

# EXPERIMENTING WITH TERRITORIALITY: PAN-EUROPEAN MUSIC LICENSE AND THE PERSISTENCE OF OLD PARADIGMS

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## ABSTRACT

*This article tells the story of what could have been an interesting and important shift in our approach to territoriality in the digitalized world. Europe had the chance to be the cradle of an unprecedented copyright experience – the creation of a quasi pan-continental license in the music field – but it might have lost that opportunity in the midst of non-binding recommendations and resolutions. This article argues this loss is due to the overreaching persistence of old paradigms, namely the principle of territoriality.*

## INTRODUCTION

¶1 In May 2004, the European Commission announced the opening of proceedings regarding collective licensing of music copyrights for online use, issuing a statement where it recognized that “the loss of territoriality brought about by the Internet, as well as the digital format of products such as music files, are difficult to reconcile with traditional copyright licensing schemes, which are based on purely national procedures.”<sup>2</sup> This article focuses on the 2005 *Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services*, the first-ever formal act from a European Institution to address these problems and to attempt to smooth the territoriality principle that has characterized – and obstructed – the relationships between rights-holders, collective management rights societies, and commercial users. In order to properly understand the meaning and weight that should be accorded to the Recommendation, this article first gives a brief overview of the recent evolution of the online music market in the European Union, followed by a

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<sup>2</sup> Press Release, Europa, Commission Opens Proceedings into Collective Licensing of Music Copyrights for Online Use (May 3, 2004), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586>.

general outline of the dynamics of music licensing from the perspective of collective rights management societies.

¶2 After dissecting the Commission’s Recommendation, this article tracks some of the post-2005 developments that were either stimulated by or reacted against the Recommendation, including the monitoring carried out by the Commission in 2007. The article concludes with a brief analysis of the March 2007 European Parliament Non-Legislative Resolution on the Recommendation.

## I. THE PARADOX

¶3 Europe has been experimenting with territoriality since the middle of the 20th century, when the treaty founding the European Commission was signed.<sup>3</sup> Since then, each one of its Member States has progressively lost elements of its sovereignty, in a process that smoothened the European Union’s internal frontiers, until it reached a point where people and goods benefited from a general “freedom” of moving, living, working and trading in different countries.<sup>4</sup> However, as Hugenholtz *et alia* point out, “the harmonization process [in Europe] has left largely intact a more serious impediment to the creation of an internal market: the territorial nature of copyright and related rights.”<sup>5</sup>

¶4 A natural question thus emerges: is it the nature of copyright that is blocking the harmonization process, or is the harmonization process itself flawed and therefore fails to set copyright free from its old territorial chains? Hugenholtz believes that the right answer implies both theories: “[i]ndeed, for as long as the territorial nature of copyright and related rights is left intact, harmonization can achieve very little;”<sup>6</sup> on the other hand, “the EU legislature has been aiming . . . at the wrong target.”<sup>7</sup> The harmonization process is paradoxical: it is convergent when it gives away more rights and a broadens protection, but that “upwards” attitude has detrimental effects in the internal market. It creates a plethora of

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<sup>3</sup> See generally Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321E) 37, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf> [hereinafter EC Treaty].

<sup>4</sup> See generally *id.* at 57.

<sup>5</sup> BERNT HUGENHOLTZ ET AL., INST. FOR INFO. LAW, THE RECASTING OF COPYRIGHT AND RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY 22 (2006), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

microscopic rights diffused at the national level, thus impairing the free movement of goods and services.<sup>8</sup>

¶5 As the following section will show, the advent of online music businesses should have been enough of an incentive for Europe to reconsider its copyright licensing scheme.

#### A. *The Online Music Market*

¶6 For the purposes of this article, the “online music market” will be defined as “any music service provided on the Internet such as simulcasting, webcasting, streaming, downloading, online ‘on-demand’ service or provided to mobile telephones.”<sup>9</sup>

¶7 Although the downloading of online music is a flourishing business in the entire Western world, Europe is particularly attractive because its market took off later than the North American market and is likely to experience unprecedented growth rates in the coming years. The following tables show the results of a comparative study between the markets in the United States and the European Union (the numbers for the years 2005 through 2008 are projections).<sup>10</sup> While both markets show the same tendency to grow at a fast pace, the ratio of total downloads and subscriptions in 2005 to the total in 2008 in the United States was expected to grow 2.5 times, whereas in Europe that number was as high as 5.2. But if we consider the time span of 2004 to 2008,<sup>11</sup> the United States’ ratio was 6, while Europe’s was 20, which means at the time the European Commission first became interested in the problem of cross-border management of digital rights, Europe was on the verge of an explosion.

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<sup>8</sup> *Id.* at 30.

<sup>9</sup> Comm’n of the European Cmtys., *Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright* 6 (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 *Working Document*].

