventually emerge.<sup>35</sup>

## **C. The CISAC Decision and Its Impact on Reciprocal Representation Agreements**

The European Commission's measures in the field of music rights management were the result of two principal institutional actors. Whereas Directorate General ("DG") Internal Market and Services carried out the work that led to the adoption of the 2005 Recommendation, DG Competition dealt with antitrust investigations initiated in response to complaints targeting the territorial

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<sup>32</sup> *Id.*

<sup>33</sup> European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, 2007 O.J. (C 301E) (EC), 64, 67. *See also* Resolution of 25 September 2008 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, EUR. PARL. DOC. (2008), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN>

<sup>34</sup> *See* HELLENIC FOUND. FOR EUR. & FOREIGN POL'Y, COLLECTING SOCIETIES AND CULTURAL DIVERSITY IN THE MUSIC SECTOR 17–18 (2009) [hereinafter ELIAMEP STUDY]; Dehin, *supra* note 17, at 222–23.

<sup>35</sup> *See Commission Report on Monitoring the 2005 Online Music Recommendation*, at 3, 8 (Feb. 7, 2008), available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/monitoring-report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf).

fragmentation of online music services and the absence of pan-European licences.<sup>36</sup> In particular, DG Competition examined two complaints in this field.

In April 2007, the DG Competition started an investigation in response to consumers' associations which complained against the territorial segmentation of the iTunes platform and about the impossibility for U.K. consumers to purchase music downloads in foreign online stores, where prices were lower. A statement of objections was sent to Apple and to the major record companies operating in Europe, alleging that distribution agreements between Apple and each record company contained territorial sales restrictions which violated TFEU article 101 (former EC Treaty article 81).<sup>37</sup> In this case, DG Competition sought to ascertain whether agreements that imposed on a platform operator such as Apple a condition restricting downloads distribution to consumers who resided in licensed countries could be deemed incompatible with the common market. According to the Commission, the outcome of these agreements was the restriction of the consumer choice of where to buy digital music, what music to buy and at what price. As a result, these agreements could have been meant as restrictive business practices that TFEU article 101 prohibited and declared void. Nonetheless, this investigation was put to an end very quickly in March 2008 since the Commission welcomed Apple's decision to equalize its download prices in Europe.<sup>38</sup>

A second and much longer and more complex investigation was launched in response to complaints coming from leading broadcaster RTL Group and digital and interactive audio broadcaster Music Choice, which targeted the absence of licences for the exploitation of music works on a multiterritorial basis. These complaints gave rise to a Commission decision in July 2008 that assessed the compatibility of the system of reciprocal representation agreements between European collecting societies with E.U. competition law.<sup>39</sup>

Issued at a time when the music industry was changing its traditional licensing schemes in response to the 2005 recommendation, this decision focused in particular on the conditions of management and licensing of authors' public performance rights by collecting societies based in the European Economic Area and members of the International Confederation of Societies of Authors and Composers ("CISAC"). Taking a view consistent with the findings of the case law of the European Court of Justice ("ECJ") and of an important previous Commission decision on the same issue, the CISAC decision did not question the practice of territorial delineation by means of reciprocal representation agreements itself.<sup>40</sup> Rather, the Commission challenged the de facto exclusivity for the

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<sup>36</sup> *Departments (Directorates-General) and Services*, EUR. COMM'N, [http://ec.europa.eu/about/ds\\_en.htm](http://ec.europa.eu/about/ds_en.htm) (last visited Mar. 16, 2011) (providing a detailed description of the E.U. Commission's Departments (Directorates-General) and services and of their main competences).

<sup>37</sup> See Memorandum from the Eur. Comm'n, Competition: European Commission Confirms Sending a Statement of Objections Against Alleged Territorial Restrictions in On-Line Music Sales to Major Record Companies and Apple., (Apr. 3, 2007), available at : <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>38</sup> Dehin, *supra* note 17, at 232.

<sup>39</sup> See *Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement*, at 1, 5 COM (2008) 3435 final (July 16, 2008), available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf) [hereinafter *CISAC Decision*].

<sup>40</sup> See *Joined Cases 110, 241 & 242/88, François Lucazeau v. Société des Auteurs*, 1989 E.C.R. 2811 (in which the ECJ concluded that territorial restrictions embodied into reciprocal representation agreements appeared to be economically justified since the territorial segmentation was aimed at ensuring the physical monitoring of the licensed uses, which at that time was deemed to indispensable); *Case 395/87, Ministère Pub. v. Jean-Louis Tournier* 1989 E.C.R. 2531 (same). See also *Case 38014, IFPI "Simulcasting," Eur. Comm'n Competition*, 2003 O.J. (L 107) 58, 81 (EC) [hereinafter *Simulcasting Decision*]. Through the *Simulcasting Decision*, the E.U. Commission ordered a number of recording producers, represented by their professional association (IFPI), to amend the so-called *Simulcasting Agreement* with a view to enabling users established in the territory of the European Economic Area ("EEA") to approach any collecting management society (established within the EEA territory) to negotiate and obtain a multiterritorial licence for acts of simulcasting (i.e., the simultaneous Internet transmission of sound recordings included in broadcasts of radio and/or TV signals). *Id.* The Commission also found that the monitoring tasks of collecting societies in the online environment

licensing of the aggregated repertoire of collecting societies participating in the system and the subsequent tight partition of the market on a national basis.

What was deemed to undermine the interests of both copyright holders and commercial users was the systematic foreclosure of competition stemming from membership restrictions and territorial exclusivity clauses contained in the bilateral agreements signed by European collecting societies that implemented CISAC standard agreements:

- According to "economic residence" clauses embodied into membership agreements, rights holders were forced to resort to their national collecting society for the assignment of collective management services without having the chance to choose a collecting society on the grounds of different criteria (e.g., level of commission fees, quality of service, frequency of distribution of royalties, etc.).<sup>41</sup>
- As a result of territorial exclusivity clauses, collecting societies were prevented from offering licences to commercial users outside their national territory. In particular, article 3 of the Commission's decision held that collecting societies infringed former EC Treaty article 81 (today's TFEU article 101) and article 53 of the EEA agreement by coordinating the territorial delineation of the reciprocal representation mandates granted to one another in a manner that licensing for online, satellite and cable transmissions was limited to the domestic territory of each collecting society.<sup>42</sup> The Commission considered that such clauses restricted competition insofar as the resulting territorial segmentation into national monopolies for the grant of performing rights cemented the structure of the market, excluded other forms of multirepertoire licensing and confined each collecting society to operate only in its domestic territory, leaving no room for other means of organizing and competing in the management of copyright.<sup>43</sup>

As a result of its investigation, the Commission ordered twenty-four European collecting societies to withdraw the above mentioned economic residence clauses and the territorial restriction clauses from their bilateral representation agreements and to bring concerted practices of territorial delineation to an end.<sup>44</sup> Even if the clauses at stake had already been removed from the CISAC contract model of reciprocal representation at the time of the decision, all the addressees of the decision still included them in their bilateral agreements.

The CISAC decision had a legally binding force under article 7 of Council Regulation 1/2003 on the implementation of E.U. competition law.<sup>45</sup> The decision ordered the above mentioned twenty-four EEA collecting societies to renegotiate all their reciprocal representation agreements regarding the management of online, satellite and cable transmission rights on their repertoires on a strictly

(Contd.) \_\_\_\_\_

could easily be performed directly on the Internet. *Id.* See also Lucie Guibault & Stef Van Gompel, *Collective Management in the European Union*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 117, 124 (Daniel Gervais ed., 2006) (arguing that, in the Commission's understanding, the traditional economic justification for collecting societies not to compete in the cross-border provision of services no longer applied in the online environment).

<sup>41</sup> See *CISAC Decision*, *supra* note 39, at 39 (considering, interestingly, that this type of clause affected commercial users in so far as it led to an artificial fragmentation of music repertoires; the reasoning of the Commission on this issue followed the rationale of the 2005 recommendation, arguing that, in the absence of "economic residence" clauses, the repertoires managed by collecting societies would be more homogeneous and commercial users would foster collecting societies to compete with each other on the grounds of the strengths of their respective repertoires).

<sup>42</sup> The European Economic Area ("EEA") consists of all E.U. member states, plus Norway, Iceland and Lichtenstein.

<sup>43</sup> See *CISAC Decision*, *supra* note 39, at 59.

<sup>44</sup> See *id.* at 73–75 (including articles 1 and 4 (membership clauses) and 3 (territorial exclusivity)). The addressees of the decision were: AEPI (Greece), AKKA/LAA (Latvia), AKM (Austria), ARTISJUS (Hungary), BUMA (Netherlands), EAU (Estonia), GEMA (Germany), IMRO (Ireland), KODA (Denmark), LATGA-A (Lithuania), OSA (Czech Republic), PRS (UK), SABAM (Belgium), SACEM (France), SAZAS (Slovenia), SGAE (Spain), SIAE (Italy), SOZA (Slovakia), SPA (Portugal), STEF (Iceland), STIM (Sweden), TEOSTO (Finland), TONO (Norway) and ZAIKS (Poland). *Id.*

<sup>45</sup> Council Regulation 1/2003, art. 7, 2003 O.J. (L1) 1, 2 (EC).

bilateral basis within 120 days from the notification of the decision.<sup>46</sup> The decision also ordered the collecting societies to provide the Commission with copies of the amended bilateral agreements.<sup>47</sup>

Unfortunately, there is no way to know what collecting societies renegotiated and agreed upon in their secret and confidential agreements. Secrecy and confidentiality are inevitable requirements of these agreements since the CISAC decision outlawed the supposedly concerted and “open” methods of creation of the territorial delineation. If collecting societies disclosed such information or continued to involve CISAC in their negotiations they would inevitably run the high risk of violating the orders embodied in the decision and of being sanctioned through antitrust fines. This means that only the E.U. Commission and the contracting parties can know the independent territorial delineations of the new representation agreements in their entirety.

It is of the utmost importance to recall here that twenty-two (of a total of twenty-four) collecting societies appealed the decision before the European Court of First Instance and requested interim measures for the suspension of the orders the decision contained, all of which were dismissed by the President of the Court.<sup>48</sup>

An action was also brought before the same court by CISAC for the annulment of article 3 of the decision.<sup>49</sup> CISAC argued in support of its action that the inclusion of a territorial delineation clause in all of the reciprocal agreements concluded by CISAC members was not the product of a concerted practice to restrict competition. Rather, according to CISAC, this arrangement existed because the collecting societies found the incorporation of territorial delineation clauses in their reciprocal representation to be in the interest of their members.

As convincingly pointed out in the literature, the court procedure in this case can last years and, even if the final court judgment was (surprisingly) favourable to collecting societies, there would be no way to restore the licensing situation preceding the Commission decision.<sup>50</sup> Interestingly, the Commission recently disclosed that the aforementioned renegotiations (that only the Commission knows in their entirety, as we have seen) have not yet led to a substantial change of the territorial scope of the licensing of the online right of public performance, which still has a strictly monoterritorial dimension.<sup>51</sup>

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<sup>46</sup> *CISAC Decision*, *supra* note 39, at 75 (art. 4 ¶ 2).

<sup>47</sup> *Id.*

<sup>48</sup> See *Case-Law—Search Form*, CURIA, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (last updated Mar. 4, 2011) (insert the name of the collecting society of interest into the search space “Names of parties”) (making available all appeals brought by EEA collecting societies against the CISAC decision before the Court of First Instance and the subsequent proceedings, including the decisions on interim measures, in the CURIA database).

<sup>49</sup> Case T-442/08, *CISAC v. Commission*, 2009 O.J. (C 82), 25, 25–26.

<sup>50</sup> See Peter Gyertyanfy, *Collective Management of Music Rights in Europe After the CISAC Decision*, 41 INT’L REV. INTELL. PROP. & COMPETITION L. 59, 80–82 (2010).

<sup>51</sup> See *Creative Content*, *supra* note 3, at 6. The reflection document by DG INFSO and DG MARKT argues:

as far as the public performance rights are concerned, collective rights management remains local. This split between international licensing of digital reproductions and national licensing of public performances (making available) has, it is argued, led to a further complication in online licensing practices. Only time will tell how collective licensing practices with respect to performance rights will change in the wake of the antitrust decision in *International Confederation of Societies of Authors and Composers* (CISAC); legislative intervention might become necessary.

*Id.* (internal citations omitted).

### **III. The Emergence of Customized Collective Management in the Online Music Sector**

Both the 2005 recommendation and the 2008 CISAC decision led to the creation of a completely new set of rules for the collective management of online music rights, which obliged the Commission to constantly monitor market developments as well as the conduct of pre-existing and newly established collective management organizations.<sup>52</sup>

The Commission's action advocated not only competition among collecting societies, but also competition based on the strengths of different music repertoires licensed on a pan-European basis in order to reflect the ubiquity of the Internet. The CISAC decision, in particular, made it clear that collective management for online and mobile music exploitations should no longer be based on licences covering the worldwide music repertoire granted on a country-by-country basis by national societies holding a de facto territorial exclusivity.<sup>53</sup>

Rather, collective management of online rights should be based on a free and E.U.-wide market where collective rights management organizations compete with one another on the grounds of their services and of the appeal of their repertoires. Since monitoring tasks of collective rights managers in the online environment can easily be performed directly on the Internet (i.e., from a distance), collecting societies are no longer excused for not competing in the cross-border provision of their services and of their own repertoires.

The E.U. Commission expected this radical change to greatly simplify and improve the structure of rights management by reducing transaction costs, increasing economies of scale to the benefit of online music service providers and strengthening competition and innovation at both levels of music rights management and commercial offers of digital music, to the benefit of copyright holders, commercial users and European consumers.

As shown in the following Sections, the current situation is far from settled and weighty legal questions have emerged in the implementation of new *monorepertoire* licensing models. The new online licensing trends that have developed in the last years in response to the E.U. Commission action clearly reveal a model polarisation.

#### **A. Collective Rights Managers Licensing Music Publishers' Repertoires**

A first type of model was adopted by new licensing bodies that major international music publishers such as EMI Music Publishing and Sony/ATV Music Publishing appointed as agents for their repertoires at the European level.<sup>54</sup> Other major publishers such as Universal Music Publishing and Warner Chappell opted for a slightly different version of the same model, which did not imply the

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<sup>52</sup> The most important initiatives have been carried out since 2008 by DG Internal Market and DG Competition, which organized various public consultations and hearings in Brussels, creating Web based platforms where it is possible to have access to all relevant documents, studies and reports. See *Management of Copyright and Related Rights*, EUR. COMM'N., [http://ec.europa.eu/internal\\_market/copyright/management/management\\_en.htm](http://ec.europa.eu/internal_market/copyright/management/management_en.htm) (last visited Mar. 6, 2011); *Online Commerce Roundtable*, EUR. COMM'N.,

[http://ec.europa.eu/competition/sectors/media/online\\_commerce.html](http://ec.europa.eu/competition/sectors/media/online_commerce.html) (last visited Mar. 6, 2011); *Public Consultation on Content Online*, EUR. COMM'N., [http://ec.europa.eu/avpolicy/other\\_actions/content\\_online/index\\_en.htm](http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm) (last visited Mar. 6, 2011).

<sup>53</sup> See *CISAC Decision*, *supra* note 39, at 74–75 (art. 3).

<sup>54</sup> See *infra* Section III.A.1. For the purpose of this Article, “international major music publishers” are the four major international music groups holding at least seventy percent of the world music repertoire through their publishing agreements: Universal Music Publishing Group, EMI Music Publishing, Warner Chappell and Sony/ATV Music Publishing. See *Universal/BMG Music Publ'g Decision*, *supra* note 11, at 14–15 (including a recent estimate of market shares covering all publishing rights, which is embodied in the merger review).

creation of new organizations but merely appointed one or more national collecting societies as exclusive or nonexclusive agents of the publishers' repertoires.<sup>55</sup>

### 1. CELAS and PAECOL

The Centralised European Licensing and Administrative Service ("CELAS") Gmbh and the Pan-European Central Online Licensing ("PAECOL") GmbH are among the most relevant and complex examples of centralized rights management organizations managing single repertoires.<sup>56</sup> CELAS is jointly owned by GEMA and PRS for Music (i.e., the collecting societies managing the rights of authors, composers and publishers on the German and U.K. music repertoires). PAECOL, instead, is a 100 percent subsidiary of GEMA. These two organizations have much in common. Both of them were established in Germany to provide cross-border licensing and management services on a pan-European basis to rights holders for online and mobile exploitations. Even if they were presented as nonexclusive agents, these organizations have licensed only the mechanical rights of EMI Music Publishing's Anglo-American repertoire (CELAS) and of Sony/ATV Music Publishing (PAECOL) and they seem to maintain their original vocation as exclusive licensors of their respective repertoires.<sup>57</sup> The EU-wide licences offered by CELAS and PAECOL cover all types of online and mobile exploitations and are based on the country of destination principle with regard to tariffs.

### 2. DEAL

A similar example of monorepertoire collective management performed by a major national collecting society stemmed from an agreement signed by SACEM (France) and Universal Music Publishing Group ("UMPG").<sup>58</sup> Under such agreement, SACEM is authorized to grant E.U.-wide licences for the repertoire of UMPG (including the French repertoire published by UMPG) covering online and mobile exploitations. Even if SACEM and UMPG state that they are willing to cooperate with other collecting societies and other music publishers, this initiative (known also under the denomination of "DEAL," i.e., Direct European Administration and Licensing) seems to retain its character of exclusivity.

### 3. PEL and PEDL

New rights management organizations such as the Pan-European Licensing Initiative of Latin American Repertoire ("PEL") and the Pan-European Digital Licensing ("PEDL") initiative gave rise to wider and nonexclusive business alliances between major music publishers and highly representative collecting societies.<sup>59</sup>

The PEL initiative stemmed from a mandate conferred to SGAE (i.e., the collecting society representing Spanish authors, composers and music publishers) by major publishers Sony/ATV Music Publishing and Peer Music and Central and South American collecting societies for the management of their Latin American repertoires for E.U.-wide online and mobile exploitations.

This initiative covers the rights for online and mobile uses owned by Sony/ATV Music Publishing and Peer Music (which represent the catalogue of their Latin American affiliates) as well as the authors, composers and publishers that are members of the Central and South American collecting

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<sup>55</sup> See *infra* Section III A.2-4.

<sup>56</sup> See ELIAMEP STUDY, *supra* note 34, at 29-31 (containing information, much of which was obtained by the authors through responses to questionnaires sent via email to the two organizations' management. Details on the functioning and licensing packages of both organizations are kept confidential). See generally CELAS, <http://www.celas.eu> (last visited Mar. 1, 2011).

<sup>57</sup> See ELIAMEP STUDY, *supra* note 34, at 30.

<sup>58</sup> See *Universal Music Publishing Group and SACEM Sign Agreement for Online Mobile Licensing in Europe*, UNIVERSAL MUSIC (Jan. 28, 2006), <http://www.universalmusic.com/corporate/news35520>.

<sup>59</sup> See ELIAMEP STUDY, *supra* note 34, at 31-33.

societies participating in the initiative.

With regard to Central and South American collecting societies, interestingly, the mandate agreement consists of an extension of the geographical scope of the reciprocal representation agreements these societies signed with SGAE for online and mobile exploitations in the whole EEA (and not just the Spanish territory).

In the PEDL initiative, instead, the representation and management of the music works published by Warner Chappell is entrusted to a number of European collecting societies, which include PRS for Music (United Kingdom), STIM (Sweden), SACEM (France), SGAE (Spain) and BUMA-STEMRA (Netherlands).<sup>60</sup> Collecting societies are designated as nonexclusive licensing agents of Warner Chappell for the mechanical rights of its Anglo-American repertoire and are authorized to grant pan-European licences for digital exploitations.

Both the PEL and PEDL initiatives apply their tariffs on the grounds of the country of exploitation of the works licensed. They differ remarkably, however, as far as their internal organization is concerned. The PEDL organization is open in principle to any European collecting society wishing to join it on condition that each new society complies with a set of specific requirements aimed at ensuring transparency, efficiency and accountability. The PEL initiative, to the contrary, is uniquely based on the licensing activities performed by SGAE, which receives an exclusive mandate from all the rights holders involved and retains a significant power of coordination and supervision that, so far, has facilitated the creation of an online database indexing all administered works and has ensured a smooth transition towards the implementation of E.U.-wide licences.<sup>61</sup>

#### **4. IMPEL**

In January 2010, U.K. collecting society PRS for Music launched the Independent Music Publishers European Licensing (“IMPEL”) initiative, which plays in this initiative a managing function which is very similar to that of SGAE in the PEL consortium.<sup>62</sup> The IMPEL foundation is of much interest in the new scenario of repertoire-based licensing models because it gives independent publishers the same benefits that the individual major publishers have achieved by licensing their mechanical rights on a multiterritorial basis through one rights manager.

As far as we know, IMPEL is the only initiative enabling a number of independent publishers to take (some) advantage of the type of E.U.-wide licensing model recommended by the E.U. Commission in 2005.<sup>63</sup> In this regard, IMPEL can be easily viewed as the exception that proves the rule. As explained by PRS on its website, independent music publishers have appointed PRS as their agent through the IMPEL initiative in order to create a common one-stop shop for licensees of the

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<sup>60</sup> See ELIAMEP STUDY, *supra* note 34, at 32–33; GEMA, *the MCPS-PRS Alliance and STIM Join Warner/Chappell Music's Pan-European Digital Licensing (PEDL) Initiative*, PRS FOR MUSIC, (Jan. 30, 2008), <http://www.prsformusic.com/aboutus/press/latestpressreleases/mcpsprsalliance/Pages/ThreekeycollectionsocietiesarethefirsttosignuptoPEDLinitiative.aspx> (disclosing that three “key collection societies” were the first to join the PEDL initiative designed to facilitate the licensing of musical compositions for music services throughout Europe).

<sup>61</sup> See ELIAMEP STUDY, *supra* note 34, at 32 (reporting the implementation plan that SGAE followed in order to ensure clarity in the transition from the traditional to the new E.U.-wide licensing model adopted under the PEL initiative: firstly, publishers announced the withdrawal of their Latin American repertoire before signing the agreement with SGAE; secondly, after the entry into force of the agreement, SGAE sent information letters to all European collecting societies and instructed them to continue to collect royalties for local exploitations of Peer Music’s and SONY/ATV Music Publishing’s Latin American repertoire).

<sup>62</sup> See *What is IMPEL?*, PRS FOR MUSIC, <http://www.prsformusic.com/impel/Pages/default.aspx> (last visited Mar. 16, 2011).

<sup>63</sup> See *Indy Publishers and PRS for Music Launch IMPEL*, PRS FOR MUSIC (May 25, 2010), <http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/IndypublishersandPRSforMusiclaunchIMPEL.aspx> (reporting that publishers such as Moncur Street Music Limited, RZO Music Limited, Truelove Music, Conexion Music, Fairwood Music (United Kingdom), Hornall Brothers Music, Kassner Associate Publishers, Music Sales, Proof Songs, Red Ink Music and Reverb Music signed up, and any right holder wishing to entrust his or her online rights has the freedom to join the platform).

online and mobile mechanical rights covering their (Anglo-American) repertoire.<sup>64</sup> Given that PRS already represented the associated performing rights on the same repertoire, IMPEL is now able to license the mechanical rights directly, and to license the digital performing rights indirectly.<sup>65</sup>

## B. Collective Online Rights Managers Licensing Regional Repertoires

An opposite pan-European licensing model that has emerged recently is based on the regional consolidation of music repertoires achieved through the establishment of strategic alliances by national collecting societies in Southern and Northern Europe. This approach to online music rights management can be viewed as a necessary response to the business models launched by the individual major music publishers and the very few, major collecting societies representing the most commercially valuable music repertoires and their copyright owners (i.e., authors and publishers).

### 1. ARMONIA

Throughout 2007 and 2008, SGAE, SACEM and SIAE (i.e., respectively, the Spanish, French and Italian collecting societies for authors, composers and music publishers) started cooperating with a view toward establishing a new licensing entity called ARMONIA, a joint venture for the licensing of the repertoires of these societies for online and mobile exploitations.<sup>66</sup>

In 2010, the three potential founders desisted from their initial project to institutionalize their joint licensing branch, after having sought to solve various corporate and tax issues related to the establishment of their joint venture.<sup>67</sup> These societies decided to transform ARMONIA into a highly coordinated undertaking aimed at licensing their national repertoires, as a single bundle of distinct repertoires, for online and mobile exploitations. The ARMONIA project has recently started operating by granting E.U.-wide licences (split formally into three separate bundles of licences) for their consolidated repertoires on the grounds of the mandates entrusted to them by means of rights holders' membership agreements.<sup>68</sup> SIAE recently explained to us that this strong coordination project has resulted so far in the development and implementation of new technologies that greatly facilitate joint collective management for online uses such as a repertoire database to determine the share of each collecting society for the licensing services provided. The aim of the project is to offer innovative services to operators of specifically defined territories, in order to increase synergies, combine know-how and share information.

### 2. Nordisk Copyright Bureau

Another important initiative in the direction of regional repertoire consolidation in the digital environment has recently developed from a pre-existing cross-border licensing system established by the Baltic and Nordic collecting societies for analogical uses of music works. Under this system

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<sup>64</sup> *Id.* (promoting PRS' initiative by *claiming that its* systems to process online mechanical rights allow both publishers and music service providers to benefit from increased transparency and faster transfer of payments and clearance of rights).

<sup>65</sup> PRS is authorized to make the Anglo-American performing rights match the mechanical rights being provided by the IMPEL members. As we will see below in more depth, this is an important clarification because it shows that IMPEL can manage directly just the online mechanical rights. The online performing rights, instead, are (still) licensed by collecting societies like PRS, which grant such rights to IMPEL after having acquired them from the EEA sister societies. Through this complex legal technique, IMPEL is able to provide an effective E.U.-wide one stop shop for its licensees. *Id.*

<sup>66</sup> See ELIAMEP STUDY, *supra* note 34, at 33–34.

<sup>67</sup> Telephone interview with Manlio Mallia, Vice Director, SIAE (Feb. 2, 2011) (providing updated information about the operation of the ARMONIA initiative).

<sup>68</sup> *Beatport Announces First Pan-European Digital Publishing License with ARMONIA Group of Societies*, ROYALTY WEEK (Feb. 3, 2011), <http://www.royaltyweek.com/?p=896>.

(which has been continuously developed since 2001), users have been free to choose from which society they wish to obtain the licence and to pay the tariffs of the country of destination.<sup>69</sup> Since 2009, under the aegis of their own licensing branch, the Nordisk Copyright Bureau, these societies have been extending and strengthening their cooperation so as to transform the Bureau into a European licensing hub for mechanical and online licensing and for the collection and distribution of royalties beyond the territories within which the cross-border system previously operated (i.e., Sweden, Norway, Denmark, Finland, Iceland, Lithuania, Latvia and Estonia).<sup>70</sup>

The objective of the Nordisk Copyright Bureau is to transform itself from a regional monopoly into a market oriented body providing its services to international online music providers on a European scale. To this end, the Bureau and the United Kingdom collecting society PRS for Music recently announced a new partnership to cooperate on recorded media royalty processing and ensure cost effectiveness and consolidation in the development of a hub for rights management in Europe.<sup>71</sup>

#### **IV. Unsettled Issues Raised by New Monorepertoire Rights Managers**

This Section identifies the major legal issues raised by the establishment and operation of the new monorepertoire rights managers of music repertoires in the E.U. online environment. The first Subsection explains why the withdrawals of online rights have been incomplete and largely unsuccessful in Europe with regard to both the Anglo-American and continental European repertoires. The second Subsection sheds light on other questions that the existing legal framework and the functioning of today's specialized rights managers leave unanswered.

##### **A. Uneasy Withdrawal of Rights Holders' Online Rights in Europe**

The creation and/or appointment of centralized and specialized agents at the E.U. level took place in conjunction with the major international music publishers' withdrawals of their Anglo-American repertoires from the aggregated global repertoires managed by local collecting societies under their system of mutual representation agreements. Unfortunately, a *full* withdrawal of both the exclusive rights covering online and mobile exploitations in Europe proved to be very hard or just impossible, at least for a few rights managers which recently appeared and started operating in the E.U. market.

The "procompetition" shift in the online environment from a system of multirepertoire licences granted on a strictly national basis to a system of E.U.-wide monorepertoire licences competing with one another presupposed a free (or at least smooth) transferability of both the mechanical and performing rights from rights holders to the new rights managers. As admitted by the same European Commission while analyzing the state of the art in the online music sector in October 2009, online music services still remained nascent in spite of the establishment of new online rights managers.<sup>72</sup> On that occasion, the Commission explicitly referred to these new entities as licensors of the mere digital reproduction (i.e., mechanical) rights, which are insufficient for the full clearance of online and mobile exploitations.<sup>73</sup>

The *Creative Content* document confirmed that, whilst reproduction rights were already

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<sup>69</sup> See *About NCB*, NORDISK COPYRIGHT BUREAU, <http://www.ncb.dk/english/00/ncbvision.html> (last visited Mar. 1, 2011).

<sup>70</sup> NORDISK COPYRIGHT BUREAU, 2009 ANNUAL REPORT (2010).

<sup>71</sup> See *PRS for Music and NCB Join Forces on Recorded Music Operations*, NORDISK COPYRIGHT BUREAU (Sep. 27, 2010), <http://www.ncb.dk/pdf/2010-09-17-pressrelease.pdf>.

<sup>72</sup> See *Creative Content*, *supra* note 3, at 6 (explicitly mentioning initiatives such as CELAS, PEDL, ARMONIA and DEAL).