<sup>10</sup> See BUS. SOFTWARE ALLIANCE, *DRM-ENABLED ONLINE CONTENT SERVICES IN EUROPE AND THE USA* 3 (2005).

<sup>11</sup> 2004 is the last year actual data was available. The European Institutions have since based their multi-territorial management decisions on these numbers.

**Online Music Market, USA**<sup>12</sup>

U.S.	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.2	0.4	0.8	28.8	155.9	374.1	518.5	663.2	787.8
Subscription (€ mil.)	0.3	0.7	1.7	15.0	51.1	124.2	229.8	349.2	478.2
Total (€ mil.)	0.4	1.1	2.5	43.8	207.0	498.3	748.3	1,012.4	1,266.0

Source: Informa Media, 2005

**Online Music Market, Western Europe**<sup>13</sup>

Western Europe	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.1	0.2	0.5	1.5	23.4	89.1	169.2	277.5	426.2
Subscription (€ mil.)	0.0	0.0	0.1	1.0	3.8	17.3	46.7	87.5	132.9
Total (€ mil.)	0.1	0.2	0.5	2.5	27.2	106.4	215.9	365.1	559.1

Source: Informa Media, 2005

If we consider the ratio of total downloads and subscriptions in 2005 to the total in 2008 in countries where major collective rights management societies operate, such as the United Kingdom, Germany, France and Italy, we find numbers that range from 4.1, in the UK, to an expressive 7.4, in Italy.

**Online Music Market, UK**<sup>14</sup>

UK	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.1	0.1	0.7	11.1	39.0	68.4	101.6	148.6
Subscription (€ mil.)	0.0	0.0	0.0	0.4	1.7	7.8	19.3	33.0	45.9
Total (€ mil.)	0.0	0.1	0.2	1.1	12.8	46.8	87.7	134.6	194.5

Source: Informa Media, 2005

**Online Music Market, Germany**<sup>15</sup>

Germany	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.0	0.1	0.3	4.2	17.6	35.4	60.9	95.3
Subscription (€ mil.)	0.0	0.0	0.0	0.3	0.9	4.3	12.1	22.8	31.0
Total (€ mil.)	0.0	0.0	0.1	0.5	5.1	22.0	47.5	83.7	126.3

Source: Informa Media, 2005

<sup>12</sup> BUS. SOFTWARE ALLIANCE, *supra* note 10, at 5.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.* at 12.

**Online Music Market, France**<sup>16</sup>

France	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.0	0.0	0.1	2.2	8.5	18.0	32.6	51.9
Subscription (€ mil.)	0.0	0.0	0.0	0.1	0.4	1.6	4.6	9.3	15.7
Total (€ mil.)	0.0	0.0	0.1	0.2	2.5	10.1	22.6	41.9	67.7

Source: Informa Media, 2005

**Online Music Market, Italy**<sup>17</sup>

Italy	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.0	0.0	0.1	1.1	4.2	8.2	15.2	28.9
Subscription (€ mil.)	0.0	0.0	0.0	0.0	0.2	0.7	2.1	4.2	8.0
Total (€ mil.)	0.0	0.0	0.0	0.1	1.3	5.0	10.3	19.4	37.0

Source: Informa Media, 2005

¶9 In smaller countries, where collective management societies are either deficient or less developed, the numbers show the same ascending tendency. Take the example of Portugal where, although collective management exists, they are not compulsory by law, and where the ratio of total downloads and subscriptions in 2005 to the total in 2008 exceeds 6.6, a number that places the country on the same level as France.

**Online Music Market, Portugal**<sup>18</sup>

Portugal	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.0	0.0	0.0	0.2	1.0	2.1	4.0	5.9
Subscription (€ mil.)	0.0	0.0	0.0	0.0	0.0	0.1	0.4	0.8	1.4
Total (€ mil.)	0.0	0.0	0.0	0.0	0.2	1.1	2.5	4.9	7.3

Source: Informa Media, 2005

¶10 Finally, the same pattern applies in an even more explosive way to the ten Member States that joined the European Union in 2004: between 2004 and 2005 their ratio was 3, but if we look to the period comprised between 2005 and 2008, then the numbers increase to 19.88.

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<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 36.

<sup>18</sup> BUS. SOFTWARE ALLIANCE, *supra* note 10, at 41.

### Online Music Market, New Member States<sup>19</sup>

New Member States	2000	2001	2002	2003	2004	2005	2006	2007	2008
Downloads (€ mil.)	0.0	0.0	0.0	0.0	0.6	1.8	8.2	17.1	31.9
Subscription (€ mil.)	0.0	0.0	0.0	0.0	0.0	0.0	0.2	1.9	3.8
Total (€ mil.)	0.0	0.0	0.0	0.0	0.6	1.8	8.4	19.0	35.8

Source: Informa Media, 2005

¶11 As of today, the numbers available confirm the projection of the studies the Commission used while framing the problem of transnational music licensing, and similar growth patterns are expected over the next few years<sup>20</sup>.