<sup>73</sup> *Id.*

licensed on an E.U.-wide basis, the management of public performance rights remained local and this inevitably led to a further complication in online licensing practices, even in the wake of the CISAC decision.<sup>74</sup> With this laconic statement, the Commission implicitly acknowledged that the strictly bilateral (and secret) renegotiations of the European collecting societies' reciprocal representation agreements ordered by the CISAC decision had not yet enabled the grant of multiterritorial (possibly E.U.-wide) licences of the (necessary) public performance rights over online music transmissions.<sup>75</sup>

The Commission failed to include in the Creative Content document of November 2009 what it widely understood and disclosed in its review of the effects on the E.U. market of the acquisition of BMG by Universal Music Publishing in May 2007.<sup>76</sup> The Commission was fully aware of the fact that the unfortunate consequence of separate licensing of mechanical and public performance rights was somehow inevitable in the absence of uniform laws and common contractual practices for the definition of copyright ownership regimes at the national level. In fact, contractual practices and arrangements that the national collecting societies developed in order to protect their authors (i.e., composers and lyricists) in their bargain with music publishers heavily hindered the progressive implementation of E.U.-wide monorepertoire licences. This situation occurred because the full withdrawal and transfer of mechanical and public performance rights over music works from traditional collecting societies to new centralized agents implied the consent of authors for all works whose ownership remained with them or was split with music publishers. In addition to that, it should also be considered that it is frequent in the music sector to have multiple authors for the same work (e.g., one or two composers and one or two lyricists) and distinct rights managers for their respective representation.<sup>77</sup>

To shed light on these aspects and to explain why the E.U.-wide online rights management of monorepertoires in the European Union is still widely incomplete and limited to the sole mechanical rights of the Anglo-American repertoire, it is essential to briefly examine the different relationships existing between music rights holders and collecting societies in the United Kingdom and in continental Europe. In analyzing these relationships, it should always be borne in mind that most collecting societies in Europe worked in the same way as labour unions by ensuring that their members—the authors and, therefore, the supposedly weaker parties—were not deprived of their rights while signing their publishing agreements.<sup>78</sup>

### **1. Differences between the United Kingdom and the Continental European Countries**

The U.K. music repertoire constitutes a very special case in the European Union. Historically and culturally, the U.K. repertoire has always been associated (also for obvious linguistic reasons) with the U.S. music repertoire. The Anglo-American music repertoires have very little in common with the repertoires of the collecting societies of continental-European countries such as France, Germany, Italy, Spain, Belgium, etc.<sup>79</sup> A recent measurement and comparison of the economic values of music repertoires in a set of selected E.U. countries evidenced that, unlike the continental European repertoires (which are diffused and enjoyed mostly at a local, i.e., national) basis, the Anglo-American repertoire is characterized by an effective cross-border penetration and holds a clearly dominant

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<sup>74</sup> *Id.*

<sup>75</sup> See *supra* Section II.C.

<sup>76</sup> See Universal/BMG Music Publ'g Decision, *supra* note 11.

<sup>77</sup> See ELIAMEP STUDY, *supra* note 34, at 24–25.

<sup>78</sup> See Dehin, *supra* note 17, at 225–26; Gyertyanfy, *supra* note 50, at 64.

<sup>79</sup> See Universal/BMG Music Publ'g Decision, *supra* note 11, at 33 (stressing that the distinct allocation of original control over a work is the consequence of the historically different legal concepts of protection under the copyright (United Kingdom and United States) and the *droit d'auteur* systems (France and then continental Europe)); Dehin, *supra* note 17, at 225; Gyertyanfy, *supra* note 50, at 64 (recalling that the four “major” international music publishers, holding at least seventy percent of the world music repertoire, belong to the Anglo-American world of copyright).

position in Europe and worldwide.<sup>80</sup>

From a legal perspective, rights holders in the Anglo-American music repertoire have developed similar licensing practices for the mechanical and public performance rights in their works. Here, for a matter of simplification, the analysis is confined to E.U. borders and considers only the U.K. practice example.

The transfer and management of mechanical and performing rights in the U.K. music repertoire are regulated by well-established contractual practices developed under the shield of two U.K. collecting societies (i.e., the Performing Right Society and the Mechanical-Copyright Protection Society).<sup>81</sup> In the U.K. music industry's practice it is customary for the composer to assign the mechanical rights in her works to the individual publisher, except for the performing rights, which go to the PRS.<sup>82</sup> Mechanical rights are managed by the MCPS, which operates not as an assignee of the relevant copyright, but rather as an exclusive agent for the copyright owners (i.e., the publishers).<sup>83</sup> For foreign uses, instead, the MCPS publishers have traditionally appointed subpublishers in every country of exploitation by granting them their mechanical rights on a territorial basis. These subpublishers are members of local collecting societies and appoint their respective societies for the management of mechanical rights on a local basis.<sup>84</sup>

This means that U.K. music publishers can administer mechanical rights without the author's approval and can easily withdraw the foreign collecting societies' rights to represent their music repertoire by merely letting the agreements with subpublishers expire.<sup>85</sup> Indeed, the expiration of such agreements automatically transfers the management of the mechanical rights back to the publisher's exclusive agent, MCPS. This is the ultimate reason for which international major music publishers were able to withdraw their mechanical rights and easily transfer their management to new online rights managers.

For the performing rights, instead, in the United Kingdom the PRS has traditionally required the assignment of the rights of its two categories of members, namely, authors (composers and lyricists) and publishers.<sup>86</sup> Music authors do not normally transfer to music publishers the performing rights over their works; rather, they generally transfer their rights management to the PRS. Authors and publishers merely conclude a standardized agreement under which the PRS collects the royalties and

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<sup>80</sup> See ELIAMEP STUDY, *supra* note 34, at 98–106 (showing that the U.K. music repertoire holds an undisputed dominant position in Europe (and worldwide) demonstrated by numbers; the music repertoire administered by U.K. collecting society PRS for Music was first in the 2008 worldwide rankings for the market value of its public performance rights and third (following U.S. collecting societies ASCAP and BMI) in the market for physical and digital sales).

<sup>81</sup> See *id.* at 84–85. Since 2009, “PRS for Music” is the new brand for the two U.K. collecting societies: Mechanical Copyright Protection Society (“MCPS”) and Performing Right Society (“PRS”). *Id.* In 1997 it was formed as the MCPS-PRS Alliance. *Id.* Formally, MCPS and PRS remain two separate societies. *Id.* The collection and administration of data is handled by PRS for Music, which also collects royalties for the music sector of the Republic of Ireland. *Id.*

<sup>82</sup> See WILLIAM R. CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS* 520 (6th ed., 2007). See also Universal/BMG Music Publ'g Decision, *supra* note 11, at 35 (showing that the main difference between the United States and the United Kingdom, in this regard, is that U.S. music publishers collect their mechanical royalties directly from the users, without any involvement of U.S. collecting societies).

<sup>83</sup> See CORNISH & LLEWELYN, *supra* note 82, at 520. See also Dehin, *supra* note 17, at 225 (explaining that all revenues are paid to the publisher, who distributes a share to the composer and lyricist in accordance with their private publishing agreements); Gyertyanfy, *supra* note 50, at 64.

<sup>84</sup> See Universal/BMG Music Publ'g Decision, *supra* note 11, at 35. Because no split into the publisher's share and the author's share applies here, local collecting societies pay 100 percent of the royalties to the subpublishers, after having retained a commission fee for their service. *Id.* Subpublishers subsequently pass these revenues to the original publishers, who then pay out the agreed share of the royalties to the author. *Id.* U.S. music publishers adopt the same management model for their mechanical rights in the EEA countries, so that the same system applies to the U.K. and the U.S. music repertoires. *Id.* See also Dehin, *supra* note 17, at 226 (positing that in the subpublishing system adopted by the Anglo-American publishers, the international transfer of royalties is not regulated by reciprocal representation agreements).

<sup>85</sup> See Dehin, *supra* note 17, at 226.

<sup>86</sup> See CORNISH & LLEWELYN, *supra* note 82, at 520–21.

distributes them in accordance with a division of two-thirds to the composer and one-third to the publisher (or equal shares if there is also a lyricist).<sup>87</sup> This means that publishers who are members of PRS are not in a position to withdraw their performing rights without the authors' approval and without terminating their membership agreement with the PRS.<sup>88</sup>

The successful withdrawal of online rights from the system of reciprocal representation agreements is even more complex for the continental European music repertoires. Even if music publishers are important and independent players of music collective rights management from the outset, they are not owners of the rights of the works of the continental European repertoires.<sup>89</sup> Authors of works registered with the collecting societies of continental European countries do not normally transfer the rights of such works, but merely confer to music publishers a share of the royalties expected from collecting societies as a countervalue for the publishing and promotional activity that the publishers undertake contractually.<sup>90</sup>

This means that publishers do not own (or at least not fully) the rights covering online and mobile exploitations and, as a result, they cannot transfer them to centralized online rights managers without the authors' contractual approval.

## 2. Consequences for the Withdrawal of Online Rights

Recent market developments evidence that the possibility of "easy" withdrawal of music repertoires exists only for the mechanical rights of the U.K. repertoire administered by MCPS in the United Kingdom and by subpublishers in foreign jurisdictions.

Instead, for the performing rights of the U.K. repertoire and for both reproduction and performing rights of the continental European repertoires, the withdrawal and the subsequent transfer of the rights to specialized agencies is impossible<sup>91</sup> without the authors' or their collecting societies' consent.

As a result, music publishers cannot successfully withdraw their repertoires from the mandate to foreign societies and to their system of reciprocal representation agreements, unless authors, who are legally owners or co-owners of those repertoires, do the same thing by acting either individually or through the intermediation of their own collecting societies.

What seems remarkable here, given the emphasis placed by the European Commission on this issue, is that music authors seem largely unaware of their freedom to withdraw their online rights from national societies and to transfer them to another collective rights manager of their choice.<sup>92</sup> The contractual mechanisms through which rights holders have established or appointed new licensing agents and regional rights "hubs" show that authors have transferred their rights on a collective basis, through the representation of their respective collecting societies.<sup>93</sup>

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<sup>87</sup> This standard can be modified by the parties, but in no way can the publisher be granted more than half of the royalties. *See id.* at 521.

<sup>88</sup> *See Dehin, supra* note 17, at 226.

<sup>89</sup> *See Gyertyanfy, supra* note 50, at 64.

<sup>90</sup> *See Dehin, supra* note 17, at 226. The revenue allocation criteria are developed by the internal practices of each national society, in accordance with the resolutions of its governing bodies. *Id.* For instance, SACEM (France) allocates one-third to publishers and two-thirds to authors; GEMA (Germany) applies the same rates for performing rights, but it applies different rates (three-fifths to authors and two-fifths to publishers) for mechanical rights; SIAE (Italy), SGAE (Spain) and SABAM (Belgium) grant fifty percent to authors and fifty percent to publishers. *Id.*

<sup>91</sup> *Id.* *See also* Gyertyanfy, *supra* note 50, at 64 (adding that the derivative right owner capacity of the Anglo-American publishers can be questioned in those European countries where the transfer of authors' economic rights is either fully excluded or allowed under strict conditions only, as found in Germany, Austria and Hungary; hence, in such countries even the withdrawal of the Anglo-American mechanical rights could be troublesome because the legal consequences of the transfer, exploitation and the method of exercising those rights are governed by the copyright law of those particular countries).

<sup>92</sup> *See ELIAMEP STUDY, supra* note 34, at 23.

<sup>93</sup> *See supra* Sections III.A and III.B.

Only a very few among the new licensing entities, however, were able to acquire all necessary rights in order to create effective “one stop shops” for online and mobile music services on a European scale. The most privileged actors in this enterprise were the publishers of the Anglo-American music repertoire and the new licensing entities that they appointed as their online rights agents. As we have seen, organizations or initiatives such as CELAS, PAECOL and PEL could easily acquire authors’ rights through the direct involvement of major European collecting societies such as PRS for Music, GEMA and SGAE.

The smoothest case was certainly that of the PEL initiative, in which SGAE acquired both the mechanical and performing shares for its E.U.-wide licensing of Sony’s and Peer Music’s Latin American repertoires through the withdrawals of these publishers and the parallel withdrawals of their Latin American authors. The withdrawal of authors’ rights from the mandates of other EEA collecting societies, in particular, took place through the representation of SGAE, which is now the representative in Europe of the members of the Central and Latin American collecting societies.<sup>94</sup>

CELAS and PAECOL were placed in a similar position since their founders (and owners, i.e., PRS for Music and GEMA) guaranteed a very wide withdrawal and transfer on behalf of their authors to their new online rights management subsidiaries. However, CELAS (which is incorporated under German law) has been able to license *directly* the sole mechanical rights of EMI Publishing’s Anglo-American repertoire. This has occurred for two reasons. First, GEMA and PRS for Music (as all the EEA collecting societies), are still managing the public performance rights of their members by themselves and on a strictly territorial basis, under their (secret!) system of reciprocal representation.<sup>95</sup> Second, GEMA and PRS for Music had no representative power for a wide portion (approximately forty percent) of CELAS’s half-a-million works, which is made of split copyright works for which CELAS represents only a few of their multiple owners.<sup>96</sup> A few years after its founding, therefore, CELAS does not yet hold a position to directly sell full packages of mechanical and performing rights for online and mobile exploitations of its repertoire.

Nowadays, the licensing solutions of CELAS, at least in this regard, seem to have evolved. The licensing agency claims to be able to offer the mechanical of its Anglo-American EMI mechanical shares and, in addition, for those EMI shares, to include also the associated performing rights shares. CELAS assures its actual and potential licensees on its website that it disposes of the full set of rights for the Anglo-American EMI repertoire for online and mobile uses, “although in some cases CELAS may opt to license its rights via an approved territorial agent.”<sup>97</sup> This circumstance clearly indicates that public performance rights that supplement its package of online rights are licensed *indirectly* and stem from sublicensing agreements that CELAS has entered into with all local collecting societies (including GEMA).<sup>98</sup>

## **B. Unanswered Questions**

The establishment of the aforementioned E.U.-wide rights management organizations raised important legal questions that have remained unanswered so far. A first important question concerns the legal status of such organizations and the legitimacy of their licensing activities under national law.<sup>99</sup> This aspect is particularly relevant in those E.U. member states in which collecting societies, due to their

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<sup>94</sup> ELIAMEP STUDY, *supra* note 34, at 31–32. Interestingly, SGAE obtained such representation of Central and Latin American authors for their online exploitations—for the whole EEA territory, and not just the Spanish territory—through an extension of the territorial scope of the pre-existing reciprocal representation agreements SGAE had with their collecting societies.

<sup>95</sup> See *supra* Section IV.A.

<sup>96</sup> See ELIAMEP STUDY, *supra* note 34, at 29–30.

<sup>97</sup> CELAS, *supra* note 56.

<sup>98</sup> This is the same licensing solution for performing rights implemented by the IMPEL initiative, which is also managed by PRS for Music. See *supra* Section III.A.

<sup>99</sup> See *infra* Section IV.B.1.

own regulatory frameworks, are subject to forms of strict or intermediate control by supervisory authorities.<sup>100</sup> Further questions refer to the supposedly nonexclusive relationship between major international music publishers and organizations such as CELAS and PAECOL and the issue of equal treatment of music repertoires whenever national collecting societies manage both their own repertoire and that of a major publisher.<sup>101</sup>

### 1. Legal Status of the New Licensors and Legitimacy of Their Activities Under National Law: The Case of Germany

Germany is supposed to provide the most comprehensive system of control of collecting societies on the international level and has assigned the role of supervisory authority for collecting societies to the German Patent and Trademark Office (“GPTO”).<sup>102</sup> Under a piece of legislation specifically devoted to copyright’s administration, the GPTO issues prior authorizations to anyone wishing to do business in the collective rights management sector and ensures that collective managers do not abuse their powers while dealing with both rights holders and users.<sup>103</sup> More generally, the German supervisory authority controls on a permanent basis whether a collecting society complies with its statutory duties of diligence, fairness and nondiscrimination.<sup>104</sup>

In February 2007, the GPTO inquired into the legal status of CELAS with a view to ascertaining whether it should have been considered a collective rights management organization under the meaning of the German Act on the Administration of Copyright.<sup>105</sup> The GPTO decided that CELAS was *not* a collecting society under German law since this joint venture did not administer the rights of a plurality of rights holders and provided its services to the sole benefit of a publisher on a strictly commercial basis. As a result, CELAS was found not to be subject to the obligations set out under the 1965 Act on the Administration of Copyright.<sup>106</sup>

Even if the GPTO’s decision seemed to grant CELAS a certain degree of immunity from the above mentioned kind of supervision, a heavy problem of legitimacy for its licensing activities started materializing in June 2009. At that time, a decision of the District Court (*Landgericht*) of Munich questioned the legitimacy of splitting the management of mechanical and performing rights for technically and economically unitary modes of exploitation.<sup>107</sup> The case was based on the assumption that CELAS administered the sole mechanical rights of the EMI repertoire and licensed the associated performing rights indirectly. Considering the claim of German online operator MyVideo, the District

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<sup>100</sup> See Guibault & van Gompel, *supra* note 40, at 125–30 (analyzing and classifying national collecting societies in the European Union according to the distinct set of rules that each member state established for the formation and operation of collective management organizations). Here, this Article follows a distinction proposed by these authors among countries having adopted “strict,” “intermediate” or “*de minimis*” forms of supervision for collecting societies and having established a supervisory authority. *Id.* The authors conclude that the vast majority of member states fall under the category of intermediate supervision, whereas Germany, Austria and Portugal should be viewed as “strict supervision” countries. *Id.* The least supervised and regulated activities are those of collecting societies in the United Kingdom, Ireland and Poland.

<sup>101</sup> See *infra* Sections IV.B.2, IV.B.3.

<sup>102</sup> See Guibault & van Gompel, *supra* note 40, at 127–28.

<sup>103</sup> See Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechte [UrhG] [Copyright Administration Law], Sept. 9, 1965, BGBl. I at 1294 (Ger.).

<sup>104</sup> See Guibault & van Gompel, *supra* note 40, at 127–28.

<sup>105</sup> Alexander Wolf & Till Evert, *Rechtsbeziehungen der GEMA zu ausländischen Verwertungsgesellschaften*, in RECHT UND PRAXIS DER GEMA: HANDBUCH UND KOMMENTAR 812, 814 (Reinhold Kreile et al. eds., 2d ed. 2008).

<sup>106</sup> *Id.*

<sup>107</sup> MyVideo Broadband S.R.L. v. CELAS GmbH, Langericht [LG] [District Court] June 25, 2009, Zeitschrift für Urheber- und Medienrecht (ZUM) 788 (2009) (Ger.). See generally Lucie Guibault & Stef Van Gompel, *Collective Management in the European Union*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 135, 162–63 (Daniel Gervais ed., 2d ed. 2010); Gyertyanfy, *supra* note 50, at 71, 77–78; *Big Problems for CELAS in Germany*, MUSIC & COPYRIGHT’S BLOG (Sept. 18, 2009, 2:14 PM), <http://musicandcopyright.wordpress.com/2009/09/18/big-problems-for-celas-in-germany/> (summarizing the case in English).

Court of Munich found that German copyright law did not allow for the split of these two rights since for a specific kind of use to be licensed validly the use must be clearly separable, economically and technically autonomous and unitary.<sup>108</sup> The Munich court took the view that online transmission of copyrighted content could not be kept distinct and separate from the acts of reproduction that constitute a technical necessity, since these acts are inherent to the act of making copyrighted works available to the public. The judgment maintained that the right of online exploitation cannot be split into two separate rights, i.e., a right of making content available and a distinct right of reproduction.<sup>109</sup> If the split were admissible and distinct rights holders held the mechanical and making available rights over the same music works, users would face substantial legal uncertainty and the risk of double claims with regard to a uniform technical process.<sup>110</sup>

This argument led the court to the conclusion that EMI had not validly transferred its mechanical rights to CELAS for digital uses because digital reproductions, as such, were not separable from the acts of making content available either technically or economically.<sup>111</sup> This meant that CELAS could not be deemed to be in a position to control and legally restrict digital reproductions for the EMI repertoire against unauthorized content provider MyVideo. A subsequent corollary was that an online music service like MyVideo should have obtained all necessary licenses for the use of online content in Germany from local collecting society GEMA.<sup>112</sup>

The Munich Court of Appeals (*Oberlandesgericht*) upheld the decision of the District Court in April 2010 and the case is currently pending before the Federal Court of Justice, after CELAS's appeal.<sup>113</sup> It seems premature to draw a conclusion from this case since it dealt with a copyright infringement claim and touched upon the legitimacy of CELAS's licensing activity only indirectly. This means that the licenses that CELAS has granted so far for online exploitations of the EMI Anglo-American repertoire remain unaffected. However, it is evident that the final court ruling and the settlement of the whole case can raise a strong issue of legitimacy for the entire functioning of the two European online rights managers (i.e., CELAS and PAECOL) of EMI's and Sony's Anglo-American repertoire.

## 2. Nonexclusivity of the Licensing Mandates

Another question that deserves attention here is the nonexclusivity of the mandates conferred by major music publishers like EMI and Sony to new collective rights managers such as CELAS and PAECOL. Nonexclusivity makes sense if third parties also license the rights entrusted to these entities.<sup>114</sup> However, there is no evidence that EMI and Sony entrusted the same rights granted to CELAS and PAECOL to other agents or collecting societies.<sup>115</sup>

EMI is reported to have initially granted exclusivity to CELAS and, at a later stage, to have agreed with CELAS upon the removal of the exclusivity clause from their agency contract.<sup>116</sup> Interestingly, however, CELAS seems to maintain its original vocation as exclusive licensor of the

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<sup>108</sup> See Gyertyanfy, *supra* note 50, at 78, n. 77.

<sup>109</sup> *Id.* The court ruling made this conclusion even clearer (and stronger) when it stated that independent online reproduction rights (under section 16 of the German Copyright Act) do not exist. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Guibault & van Gompel, *supra* note 107, at 163.

<sup>112</sup> *Id.*

<sup>113</sup> See CELAS GmbH v. MyVideo Broadband S.R.L., Oberlandesgericht [OLG] [Court of Appeal] Apr. 20, 2010, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 709 (2010) (Ger.). See also Bundesgerichtshof [BGH] [Federal Court of Justice] Pending case Az. I ZR 116/10 (Ger.).

<sup>114</sup> See ELIAMEP STUDY, *supra* note 34, at 35.

<sup>115</sup> *Id.* (reporting that none of the interviewees, responding on behalf of CELAS and PAECOL, confirmed whether or not these new entities should be considered as exclusive agents of EMI's and Sony's repertoires). As the Study observes, one should not rule out the possibility of these music publishers retaining the right to grant relevant licences themselves. *Id.*

<sup>116</sup> *Id.* at 30.

mechanical rights of EMI's Anglo-American repertoire since, as stated on its website, these rights are only available through CELAS or CELAS approved agents.<sup>117</sup> The status of exclusivity seems to be very ambiguous and misleading also for other collecting societies, some of which still describe CELAS as the exclusive licensor of the EMI repertoire.<sup>118</sup>

Therefore, it can reasonably be inferred that, due to the heavy lack of transparency on such an important issue, commercial users might have entered into agreements with CELAS, assuming that CELAS exclusively represented the EMI repertoire for online exploitations.

### 3. Equal Treatment of Music Repertoires

Finally, some emphasis should be placed on the issue of equal treatment of music repertoires, whenever a collecting society is mandated to play both the role of specialized online rights manager for a major international music publisher and that of licensor of its own domestic repertoire.

For instance, this has clearly happened in the case of the PEDL initiative for the E.U.-wide management of the Warner Chappell music repertoire.<sup>119</sup> Under the model agreement made available by Warner Chappell, every E.U. collecting society is granted—on a (truly) nonexclusive basis—the possibility of managing the publisher's Anglo-American repertoire, on condition that the society ensures conditions of efficiency, transparency and accountability in its services.<sup>120</sup>

According to the principle of nondiscrimination embodied in the 2005 recommendation of the E.U. Commission, collecting societies have an obligation to treat all rights holders equally in relation to all elements of the management service provided.<sup>121</sup> This means that societies granting licences under the PEDL agreement should afford the same treatment to both their domestic repertoire and Warner Chappell's music repertoire. To the contrary, it is reported that the PEDL initiative challenges this principle openly since Warner Chappell imposes more favorable licensing terms for the management of its repertoire to the collecting societies involved in the initiative (e.g., maximum commission fees and absence of deductions for cultural and social purposes from its repertoire's revenues).<sup>122</sup>

It should be emphasized here that the views the E.U. Commission recently took on regarding nondiscrimination of music repertoires are clearly contradictory. In its 2005 recommendation, as we have seen, the Commission restated the principle of nondiscrimination between categories of rights holders and looked at it as one of the key principles that national collecting societies should have followed.

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<sup>117</sup> CELAS, *supra* note 56. The CELAS website provides:

CELAS provides a one-stop-shop for pan-European licensing. It is responsible for licensing the rights of EMI Music Publishing throughout Europe when those rights are used in an online or mobile service. CELAS will issue a single new licence to cover exploitation of this repertoire on a pan-European basis. *As of 1st January 2007 these rights are only available through CELAS or via CELAS approved agents.*

*Id.* (emphasis added).

<sup>118</sup> See ELIAMEP STUDY, *supra* note 34, at 30 (reporting that one of the collecting societies interviewed by the Study's authors (SABAM, Belgium) described CELAS as the exclusive licensor of EMI's repertoire).

<sup>119</sup> See *supra* Section III.A.

<sup>120</sup> See ELIAMEP STUDY, *supra* note 34, at 32–33.

<sup>121</sup> See Recommendation of Oct. 18, 2005, *supra* note 21, at 56 (according to which “[t]he relationship between collective rights managers and right-holders, whether based on contract or statutory membership rules should be based on the following principles: (a) any category of right-holder is treated equally in relation to all elements of the management service provided . . .”).

<sup>122</sup> See ELIAMEP STUDY, *supra* note 34, at 33 (referring to a presentation made by European Grouping of Societies of Authors and Composers (“GESAC”), “Collective management as regards cross-border music services,” at a conference organized by the Association Belge pour le Droit d’Auteur, Brussels, March 9, 2009).

Nondiscrimination has strong justifications at both the international and national levels.<sup>123</sup> At the international level, nondiscrimination is a guarantee for foreign rights holders and reflects the well-known principle of national treatment and formal reciprocity embodied under international copyright treaties.<sup>124</sup> At the national level, nondiscriminatory conditions of tariffs and distribution of royalties are a guarantee for national rights holders in a legal context in which most European collecting societies enjoy a de jure or de facto monopoly and are not allowed to refuse licenses to customers.<sup>125</sup>

Unfortunately, in an important antitrust analysis of the European music sector, which preceded Universal's acquisition of BMG in 2007, the Commission openly contradicted the enforcement of the principle it had advocated and restated in its 2005 recommendation.<sup>126</sup> Surprisingly, when analysing the issue of nondiscrimination between repertoires, the analysis at issue assumed naturally (as if it were not a sensitive issue) that nondiscriminatory tariffs and the general obligation to license would likely be abandoned, at least in the digital environment, where collecting societies are expected to adopt the mere role of agents and service providers for the publishers.<sup>127</sup> As soon as the transition to the new online licensing regime will be completed through the full right holder withdrawal of online rights—this was the Commission's conclusion on that occasion—collecting societies will no longer act in the traditional context of their usual regulatory frameworks.<sup>128</sup>

## **V. Independent Management of All Online Music Rights by Vertically Integrated Rights Holders**

A short digression on the role that independent copyright management plays in the online music sector is of crucial importance to understand where the (still unaccomplished) restructuring of online rights management in the European Union is leading.

It should always be borne in mind that the legitimate supply of online services presupposes the clearance of both copyright and recording (i.e., so called “neighbouring”) rights. In the E.U. legal framework performing artists and recording producers enjoy, for their performances and for the sound recordings that incorporate such performances, respectively, the same rights that authors (and, indirectly, music publishers) enjoy on the use of their works.<sup>129</sup> This means that three layers of full property rights protection coexist on the same digital goods exploited in the context of online music services.

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<sup>123</sup> See Gyertyanfy, *supra* note 50, at 63.

<sup>124</sup> *Id.*

<sup>125</sup> See Dehin, *supra* note 17, at 223–24 (emphasizing that the principle of nondiscrimination, which ensures a regime of identical tariffs for any kind of music work, is also beneficial to commercial users, who are protected against unjustified discriminatory treatment that can benefit their competitors). See also Case C-52/07, Kanal 5 Ltd., TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM), 2009 OJ (C 32) 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:032:0002:0003:EN:PDF> (finding that it was appropriate to verify whether the application of differentiated licensing terms for private and public broadcasters by Swedish collecting society STIM was reasonable in relation to the economic value of the service provided by that organization). As held by the Court, it should be ascertained whether differentiated licensing fees constitute a discriminatory practice under article 82 of the EC Treaty (now article 102 of TFEU), which prohibits abuses of dominant position. *Id.*

<sup>126</sup> Universal/BMG Music Publ'g Decision, *supra* note 11.

<sup>127</sup> *Id.* at 50.

<sup>128</sup> *Id.*

<sup>129</sup> See Council Directive 2001/29, *supra* note 1, art. 2–3. The subject matter of the rights related to copyright (or “neighboring” rights) was harmonized at E.U. level by Directive 92/100/EEC, 1992 O.J. (L 346) 61, which was recently replaced (with no substantive changes) by **Directive 2006/115/EC**, art. 7–9, 2006 O.J. (L 376) 28.

The type of protection granted to performances and sound recordings evolved over time and became as strong as it is today with the advent of the digital environment. The emergence and the fast development of digital technologies and of a new medium like the Internet raised unprecedented challenges for the management of all music rights, mostly due to the ubiquitous and fully decentralized (or “point-to-point”) nature of online communication. In this new scenario, the perfect character of digital copies embodying sound recordings placed a strong emphasis on the second and third layers of music copyright protection by challenging the investments of record companies and the reward for performing artists conferred by recording rights.<sup>130</sup>

The advent of digital technologies made it possible for digital (i.e., intangible) copies to become a perfect substitute for the physical (i.e., tangible) copies. Such perfection inevitably affected (and almost disrupted, as some would say) the market for sale of physical records, which was the primary form of exploitation of music works for the recording industry. In the analog world, whenever sound recordings were used in an intangible form (i.e., over the air) through radio or television broadcasts, these uses were clearly viewed as a case of secondary exploitation, in comparison to primary physical exploitations.<sup>131</sup> In the digital environment, instead, the dematerialized use of sound recordings on the Internet became a form of primary exploitation itself, having the potential to replace, or at least to dramatically reduce the scope of, markets for physical records. The distinction between primary and secondary exploitation is relevant here because it explains why, in the predigital era, neither U.S. copyright law nor the E.U. legal framework conferred protection to secondary (i.e., intangible) forms of exploitation of music performances and sound recordings through the recognition of full property rights.<sup>132</sup>

At a time when intangible copies on the Internet became nearly perfect substitutes for tangible copies and started threatening their primary exploitation in the offline world, the record industry successfully lobbied for legislative upgrades that eventually resulted in the recognition of exclusive rights covering the interactive making available of digital sound recordings to the public under both U.S. and E.U. law.<sup>133</sup> As a result, the law ended up conferring to second- and third-layer rights holders the power to control whether or not their performances and sound recordings can be made available legitimately on the Internet.

Even if the 2005 recommendation applied to copyright and recording rights alike, so far its impact has been perceived only in the field of author and publisher rights management.<sup>134</sup> The Commission’s action does not seem to have altered the management of music performer and record producer rights.

The impact of the restructuring of online rights management is negligible since European collective rights managers of sound recording rights have not established an advanced system of reciprocal representation. In addition to that, it must be considered that record producers have traditionally managed their rights in sound recordings on an individual basis, after having acquired the rights of performing artists in their performances at the time of the record production. To be more precise, record companies normally grant individual blanket licences for their reproduction rights and their (online) rights of making recordings available to the public interactively. Collective licences are

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<sup>130</sup> See Marco Ricolfi, *Individual and Collective Management of Copyright in a Digital Environment*, in *COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH* 283, 287 (Paul Torremans ed., 2007).

<sup>131</sup> *Id.* at 290–91.

<sup>132</sup> Ricolfi emphasizes that the type of copyright that protects sound recordings under U.S. law, before the adoption of the Digital Performance Rights in Sound Recordings Act of 1995 covered acts of reproduction and distribution without extending protection to public performances, which were clearly viewed as forms of secondary (and indirect) exploitation (i.e., uncompensated radio and TV broadcasts were meant to enhance a sound recording popularity and to lead to an increase of record sales). In the European Union, instead, rights holders in sound recordings and music performances were granted a mere (and limited) right to remuneration in relation to acts of communication to the public of their sound recordings. Digital Performance Rights in Sound Recordings Act of 1995, 17 U.S.C. § 106(6) (2006); Ricolfi, *supra* note 130, at 290. See also GORMAN & GINSBURG, *supra* note 16, at 686.

<sup>133</sup> See, e.g., 17 U.S.C. §§ 106(6), § 114(d); Council Directive 2001/29, *supra* note 1, art. 3.2.

<sup>134</sup> See ELIAMEP STUDY, *supra* note 34, at 22.

granted by record producers' collective rights managers for the rights of communication to the public and for broadcasting and "simulcasting" rights.<sup>135</sup> This means that, to offer legitimate online music services, commercial users need to make additional deals with all recording producers holding online rights in the recordings they use so as to supplement the authorizations granted by collecting societies and/or new E.U.-wide specialized agents managing author and publisher rights.

The move towards monorepertoire collective management for the publishing rights (i.e., authors' and publishers' rights) should therefore be contextualized and correlated to the pre-existing, strongly individualized management of recording rights in the digital environment and to the strategic power of control that ownership of these rights confers. It seems evident to me that the progressive abandon of the traditional collective management schemes was mainly designed to let major international music groups manage their publishing rights in the same way as they administer their recording (i.e., second- and third-layer) rights on a multinational basis through their subsidiaries.

The bold move of the E.U. Commission towards monorepertoire collective management was intended to be mostly beneficial for the four international media conglomerates which own seventy percent of the world music repertoire and group together the major publishing companies and the major recording companies (i.e., EMI, Sony, Universal Music and Warner). Indeed, these vertically integrated rights holders hold an ideal position to package all necessary rights (i.e., publishing *plus* recording rights) in their repertoires and to sell them to commercial users through E.U.-wide monorepertoire blanket licences issued and enforced by their newly established centralized agents.

Perfect centralization and individualization of online rights management by specialized agents of international major music groups is not a reality yet, however. This is mainly due to structural problems of old fashioned copyright ownership regimes and management practices developed for mechanical and public performance rights at the national level. However, that seemed to be the ultimate objective sought by the recent structural change of licensing models in the European Union. Interestingly, such conclusion is not a matter of conjecture. To the contrary, this conclusion can be easily found in the detailed and lengthy review of the E.U. Commission regarding the above mentioned merger between Universal and BMG in May 2007.

In analyzing the potential consequences of a merger between Universal Music Publishing and BMG, the Commission acknowledged that the publishing and the recording music markets were widely dominated by the above mentioned international media conglomerates through their publishing and recording subsidiaries (or "sister companies," as the Commission defined them in its review).<sup>136</sup> The Commission measured the market shares of the two merging parties and of the other competitors in all relevant markets, including the specific segments of publishing rights, recording rights and online rights. The final decision on this case observed in particular that, due to a uniquely strong integration of its publishing and recording businesses, Universal, after the proposed merger, could have exerted control over a large percentage (almost fifty percent) of the "must have" Anglo-American repertoire in the new online music sector.<sup>137</sup>

For this reason the Commission decided to clear the merger only after Universal's submission of a divestiture package for important music catalogues of Anglo-American works, which included not only online rights but also the whole publisher's copyrights (i.e., mechanical, performance, synchronisation and print rights) and contracts with authors.<sup>138</sup> The circumstance that, through the withdrawal of its music repertoire from the system of reciprocal representation, Universal would have gained pricing power that was previously kept in the hands of local collecting societies forced the Commission to act very cautiously in the merger approval. As observed in the final decision, the higher concentration of market power deriving from the merger would have given Universal an easy

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<sup>135</sup> See *Creative Content*, *supra* note 3, at 5.

<sup>136</sup> See Universal/BMG Music Publ'g Decision, *supra* note 11, at 18–19, 71 (noting that this merger did not include the record business of BMG, which was previously acquired by Sony).

<sup>137</sup> See Commission Decision 2007/595, of 22 May 2007 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement, 2007 O.J. (L 230) 12, 13 (EC).

<sup>138</sup> *Id.* at 14.

chance and a high incentive to increase prices for online rights on the most commercially valuable repertoire.<sup>139</sup>

What matters here, in more general terms, is the assumption (or prophecy) that the Commission's cautious conclusion was based upon:

After the re-structuring of the online rights market, all vertically integrated music companies will in the future be able to negotiate the access to the combined package of recording rights and publishing rights including fully and partly owned publishing rights for online applications. The reason for this is that both categories of rights are held and controlled by the same undertaking and the customers are also the same. An online music provider will therefore have to negotiate with a music company whose market power will derive from the titles it controls either by recording rights or by publishing rights.<sup>140</sup>

In my view, these statements are clear enough to prove that the ultimate objective of the restructuring of online rights management was that of facilitating the business practices and accommodating the economic needs of the major international music groups in their long-lasting struggle for independence from national collecting societies.<sup>141</sup>

In opting for a pan-European monorepertoire licensing model, the Commission seemed to act as an ally of major music publishers in their attempt to minimize the economic impact of the royalty collecting services of European collecting societies on the turnover of their recording businesses, which dramatically were hit by illegal file sharing activities and scarce profitability of online music businesses in Europe. As shown in the next Section, however, the Commission did not make the shift from collecting society control to corporate control plausible, nor did it consider carefully the negative effects of such a shift for society at large.

## VI. Current Scenarios

In the previous Section, I argued that the ultimate aim of the new E.U.-wide monorepertoire licensing models in the online music sector was to enable (or at least to facilitate) the vertically integrated management of publishing and recording rights, mostly to the benefit of the multinational music industry. This Section discusses pros and cons of the implementation of the new online rights management models and identifies prospective winners and losers in the scenarios that have materialized so far.

### A. Major Music Groups: A Bold Move Towards Independent Rights Management

The creation of strong business partnerships with new licensing arms of the major collecting societies in Europe (i.e., PRS, GEMA, SACEM and SGAE) placed major music publishers in a position to directly negotiate all the conditions of management of their online rights, obtaining a preferential regime which contradicts the above mentioned principle of nondiscrimination between rights holders and their repertoires.

However, it would be misleading to present this strong alliance between major publishers and major collecting societies as a sudden or unexpected breakthrough. A preferential regime for the repertoires of the major music publishers was already granted, to a certain extent, through the fixation of lower commission fees for the management services provided by collecting societies for the

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<sup>139</sup> *Id.* at 13.

<sup>140</sup> See Universal/BMG Music Publ'g Decision, *supra* note 11, at 71.

<sup>141</sup> See Gyertyanfy, *supra* note 50, at 77–79 (reaching a similar conclusion).

clearance of major music publishers' mechanical rights under the so called Cannes Agreements.<sup>142</sup>

This preferential treatment was linked to a centralized rights clearance system for mechanical rights developed in the European Union as of the 1970s.<sup>143</sup> At that time, the larger Western European collecting societies started clearing mechanical rights for the whole volume of records produced by the four or five major international record producers for all E.U. countries by themselves (i.e., excluding other European collecting societies from this business).<sup>144</sup> Because, in the case of vertically integrated music groups, the entity owning the major record producer is also (directly or indirectly) the owner of the publishing rights, the licence fees paid by record producers to the collecting society are allocated to the publishing branch of the same major after deduction of management fees.<sup>145</sup> As a result of the Cannes agreements, these management fees are lower in the case of a major music publisher.<sup>146</sup>

More generally, major publishers have been able to deeply influence the decision making process of music rights management through the participation of their representatives in the activities and in the resolutions of the governing bodies of national collecting societies. As provided under the Common Declaration on Governance in Collective Management Societies and on Management of Online Rights in Music Works, issued by the International Confederation of Music Publishers ("ICMP") and the European Grouping of Societies of Authors and Composers ("GESAC") in 2006, now one-third of the seats on the board of directors of collecting societies is reserved for music publishers.<sup>147</sup>

The new monorepertoire licensing models in the online music sector indisputably increase the bargaining power of major music publishers, especially in their relationships with the specific collecting societies (or subsidiaries of them) they appoint as their exclusive or nonexclusive licensing agents. Major music publishers can easily dictate the adoption of licensing and management conditions for their repertoires (for both online or offline uses) by threatening the withdrawal of their online rights and repertoires, which would lead to significant losses in the turnover of the licensing entities involved.<sup>148</sup>

As pointed out above, the enhanced subjection of collecting societies to the leverage of major publishers inevitably challenges the well-known principle of equal treatment (or nondiscrimination) between repertoires and distinct categories of rights holders.<sup>149</sup> The circumstance that the 2005 recommendation restated the principle with no practical effects on the operation of new rights management organizations raises doubts about the adequacy of a mere soft law instrument for the safeguard of individual authors' and small music publishers' interests.

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<sup>142</sup> See Frabboni, *supra* note 24, at 385–88. Originally negotiated in 1997 with all collecting societies in Europe, and renewed in 2000, the Cannes Agreement between major music publishers and mechanical copyright collecting societies was renegotiated and renewed in 2002. This was an extension of the previous agreements and concerned in particular the maximum administration fees that collecting societies could charge their members for services of rights clearance concerning reproduction of sound recordings on physical carriers.

<sup>143</sup> *Id.* at 386. See also Gyertyanfy, *supra* note 50, at 60.

<sup>144</sup> See Frabboni, *supra* note 24, at 386 (explaining that the practice of centralized agreements for the clearance of mechanical rights is based on an extensive interpretation of the reciprocal representation agreements concluded by collecting societies and on the grounds of the well established concerted negotiation taking place between BIEM (umbrella association of mechanical copyright collecting societies) and IFPI (international association of record producers), which contract on behalf of their members).

<sup>145</sup> See Gyertyanfy, *supra* note 50, at 60.

<sup>146</sup> See ELIAMEP STUDY, *supra* note 34, at 95–96.

<sup>147</sup> See Dehin, *supra* note 17, at 229. See also ELIAMEP STUDY, *supra* note 34, at 96.

<sup>148</sup> See ELIAMEP STUDY, *supra* note 34, at 96.

<sup>149</sup> See *supra* Section IV.B.3.

## B. Collecting Societies and the Indirect Threat to Cultural Diversity

National collecting societies excluded from the small circle of E.U.-wide licensors of major publishers' repertoires for digital uses are definitely the most affected stakeholders in the new scenario. Many European collecting societies openly contested the major international music publishers' direct involvement in the organization of new licensing bodies and argued that the loss of mandates for the administration of online rights is likely to reduce their turnover significantly.<sup>150</sup> Moreover, due the decreased number of works managed, these societies claimed that their administration costs would have increased, causing a subsequent reduction of revenues for local authors and music publishers and an inevitable contraction of the culture-supporting tasks that all of them have an obligation to perform under their national laws, reciprocal representation agreements or by laws.<sup>151</sup>

A recent study on collecting societies and cultural diversity (the ELIAMEP Study) found that the entrustment of major publishers' rights to specialized online rights managers will affect mainly the functioning of small and medium sized collecting societies.<sup>152</sup> The study argued that—deprived of the Anglo-American repertoire for online exploitations—the economic sustainability of such societies is likely to be seriously endangered with the predictable growth and expansion of the (still immature) E.U. online market.<sup>153</sup> In the absence of major music repertoires to manage, the profitability of local collecting societies will largely depend on the volume of their remaining repertoire and their commercial appeal.

The ELIAMEP Study evidenced that the music repertoires of the smaller Western European countries and of all Eastern European member states have mostly a local diffusion and do not easily penetrate European markets, for both cultural and economic reasons.<sup>154</sup> To reach this conclusion, the study measured and compared the economic values of the domestic repertoire of a selected number of European countries (the United Kingdom, Germany, Italy and Belgium) by deducting foreign repertoires' shares from the total revenues of each national collecting society (respectively: PRS for Music, GEMA, SIAE and SABAM) and taking account of what each society received for uses of its repertoire abroad (in the European Union as well as in the rest of the world). This comparison clearly revealed that the presence of a wide range of foreign repertoires in the E.U. territory was very limited and music repertoires are exploited mostly at the local level, with the big exception of the international (i.e., Anglo-American and Latin American) repertoire.<sup>155</sup>

The withdrawal of the online rights of the Anglo-American repertoire from the mandates conferred on local collecting societies constitutes a potential threat for local collecting societies and for their music. The economic consequences of the major publishers' withdrawals are still limited

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<sup>150</sup> See ELIAMEP STUDY, *supra* note 34, at 22–23 n.24 (making reference to the Joint Position of collecting societies AEPI (Greece), AKKA-LAA (Latria), AKM (Austria), Artisjus (Hungary), Austro Mechana (Austria), BUMA/STEMRA (Netherlands), EAU (Estonia), HDS (Croatia), IMRO (Ireland), KODA (Denmark), LATGA-A (Lithuania), Musicautor (Bulgaria), OSA (Czech Republic), SABAM (Belgium), SAZAS (Slovenia), SOZA (Slovakia), SPA (Portugal), STEG (Iceland), TONO (Norway), UCMR-ADA (Romania), and ZAIKS (Poland) on the Recommendation of October 18, 2005).

<sup>151</sup> See Dehin, *supra* note 17, at 224 (noting that collecting societies within which there is a high degree of solidarity among members apply social and cultural deductions on rights holders' revenues); Gyertyanfy, *supra* note 50, at 66 (recalling that collecting societies have agreed so far to limit deductions to a maximum of ten percent of all collected revenues).

<sup>152</sup> See ELIAMEP STUDY, *supra* note 34, at 97–98.

<sup>153</sup> *Id.* at 97.

<sup>154</sup> *Id.* at 98–106.

<sup>155</sup> While measuring intra-European trade flows for each of the above mentioned societies, the ELIAMEP Study found that PRS for Music's revenues coming from other E.U. collecting societies were 6.71 times higher than what PRS distributed to E.U. societies. As for the repertoire revenues that PRS for Music received from foreign societies, in 2008, 60.9 percent came from other E.U. member states, whereas fifteen percent came from the United States. *Id.* at 89–91.

today since the licenses and revenues related to online music services remain quantitatively modest.<sup>156</sup> However, this situation has been changing quickly as a result of the predictable expansion of digital music markets following the growth of broadband Internet services in Europe.<sup>157</sup>

The fragmentation of repertoires stemming from the centralization of online rights management for single publishers' music titles gives pan-European commercial exploiters a high incentive to seek authorization for the exploitation of only the most commercially appealing repertoires. This entails concrete risks of marginalization for local repertoires that are certainly higher for smaller domestic repertoires, like those of Eastern European countries and of Western European countries, such as Greece, Portugal, the Netherlands, Belgium and the Scandinavian countries.<sup>158</sup>

The only means that small societies have at their disposal in order to face the competition of the biggest repertoires and of the wealthiest rights managers is to improve the quality of their services (even from a technology related perspective) and to create regional hubs for the smooth licensing of joint music repertoires.<sup>159</sup>

As things stand, then, it seems fair to conclude that a prospective problem of preservation of and promotion of cultural diversity undoubtedly exists and E.U. lawmakers should take it into consideration in their next moves, as constitutionally prescribed by a cross-sectional clause of TFEU article 167.<sup>160</sup>

### **C. Commercial Users and Fragmentation of Repertoires**

The biggest commercial users of digital music (i.e., those who are able to devise and launch pan-European services) should have been the main beneficiaries of the restructuring of online rights management in the European Union. However, very few among these users seem to be satisfied with the fragmentation of music repertoires stemming from the withdrawal of major publishers' rights from the system of reciprocal representation.<sup>161</sup> Major retailers of online music complained that

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<sup>156</sup> *Id.* at 39, 52, 63, 82 (observing that the value of 2007 digital music sales on the total value of recorded music sales was six per cent in Belgium, 5.5 percent in Germany, 7.2 percent in Italy, and 8.3 percent in the United Kingdom).

<sup>157</sup> Email interview with Gabriela Lopes, Int'l Fed'n of the Phonographic Indus. (IFPI), Dir. of Mkt. Research & Analysis (Mar. 22, 2011) (providing updated information on online music revenues in Europe between 2007 and 2010). According to IFPI figures, in 2010 the volume of digital music sales on the total value of recorded music sales in the countries examined in the ELIAMEP Study was, respectively, 9.2 percent in Belgium, 12.6 percent in Germany, 15.3 percent in Italy and 25.2 percent in the United Kingdom. *Id.*

<sup>158</sup> See Frabboni, *supra* note 24, at 395 (emphasizing that the E.U. Commission was fully aware of the problems of economic sustainability that the adoption of a pan-European monorepertoire licensing model would have created for all those collecting societies deriving a large portion of their income from licensing foreign repertoire). See also *Commission Study of July 7, 2005*, *supra* note 2, at 44.

<sup>159</sup> See *supra* Section III.B.

<sup>160</sup> See TFEU, *supra* note 28, art. 167(4) ("The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."). See also Gyertyanfy, *supra* note 50, at 71 (criticizing the fact that word "culture" does not appear in the nineteen paragraphs and in the preamble of Recommendation of October 18, 2005).

<sup>161</sup> Nokia (i.e., one of the world's largest mobile phone manufacturers and provider of innovative digital music services) was definitely one of the very few commercial users having publicly disclosed its satisfaction with the pan-European monorepertoire approach to music licensing. In its intervention at the E.U. Commission Public Hearing on the Governance of Collective Rights Management in the European Union held in Brussels on April 23, 2010, Nokia reported it had experienced "good progress in reforming the earlier national-monopoly based copyright licensing regime" and it found the 2008 CISAC decision helpful. On that occasion, Nokia mentioned the successful example of its "Nokia Comes with Music" service, which gives its mobile phone users unlimited access to music downloads for a certain period (typically one year) at the end of which the consumer can keep everything she has downloaded. For this service, Nokia entered into pan-European licensing agreements with PRS for Music, Chrysalis Music, Peer Music, Sony/ATV and Warner Chappell. See *Public Hearing on the Governance of Collective Rights Management in the EU, Brussels*, EUROPEAN COMMISSION, [http://ec.europa.eu/internal\\_market/copyright/management/management\\_en.htm#hearing](http://ec.europa.eu/internal_market/copyright/management/management_en.htm#hearing) (last visited Mar. 27, 2011). See also *Press Release: PRS for Music, PRS for Music, Chrysalis Music, peermusic, Sony/ATV*,

fragmentation of repertoires obliges them to negotiate and enter into multiple licensing agreements with different entities in order to clear all those rights that, under the old fashioned system, they could easily obtain through a monoterritorial blanket licence from each national collecting society. For instance, one of the most popular providers of music downloads through its iTunes Music Store, Apple, and a large German retailer of music downloads, music videos and ringtones like Deutsche Telekom expressed their frustration in the context of public consultations held by the E.U. Commission.<sup>162</sup> Both online music retailers emphasized that their licensing businesses were much smoother before the advent of the new regime and showed a strong preference for the previous monoterritorial global repertoire licenses.<sup>163</sup>

As the new licensing scenario stands, a pan-European service provider wishing to offer the repertoire of the major international music publishers needs to negotiate with their different specialized agents and resort to the traditional management services of national collecting societies (or to one of their regional hubs) if it intends to enrich its service or platform with local music repertoires. This monorepertoire licensing system evidently requires any lawful commercial user like Apple to identify beforehand which music titles he wants to use and which entity manages those titles; and this seems an almost unbearable task.

Commercial users still have to face general legal uncertainty as to the identity of the collective rights managers entitled to grant licences, and the exact scope of such licences (especially in case of split copyright ownership, in which the presence of multiple rights holders makes it difficult to understand who controls the necessary rights). In replying to the 2009 consultation of the E.U. Commission regarding online distribution of music, YouTube (Google) and Apple raised the issue that, due to repertoire fragmentation, commercial users do not know exactly which rights they are clearing or purchasing.<sup>164</sup> This is due to the unfortunate circumstance that many collective rights organizations (still accustomed to the practice of granting blanket licenses giving access to global music repertoires) are largely unable to provide commercial users with sufficient repertoire data identifying the relevant rights owners in a certain song. This is particularly unfortunate, YouTube stressed, for devisers of user-generated platforms, who need to know the repertoire data in advance in order to monetize content.<sup>165</sup>

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and Warner/Chappell Music support Nokia's European Roll Out, PRS FOR MUSIC (May 14, 2009), <http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/InnovativeComesWithMusicserviceextendingtootherEU.aspx>.

<sup>162</sup> See, e.g., *Deutsche Telekom Reply to the Commission's Consultation Regarding the Online Distribution of Music* (June 30, 2009), available at [http://ec.europa.eu/competition/consultations/2009\\_online\\_commerce/deutsche\\_telecom\\_ag.pdf](http://ec.europa.eu/competition/consultations/2009_online_commerce/deutsche_telecom_ag.pdf) [hereinafter *Deutsche Telekom Reply*]. See generally *Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing* (May 26, 2009), available at [http://ec.europa.eu/competition/sectors/media/online\\_commerce.html](http://ec.europa.eu/competition/sectors/media/online_commerce.html) (reporting the opinions expressed by Apple in the debate on online retailing of music).

<sup>163</sup> See, e.g., *Deutsche Telekom Reply*, *supra* note 162. Deutsche Telekom writes:

Although Deutsche Telekom is generally interested in multi-territory licenses, there is no advantage for Deutsche Telekom if such multi-territory licenses must be acquired from a multitude of right-owners with regard to certain works and/or music repertoires. The efforts to find out the numerous rights owners (co-lyricists, co-composers, co-publishers) for each music work contained in broad music repertoire offers is higher than the effort for the acquisition of global repertoire licenses from a limited number of collecting societies.

*Id.*

<sup>164</sup> See *Apple/iTunes Response to the Commission's Consultation Regarding Opportunities in Online Goods and Services*, available at [http://ec.europa.eu/competition/sectors/media/apple\\_itunes\\_contribution.pdf](http://ec.europa.eu/competition/sectors/media/apple_itunes_contribution.pdf); *Google/YouTube Reply to the Commission's Consultation Regarding the Online Distribution of Music* (July 15, 2009), available at [http://ec.europa.eu/competition/consultations/2009\\_online\\_commerce/google\\_youtube.pdf](http://ec.europa.eu/competition/consultations/2009_online_commerce/google_youtube.pdf) [hereinafter *Google/YouTube Reply*].

<sup>165</sup> See *Google/YouTube Reply*, *supra* note 164, at 2. Unsurprisingly, in its attempt to legalize the uploads of YouTube's users in Europe, Google is still negotiating and obtaining the old fashioned monoterritorial licences for the clearance of the online rights of public performance for global music repertoires with national collecting societies such as SACEM (France) and SIAE (Italy). As pointed out in the main text, these societies still manage such rights, on the grounds of their reciprocal representation agreements, even for the Anglo-American repertoires of major international music groups.

For now, the only specialized rights manager who can license full packages of rights for digital uses in Europe, due to its structure, is SGAE, acting as de facto exclusive manager of Sony and Peer Music's Latin American repertoire, PEL. The other specialized agents can *directly* license the sole mechanical shares of their Anglo-American repertoire. However, for the clearance of public performance shares of the same repertoire, online music providers still need to enter into agreements with the national collecting societies.<sup>166</sup>

Finally, the legal uncertainty that still characterizes the licensing practices of specialized agents like CELAS and of national collecting societies undeniably stifles large investments on pan-European online platforms.

An emblematic example of uncertainty (and deceptiveness) at the expense of a big commercial user was given by a E.U.-wide rights clearance solution offered by Dutch collecting society BUMA/STEMRA to U.S.-based online music retailer Beatport.<sup>167</sup>

In July 2008, BUMA/STEMRA concluded with Beatport a E.U.-wide license granting access to the entire global music repertoire for online uses. It was the very first time that a *multirepertoire* license was issued by a collecting society on a European scale. This initiative triggered the almost immediate reaction of PRS and GEMA, which sued BUMA/STEMRA to bring the offering of this licence to an end. PRS succeeded in claiming firstly before the District Court of Haarlem (Netherlands) and then before the Court of Appeal of Amsterdam that the reciprocal representation agreement signed by these two organizations had given BUMA no right to manage the music repertoire of PRS outside the Dutch territory.<sup>168</sup> GEMA obtained a similar court ruling before the Court of Manheim (Germany) in August 2008 in respect of the reciprocal representation agreement it had signed with BUMA/STEMRA.<sup>169</sup>

In both cases the rulings enforced the territorial restrictions embodied into the reciprocal representation agreements signed by BUMA/STEMRA with PRS and GEMA and ordered the Dutch collecting society to refrain from granting or applying licensing agreements for the benefit of online users providing music services which were accessible outside the Netherlands.<sup>170</sup> Interestingly, in the Dutch proceedings BUMA sought to take advantage of the E.U. Commission's invalidation of the

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See also Aymaric Pichevin, *Youtube Signs with France's SACEM*, BILLBOARD.BIZ (Sept. 30, 2010), <http://www.billboard.biz/bbbiz/others/youtube-signs-with-france-s-sacem-1004117894.story>; Claudio Tamburino, *YouTube e SIAE, Licenza di Monetizzare*, PUNTO INFORMATICO (July 29, 2010), <http://punto-informatico.it/2958158/PI/News/youtube-siae-licenza-monetizzare.aspx>.

<sup>166</sup> Obviously, commercial users are placed in a much easier position in the rights clearance process whenever one of these agents (e.g., CELAS or IMPEL) sublicenses the performing rights pre-acquired by national collecting societies and bundles them with the mechanical rights.

<sup>167</sup> Guibault & van Gompel, *supra* note 107, at 163–65 (reporting that BUMA/STEMRA publicly disclosed that, under the licence granted, the royalty rates were the tariffs of the countries where Beatport would have concretely exploited the music works, and therefore, the licence would have been a mere implementation of the rights acquired through the system of reciprocal representation).

<sup>168</sup> *Id.* (citing Rb.-Haarlem 19 augustus 2008, KG ZA 08-410, m.nt. (The Performing Rights Soc'y Ltd./Vereniging BUMA) (Neth.), available at <http://www.boek9.nl/index.php?/Prs+vs.+Buma///20609/>; Hof's-Amsterdam 19 januari 2010, 01 KG, m.nt. (Vereniging BUMA/The Performing Rights Soc'y Ltd.) (Neth.) available at

[http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BL4289&u\\_ljn=BL4289](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BL4289&u_ljn=BL4289).

<sup>169</sup> *Id.* at 65 (citing Landesrechtsprechung [LRG] [higher land court] Aug. 25, 2008, 7 O 224/08 Kart, available at [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Landgerichte&Art=en&Datum=2008-8&nr=11180&pos=3&anz=8](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Landgerichte&Art=en&Datum=2008-8&nr=11180&pos=3&anz=8)).

<sup>170</sup> BUMA/STEMRA advocated the legitimacy of its licence for Beatport's pan-European services claiming that the territorial restrictions stemming from the reciprocal representation agreements were *nonenforceable* in the online environment. BUMA argued that online services had a cross-border reach by definition and, as a consequence, that online rights could not have been restricted territorially (as it happens, instead, for offline rights). The court ruling dismissed the argument holding that online rights could not be meant to be included in the scope of the reciprocal representation agreements, since the above mentioned Santiago and Barcelona agreements had expired and were not renewed. See *supra* Section II.A. To cover online rights, according to the court ruling, the parties (i.e., PRS for Music and BUMA) should have signed a new reciprocal representation agreement or amended the pre-existing one.

territorial delineation practices embodied in the CISAC decision, which was issued a few days before the grant of the challenged licence.<sup>171</sup> The court ruling dismissed the argument recognizing that territorial restrictions were still enforceable since they were not invalidated per se by the CISAC decision, but were rather found unlawful because of the concerted method implemented by the EEA collecting societies.

#### **D. What Room for Authors' Individual Management and Start-ups' Collective Management?**

Nowadays, many composers, lyricists and music performers claim the right to manage their online rights individually while being able to entrust (or to continue to entrust) their offline rights to collecting societies. Many individual rights holders today find it convenient to diversify the management of their rights and to authorize uses of their works through more permissive rights management tools like Creative Commons licences.<sup>172</sup> The suitability to apply such more permissive (or "some rights reserved") forms of licensing is also shared by recently launched companies like U.S.-based Magnatune and U.K. start-ups such as Beatpick and Flattr, which adopt new models of compensation for the creators they group and represent.<sup>173</sup>

On both fronts the main question is the same: is the current E.U. Commission's attempt to restructure copyright collective management of any help to these individuals and businesses?

As far as the position of individual authors is concerned, it is still problematic to assert whether a composer or a lyricist in the European Union wishing to split her online rights from the bundle of rights assigned to her current collecting society can effectively do that. Rights holders' freedom to assign their online rights to a licensing entity of their choice was one of the key principles of the Recommendation of October 18, 2005. However, the recommendation was a soft law instrument that had no binding force and could not oblige national collecting societies to allow such split in the management of online and offline rights. A music author certainly enjoys at the individual level the freedom to choose and enroll in a collecting society based in a E.U. member state different from that where she has her economic residence, irrespective of the member state of residence or the nationality of either the collecting society or the right holder. As we have seen, the European Commission firstly sponsored the territorial liberalization of the relationship between authors and collecting societies through its nonbinding 2005 recommendation and subsequently made it mandatory for collecting societies through the 2008 CISAC decision, by ordering the withdrawal of the economic residence clauses from their reciprocal representation agreements.<sup>174</sup>

The possibility of splitting the management of online rights from the management of the other rights assigned to a collecting society, instead, has more complex roots. This freedom was strongly advocated by the 2005 recommendation for the sole withdrawal and transfer of the multiterritorial management of online rights from one collecting society to another. The Commission recommended that, when the management of online rights is transferred, all collecting societies should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded among them.<sup>175</sup>

The 2005 recommendation did not contemplate, instead, the distinct hypothesis of an author wishing to retain her online rights for her own individual management (e.g., under a Creative Commons "Attribution—Noncommercial—No Derivatives Works" licence) while being able to assign

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<sup>171</sup> Guibault & van Gompel, *supra* note 107, at 163–64.

<sup>172</sup> See CREATIVE COMMONS, <http://creativecommons.org> (last visited Feb. 24, 2011).

<sup>173</sup> See BEATPICK, <http://beatpick.com> (last visited Feb. 24, 2011); FLATTR, <http://flattr.com> (last visited Feb. 24, 2011); MAGNATUNE, <http://magnatune.org> (last visited Feb. 24, 2011).

<sup>174</sup> See *supra* Sections II.A and II.C.

<sup>175</sup> See Recommendation of Oct. 18, 2005, *supra* note 21, at 56.

(or to continue to assign) the remaining rights for offline exploitations to a collecting society.<sup>176</sup> The E.U. Commission analyzed this hypothesis in an important antitrust decision in 2002, known as the *Daft Punk* decision.<sup>177</sup> In this case the (two) members of the French band Daft Punk objected to the Commission that collecting society SACEM refused them membership because they intended to individually manage their rights for exploitations on the Internet and through physical formats (e.g., CDs, DVDs, etc). Indeed, SACEM required its authors to assign *all* their rights through the conclusion of standard administration mandates which were viewed by Daft Punk as an unfair commercial practice and as a possible abuse of the dominant position under article 102 of TFEU (former article 82 of the EC Treaty). SACEM advocated its practice by holding that an all-encompassing rights management approach ultimately protected the authors from unreasonable demands of the recording industry and prevented a “cherry picking” of the most valuable rights.<sup>178</sup>

The Commission took the view that the fairest solution to that case lay somewhere in the middle. The decision found it legitimate that SACEM sought to retain control over certain rights that authors intended to exercise certain rights individually. However, the Commission considered that refusing membership was a disproportionate limitation of the authors’ contractual freedom to manage the rights at issue. For this reason, the decision found SACEM’s conduct contrary to EC Treaty article 82 and ordered the French collecting society to grant derogations to the rule of the all-encompassing character of rights assignment on a case by case basis on objective and reasonable grounds. In response to this decision, SACEM amended its by-laws and now allows its members to apply for a limited withdrawal of the rights assigned.

Several collecting societies in Europe did something similar, especially in the wake of the 2005 recommendation, even if they were not legally bound by this instrument and the recommendation did not make any reference to the freedom of individual management for the specific case of online rights. The Commission’s position expressed in the *Daft Punk* case is, therefore, still the benchmark.

On the grounds of the *Daft Punk* precedent and embracing the philosophy of the recommendation, an increasing number of collecting societies in the European Union are exploring the possibility of allowing their members to adopt Creative Commons licences for their online noncommercial uses of their works while making such licensing compatible with the management of commercial uses by the same societies. Such a “dual licensing” policy has already been embraced by collecting societies KODA (Denmark) and BUMA/STEMRA (Netherlands), whereas SIAE (Italy) established a working group to study various licensing solutions for a consistent and constructive coexistence.<sup>179</sup>

As far as new or potential providers of collective rights management services are concerned, we know that in the last years the E.U. Commission sought to remove those legal barriers that restricted rights holders and collective rights managers from choosing freely their territorial ambit of operation and their most suitable business partners within the E.U. territory.

This policy design has inevitably collided with the heavy barriers and discrepancies that exist at the national level as a consequence of the absence of a common regulatory framework (a “common playing field” in the E.U. internal market parlance) that all stakeholders could rely upon.<sup>180</sup> Neither the soft law of the 2005 recommendation nor the ad hoc 2008 CISAC antitrust decision could effectively persuade or oblige, say, Germany to change its strict supervision approach in the regulation of

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<sup>176</sup> *Creative Commons—Attribution-NonCommercial-NonDerivative Licence 3.0 Unported*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-nd/3.0> (last visited Feb. 24, 2011).

<sup>177</sup> See Case 37219, *Banghalter v. SACEM*, 2002 Eur. Comm’n Competition, available at [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/37219/37219\\_11\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf).

<sup>178</sup> Guibault & van Gompel, *supra* note 107, at 141.

<sup>179</sup> See Alberto Grandi, *SIAE, Apertura verso i Creative Commons*, WIRED MAG (Oct. 14, 2010), <http://mag.wired.it/news/siae-apertura-verso-i-creative-commons.html>; *More Opportunities to Promote Their Own Repertoire*, BUMA/STEMRA, <http://www.bumastemra.nl/nl-NL/Pers/Persberichten/pilotCC.htm> (last visited Feb. 24, 2011); Michelle Thorne, *Danish Collecting Society KODA Teams up with CC Denmark*, CREATIVE COMMONS (Jan. 31, 2008), <https://creativecommons.org/weblog/entry/8012..>

<sup>180</sup> See *infra* Section VII.B.

collective management or other continental European countries (Italy, for instance) to open this activity to free market and to dismantle well established legal or de facto monopolies.

Consequently, the possibility for a new company wishing to pursue or to experiment with alternative business models and to enter (implementing one of these models) the territorially unrestricted market of online copyright management services largely depends on the openness and flexibility of the regulatory framework of its country of incorporation. That is why both the aforementioned European start-ups were incorporated in the United Kingdom, in spite of their Italian (Beatpick) and Swedish (Flattr) origins and conceptions.<sup>181</sup>

Strange as it may seem then, unconventional forms of individual and collective online music rights management are currently benefiting, to a certain extent, from the E.U. Commission's reform.

## VII. Future Prospects and Concluding Remarks

The scenarios depicted above show an undeniable situation of chaos, from both a legal and a market related perspective. An unbearable degree of uncertainty still characterizes crucial components of the new rights management architecture for digital music. As this Article suggests, the major multinational music groups should have been the greatest beneficiaries of the radical changes advocated by the E.U. Commission. However, these actors are still facing insurmountable problems while seeking to centralize their E.U.-wide online rights management and to eventually acquire or clear all copyrights and related rights which are needed to establish workable one-stop shops for actual and prospective pan-European online music services.

In my view, such uncertainty is not coincidental. Rather, it is a consequence of the inaccurate and partisan way through which the E.U. Commission proceeded in a politically and culturally sensitive area of copyright law through the enactment of its 2005 recommendation. A radical change of the structure of online collective rights management was sought without intending to pursue any legislative harmonization of the disparate regulatory frameworks governing the establishment and activities of collective rights management organizations at the national level. Moreover, the Commission has not taken into consideration that copyright contract laws and practices vary significantly from country to country and lead to distinct relationships between authors and music publishers and distinct copyright ownership regimes.<sup>182</sup> In particular, the fact that continental European collecting societies followed a union model in protecting authors from the bargaining power of music publishers and in ensuring that authors eventually kept the copyright in their works was largely disregarded.

Regrettably, as we have seen, the European Parliament has not endorsed the adoption in the online music sector of monorepertoire licensing models, even though these models penalize small or medium sized collecting societies and their commercially weaker repertoires. While opting for a market driven solution in a rather solitary enterprise, the E.U. Commission has avoided a truly democratic debate about what the nature, type of governance, functions and ultimate objectives of music rights management organizations should be in the future, namely, in the so called "information society."

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<sup>181</sup> Gianluigi De Stefano, *Il Suono dell'Avvenire*, DOC STOC, <http://www.docstoc.com/docs/46120961/Article-on-il-Sole-24-Ore-Italian-biggest-financial-newspaper-on-Beatpickcom> (last visited Mar. 16, 2011); *The Flattr Story*, FLATTR, <http://flattr.com/about> (last visited Feb. 24, 2011).

<sup>182</sup> See Rita Matulionytė, *Cross Border Collective Management and Principle of Territoriality: Problems and Possible Solutions in the EU*, 11 J. WORLD INTELL. PROP. 467, 470 (2009) (pointing out that important copyright issues such as initial ownership regimes, especially in cases of work for hire, and the definitions of joint work have not been harmonized under E.U. law and cause problems for efficient cross-border collective management of copyright).

I firmly believe that the establishment of a common playing field for copyright collective management through a proper legislative harmonization initiative is indispensable (long as this initiative may take).<sup>183</sup>

If European collecting societies and other licensing bodies are expected to compete with one another on reasonably fair grounds, they should enjoy a uniform legal treatment and be subject to similar administrative duties and burdens (e.g., the pursuit of solidarity or cultural goals), which can greatly influence their profitability.<sup>184</sup>

What is also indispensable, in my view, is a conscious and democratic decision about what the advocated competitive relationship between collecting societies should be about. In other words, should such competition be based on the strengths of management services or—as the E.U. Commission claims today—on the appeal of music repertoires, regardless of how big or commercially valuable they are at the moment?

This seems to me a politically and culturally strategic choice, which should be made carefully and democratically. As things stand in the offline world, music repertoires have very different commercial values and the disproportion between the market power and the territorial penetration of the Anglo-American repertoire and of national repertoires is impressive in Europe. One wonders why E.U. law and policy makers should deliberately facilitate the sole position and rights management model of the music multinational industry, which has been largely incapable of adapting its businesses to the *online* music world in the last ten years. Why should not Europe give all repertoires the chance to be heard and known online, taking its cultural diversity as an advantage and investing on the potential of new technologies for the valorization and wide diffusion of a vast array of music works, and not only the “chart hits” that the Commission seems to exclusively care about?

It was emphasized above that E.U. law and policy makers are constitutionally bound to take cultural diversity into account, and to promote such diversity in their action. In this regard, lawmakers should preferably opt for a licensing model that proves to work smoothly on a pan-European scale and does not end up discriminating and fragmenting commercial users’ and consumers’ legitimate access to music repertoires.

In this alternative scenario, in my view, collecting societies should compete one with the other on the sole grounds of their management services without discriminating between different categories of rights holders.

The European Union has already adopted multiterritorial or “central” licensing solutions which presuppose a single act of rights clearance by commercial users and have an immediate pan-European reach. The legislative adoption of one of these models for the creation of one stop shops in the management of online music rights is the least disruptive and most practical alternative to the currently unrealistic goal of unification of the national copyright systems and to the consequent creation of single E.U. entitlements, which would automatically supersede national rights.

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<sup>183</sup> Surprisingly, this is the same view expressed by GEMA at the E.U. Commission’s *Public Hearing on the Governance of Collective Rights Management in the EU*, held in Brussels on April 23, 2010. On that occasion, GEMA advocated an urgent legislative initiative of the Commission aimed at enacting a directive on collective rights management. The speech delivered in Brussels by the managing director of GEMA’s Department of Broadcasting and Online was very critical of the monorepertoire model that the E.U. Commission has endorsed so far (and that GEMA, through its CELAS and PAECOL subsidiaries, seemed to benefit from). The GEMA representative said:

Who still proposes to introduce competition between collecting societies about licensing deals (and secretly hopes to cut his costs) merely repeats the arguments of yesterday. Whereas the discussion of today is about win-win solutions for all involved stakeholders. . . . During the last ten years we have learned that competition law alone does not provide for solutions. . . . We need a horizontal framework directive that covers all of the activities of collecting societies.

Urban Pappi, *Relationship Between Collective Rights Managers and Commercial Users Intervention at the Public Hearing on the Governance of Collective Rights Management in the EU* (April 23, 2010), available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/hearing20100423/panel\\_3\\_gema\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/hearing20100423/panel_3_gema_en.pdf).

<sup>184</sup> See Guibault & Van Gompel, *supra* note 40, at 138–40. See also Matulionytė, *supra* note 182, at 479–80 (suggesting the adoption of a directive on collective rights management and discussing, in particular, issues that would be worth harmonizing at the E.U. level, e.g. the so-called establishment requirement, deductions for cultural and social purposes, etc.).

This licensing solution for pan-European licensing of copyrighted works already exists under E.U. law and was implemented under the 1993 Satellite and Cable Directive and, more recently, under the 2010 Audiovisual Media Services Directive.<sup>185</sup> Both directives apply, respectively, a principle of private international law known as “country of origin” to broadcast transmission signals and to online transmissions of audiovisual content (mainly digital TV services).<sup>186</sup> In both cases, the logic is that of avoiding the cumulative application of several national laws to a single E.U.-wide act of commercial exploitation of a copyrighted work, by adopting a criterion that identifies a single applicable law.<sup>187</sup> Even though their logic is the same, these two directives implement the principle of the law of the country of origin of the transmission in different ways.

Directive 93/83 adopts a country of emission rule, under which satellite broadcasters must clear copyrights just once, in the E.U. member state from which the programme-carrying signal is uplinked to the satellite under the control and responsibility of the broadcaster (rather than in the various member states where the broadcast is received because of the satellite footprint). By contrast, Directive 2010/13 (which codified the 2007 “modernization” amendment to the 1989 Television without Frontiers Directive) extends a “country of establishment” rule from traditional television services to both interactive and noninteractive online television services. Due to the country of establishment principle, providers of audiovisual media services must comply only with the laws (including copyright law) of the E.U. member state where the service provider is established, rather than with those of the member states where the service can be received.<sup>188</sup>

While adopting a “single law approach,” both these directives took steps to prevent opportunistic location of the television service’s business establishment or of the point of departure of the transmission in a country with particularly lax copyright norms. First, the single law approach applied only to business establishments or transmission points located within the European Union. Second, the Directives embodied measures ensuring a sufficient level of substantive harmonization of member state laws in their respective fields of application. This means that, despite the application of a single national law with E.U.-wide effects on satellite and online TV services, identical or similar conditions for market players in all E.U. member states preclude a “race to the bottom.”

If E.U. law elaborated and then extended the country of origin principle to all kinds of online music services operated within the European Union, then a multirepertoire licence acquired in the territory of the country of the communication’s origin would automatically cover the whole E.U. territory. For a matter of consistency, this principle should be extended also to the licensing of rights in sound recordings, in such a way that a licence obtained from rights holders in sound recordings (or from their collecting societies) would automatically have a pan-European reach.

It goes without saying that E.U. lawmakers would need to determine how to concretely adapt the country of origin principle to the realm of online music services. The criterion identifying the single applicable law could be either the country of upload of the copyrighted content to the server connected to the Internet or the country of establishment of the service provider. These variations on

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<sup>185</sup> Council Directive 93/83/ECC, art. 1.2, 1993 O.J. (L 248) 15, 19 (EC) [hereinafter Directive 93/83]; Directive 2010/13, art. 2, 2010 O.J. (L 95), 1 (EU) (codified version) [hereinafter Directive 2010/13], *replacing (with no substantive changes)* Directive 2007/65, art. 2, 2007 O.J. (L 332), 27 (EC) [hereinafter Directive 2007/65].

<sup>186</sup> See *Creative Content*, *supra* note 3, at 12, 17 (discussing the possible legislative extension of the principle of the country of origin of the transmission principle to the realm of online film deliveries). See also Hannah Wardale, *The New Frontier—The Audiovisual Media Services Directive*, 31 EUR. INTEL. PROP. REV. 336, 338 (2009) (providing an overview of Directive 2007/65).

<sup>187</sup> See Matulionytė, *supra* note 182, at 475–78 (discussing the above mentioned “single law approach” with regard to the applicability of Directive 2000/31, 2000 O.J. (L 178) 1 (EC) (E-Commerce Directive), and Directive 2006/123, 2006 O.J. (L 376) 36 (EC) (Services Directive) to services of collective rights management). As this author concludes, both these directives, which enable service providers to adhere to the single law of their country of establishment, explicitly exclude copyrights and neighbouring rights from their field of application and can hardly be applied to the establishment and functioning of collecting societies. *Id.*

<sup>188</sup> Directive 2010/13, *supra* note 185, art. 2, ¶ 3 (establishing the criteria according to which a media service provider should be deemed to be established in a given member state: e.g., location of the provider’s head office or location of a significant part of its workforce).

the country of origin principle would entail the emergence of distinct scenarios, whose thorough analysis goes beyond the purposes of this Article.<sup>189</sup>

What matters here, in my view, is that the above mentioned risk of a “race to the bottom” in the protection of rights holders—as a consequence of the application of one single national law—would be widely mitigated by the circumstance that member state copyright rules have already been harmonized to a sufficient extent. As this Article has suggested, an even stronger level of harmonization would stem from the creation of a common playing field for collecting societies through the adoption of a directive on collective rights management law.

The pan-European reach of the multi-repertoire licence in the country of origin would derive automatically from the law of such country since, legally speaking, that country would be the only place of use of copyrighted works in the online environment.<sup>190</sup> Under this approach, collecting societies should continue to be bound by the principle of nondiscrimination between different categories of rights holders and repertoires and should continue to rely on reciprocal representation agreements in order to give commercial users access to the global music repertoire.

In this prospective framework, all stakeholders would effectively end up treating the European Union as a “Digital Single Market.” The opportunity for online music providers to offer their services by merely having to clear the necessary online rights in the country where their content is materially uploaded (or where the provider is established), while paying the same price for all music titles, would greatly reduce today’s discriminations between big and small music repertoires, mainstream and local (or niche) repertoires, major recording businesses and small or independent record labels, traditional business models and innovative businesses combining commercial and noncommercial licences. On the rights holders’ front, their freedom to select and join a collecting society of their choice for the management of online music rights in the European Union then would ensure that societies would effectively compete and seek to implement the best management conditions for their members (i.e., both authors and publishers). As for the economic conditions of licensing, fair competition among collecting societies on licence prices would be ensured through the inclusion in the above mentioned regulatory framework on collective rights management law of a principle obliging societies and commercial users to take account of the actual and potential audience of the online content transmission on a pan-European basis in determining the amounts of the payments to be made for the rights acquired.<sup>191</sup>

From a practical perspective, the effects of such a centralized, truly pan-European licensing system would be similar to those of the above mentioned Santiago and Barcelona agreements, the IFPI Simulcasting Agreement and the type of E.U.-wide multirepertoire licence granted by BUMA/STEMRA to Beatport in 2008.<sup>192</sup> From a legal perspective, however, the implementation of

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<sup>189</sup> For instance, E.U. law would need to establish a secondary criterion identifying the single law of a E.U. member state if the service provider establishment or the transmission points were not located within the European Union (e.g., opting for the law of the member state with which the online music service or the non-E.U. provider are most closely connected, in light of, say, the presence of offices or workforce of the same provider).

<sup>190</sup> It goes beyond the scope and the purposes of this Article to discuss the implications of the proposed reform for the determination of the law applicable to copyright infringements affecting works made available online under the above mentioned “single law” principle. This aspect is currently disciplined under Regulation 864/2007, art. 8, 2007 O.J. (L 199) 40 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>. Regulation 864/2007, article 8, provides that the law applicable to a noncontractual obligation arising from the an infringement of an intellectual property right should be the law of the country for which protection is claimed (*lex loci protectionis*). Ideally, to avoid the application of distinct laws to the management of online music rights and the infringement of the same rights, E.U. lawmakers could create an exception to the *lex loci protectionis* rule by embracing the principle of the country of origin of the transmission even for the determination of the law applicable to online copyright infringements.

<sup>191</sup> Directive 93/83, *supra* note 185, recital 17 (containing a similar principle requiring satellite broadcasters and collective rights organizations to take account of all aspects of the broadcast, such as the actual and the potential audience and the language version, in the determination of the licence price).

<sup>192</sup> See *supra* note 40 (recalling the E.U.-wide effects of the Simulcasting Agreement for the licensing of record producers’ rights of simulcasting). See also *Major Step Forward in Cross Border Music Licensing Regime*, IFPI (Apr. 27, 2007),

the law of the country of the transmission's origin in the whole E.U. territory would avoid the recourse to antitrust reviews of contractual territorial restrictions and make the online integration of the E.U. market happen by mere operation of the law.

As this Article has shown, the results of the 2008 CISAC decision have been modest so far and today's persistence of the structural problems of copyright transfer and management at the national level, in spite of the legally binding force of the decision, show that the implementation of E.U. competition law in this area cannot have, as such, constructive consequences. As we have seen, by forcing collecting societies to conclude independently and secretly negotiated agreements for their reciprocal representation on a territorial basis, the Commission's decision dramatically reduced the degree of transparency of the E.U. market for collective management services, treating collecting societies as if they were ordinary businesses.

Therefore, with regard to the territorial dimension of the licensing system at issue, the law would mandate the E.U.-wide character of online music licences in order to avoid artificial restrictions in an intrinsically borderless environment. To a certain extent, the mandatory pan-European dimension of online music licences in the intangible world of copyright would play for diffusion of online music service (and, possibly, for the diffusion of other kind of online content) the same market-integrating function that the exhaustion principle plays at the E.U. level in the real (i.e., tangible) world for the free circulation of physical items embodying copyrighted works in the E.U. territory. To this end, the proposed licensing system would sacrifice the music rights holders' freedom to license their rights on a strictly monoterritorial basis and to geolocalize the legitimate online transmission of their works, recordings or performances, in the same way as E.U. copyright law restricts the national subject matter of the right of distribution when the copyrighted tangible good is placed on the market with the copyright owner's consent.<sup>193</sup>

From an economic and cultural perspective, the advocated reform would greatly emphasize the function of reciprocal representation agreements, through which each collecting society builds up its multirepertoire of "musical offering" while giving national collective rights managers (even the small and medium size ones) a large incentive to compete with one another on the grounds of the quality, speed and innovative character of their services. As the Article has suggested, innovation in this field may also be given by the development of "dual licensing" policies which could facilitate the coexistence of commercial licenses issued by collecting societies and noncommercial licenses individually granted by rights holders for promotional online uses (e.g., on YouTube, social networks, personal Web pages, etc.). It seems evident to me that such an easier and clearer structure of online music rights licensing would ultimately promote European cultural diversity. A wide and legitimate exploitation of highly diversified stocks of music repertoires would be strongly encouraged; small and independent entrepreneurs, who are completely forgotten and discriminated against in today's licensing system, would be given a much greater incentive to invest in online content services and an effective enjoyment of music "without frontiers" (i.e., on a truly European basis) would become feasible through reasonably cheap and equal forms of access to cultural content by the widest portion of E.U. citizens.

Finally, as far as the definition of the rights covering online exploitations, it seems clear that today's archaic distinction between mechanical and public performance rights is no longer justified, neither legally nor economically. It does make sense to keep, for instance, the licensing of streaming music services distinct from that of music downloads, but this should only be an economically relevant distinction, allowing rights holders to price discriminate between licensing solutions corresponding to differentiated forms of exploitation (e.g., randomized Web radio streams like the service Pandora; music downloads from sources such as iTunes and Beatport; ringtones and Nokia's mobile phone downloads). Legally speaking, however, keeping the distinction into force in the online environment has proven to be highly detrimental for the development of a mature market for online creative

(Contd.) \_\_\_\_\_

[http://www.ifpi.org/content/section\\_news/20070427.html](http://www.ifpi.org/content/section_news/20070427.html) (informing about the extension of reciprocal representation agreements among record producers' collecting societies to web-casting and on-demand services).

<sup>193</sup> See Council Directive 2001/29, *supra* note 1, art. 4.2.

content. In my view, online rights management should no longer be based on old fashioned categories of rights which were exercised distinctly and transferred to today's rights holders when composers, lyricists and music publishers (e.g., John Lennon, Paul McCartney and EMI in the 1960s) could not imagine what the online world and the related forms of commercial exploitations would have been about. As we have seen, the simultaneous implementation of both these old fashioned categories in online rights clearance processes has entailed in Europe the risks described by the "tragedy of the anticommons."<sup>194</sup>

I agree with those authors who have called for a radical change in online licensing practices and proposed the worldwide recognition of a new exclusive right of authorization functioning as a single digital transmission right covering all kinds of online and mobile exploitations.<sup>195</sup> I believe that the existence of a very wide statutory right of making copyrighted content available to the public under article 3.2 of Council Directive 2001/29 should place the European Union in a position to enforce such a right in conformity with the objective that the directive intended to pursue. The making available right was the first E.U. right formulated while having online services in mind and such right was specifically tailored to cover not just streaming services but also permanent downloads.<sup>196</sup> This new prerogative was not conceived as a new type or category of right, but rather as an extension of the pre-existing right of public performance. Unfortunately, the wording of the 2001 directive did not make it clear whether or not the sole clearance of the right of making content available would have sufficed in order to make online on-demand transmissions legitimate. As we have seen, the simultaneous application of the rights of digital reproduction has been deemed to be necessary for a legitimate offer of online music services, with an inevitable increase of transaction costs.

In my view, the E.U. Commission should take action urgently in order to remove such uncertainty and to impose an economically viable and modern interpretation of the exclusive making available right. Ideally, this right should be the only one covering online on-demand transmissions and, as a result, the only type of right to be cleared by service providers for online music deliveries, irrespectively of the techniques (e.g., streaming, downloading, etc.) through which the content is transmitted and placed at the consumer's disposal. Beyond efficiency and transparency, there are strong legal arguments under Council Directive 2001/29 which suggest the nonenforceability of mechanical (i.e., reproduction) rights and the mere application of the public performance (or making available) rights in the realm of online music services. It should be considered that all acts of digital reproductions which are technically inherent to, and economically inseparable from, acts of making content available to the public can be legally intended to be "absorbed" by the function of transmitting copyrighted works interactively, which is logically and economically predominant. This rationale is clearly embodied into the wording of the only copyright exception that Council Directive 2001/29 made it mandatory for E.U. member states.<sup>197</sup> This means that acts of reproduction which constitute a technical necessity, and are inherent to, acts of online content transmissions could be easily deemed to fall outside the scope of the right of digital reproduction since they have, as such, no independent economic significance.

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<sup>194</sup> In the copyright field, the risk of such a situation is entailed by multiple layers of exclusive rights over the same music works and over the same sound recording. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998) (coining this expression to describe a coordination breakdown caused by the existence of too many owners over the same resource).

<sup>195</sup> See Gyertyanfy, *supra* note 50, at 88; Bennet Lincoff, *Common Sense, Accommodation and Sound Policy for the Digital Music Marketplace*, 2 J. INT'L MEDIA & ENT. L. 1, 9 (2008).

<sup>196</sup> Recital 23 of Council Directive 2001/29 made it clear that "this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting." *Id.*

<sup>197</sup> See Council Directive 2001/29, *supra* note 1, art. 5. Article 5 provides:

Temporary acts of reproduction . . . which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable . . . a lawful use . . . of a work or other subject-matter to be made, and which have *no independent economic significance*, shall be exempted from the reproduction right provided for in Article 2.

*Id.* (emphasis added).

It remains to be seen how the objective of enforcing a single exclusive right of online transmission for online music services can be concretely achieved. If the Commission resorted to the above-mentioned interpretation of the relevant provisions of Council Directive 2001/29, there would be no need for a legislative amendment of the current legal framework. However, to do so, the Commission would need to change its current approach and to develop a completely new strategy for the definition and management of online rights. More realistically, the same objective could be achieved through a legislative reform aimed at recognizing the autonomous character of the right of making content available for the clearance of online transmissions.