¶12 While reviewing this data, the Commission Staff framed its own role as a fixing task: “For 2005, online music revenue is expected to rise to €106.4 million within Western Europe, while the US revenue will forge ahead to €498.3 million. This gap between U.S. and Western European online music revenue needs to be redressed.”<sup>21</sup> And while the Commission left some room for the possibility of other factors contributing to this gap,<sup>22</sup> it mainly held the structure of existing collecting societies liable for Europe’s lower numbers.

#### *B. Collective Rights Management Societies in Europe*

¶13 “[M]ost . . . collective rights management societies currently derive their existence from rights granted or entrusted to them on a national (territorial) basis.”<sup>23</sup>

<sup>19</sup> *Id.* at 4.

<sup>20</sup> See European Music Download Forecast: 2006 to 2011 by Rebecca Jennings—Forrester Research, <http://www.forrester.com/Research/Document/Excerpt/0,7211,38733,00.html> (last visited Aug. 21, 2009) (stating the number of legal downloads via computer or mobile telephone is expected to grow 36% between 2006 and 2011).

<sup>21</sup> *Working Document*, *supra* note 9, at 6.

<sup>22</sup> See *Working Document*, *supra* note 9, at 6 n.6 (“Some argue that the principal hindrance to revenue growth in online music services is the widespread use of illegal peer-to-peer networks to share electronic music files, the lack of interoperability and consumer acceptance. Whilst these are contributory factors in each area, especially in the case [sic] P2P file sharing, efforts are being made separately either at a legislative level (Directive on Enforcement) or by market initiatives on greater interoperability.”).

<sup>23</sup> HUGENHOLTZ ET AL., *supra* note 5, at 22.

¶14 The somewhat fragmentary model according to which a cloud of collecting societies has been operating in the European Union does bring some benefits to both consumers and rights-holders. Hugenholtz’s study has identified at least two territoriality-related positive effects:<sup>24</sup> cultural diversity and economic efficiency. Cultural diversity is a consequence of collecting societies naturally protecting and promoting local authors and performers.<sup>25</sup> Economic efficiency happens – or may happen – because “[t]erritoriality makes it easier for right holders to define, and split up, markets along national borders, and set different prices and conditions for identical products or services in different Member States.”<sup>26</sup> Nonetheless, there is a relevant drawback to this function: “such price discrimination” and “such uses of intellectual property are fundamentally at odds with the goal of achieving an internal market.”<sup>27</sup>

¶15 Following the first steps taken in 2004 towards an assessment of the performance of the several collective rights management societies operating in the Union and the breadth of the online music licensing market, the European Commission chose to focus a large part of its analysis on an efficiency evaluation. The Commission concluded that collecting societies across the Union present different levels of efficiency (see graphic below) and that, as a whole, they are prevented from addressing the geographic-free necessities of consumers and rights-holders by several factors, the primary one being the territorial barriers to their expansion.<sup>28</sup>

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<sup>24</sup> *Id.* at 23.

<sup>25</sup> *Id.* Interestingly, the European Commission will argue that the exact opposite model – promoting collecting societies with pan-European mandates – is actually the option that better suits cultural diversity, because it forces collecting societies to compete among themselves and competition will lead some of them to specialize in niche markets in order to survive. *See Working Document, supra* note 9, at 29.

<sup>26</sup> HUGENHOLTZ ET AL., *supra* note 5, at 23.

<sup>27</sup> *Id.*

<sup>28</sup> *Working Document, supra* note 9, at 9–10.

**Collective right management societies are not equally efficient in the cross-border collection and distribution of revenues<sup>29</sup>**

	Average annual growth rate of income and distributed royalties			
	SGAE (E) (2001-2004)	SACEM (F) (1999-2003)	GEMA (D) (1999-2003)	SIAE (I)(music report 1999- 2003)
Annual growth rate of total revenues	9,59%	5,95%	1,24%	4,40%
Annual growth rate of total distributed royalties	6,51%	5,81%	1,29%	3,14%
Annual growth rate of payments to foreign societies	-13,12%	5,08%	2,10%	7,07%
Annual growth rate of revenues from affiliated societies	-5,46%	-0,50%	-1,04%	-0,54%

¶16 Notice in particular the transversal negative growth rates in the revenues from affiliated societies.<sup>30</sup> Although it stands alone on this trend, Spain's SGAE also presents a strong decrease in the payments made to foreign societies (-13.12%), a phenomenon that is particularly interesting when linked to the fact that it has the highest growth in total revenues among Europe's largest collecting societies.

¶17 In addition to this irregular internal pattern, the Commission Staff found that the existence of collective rights management entities spread around Europe but operating on a mono-territorial basis was the source of considerable static and dynamic efficiency. "The current practice of collective management of copyright on a national territorial basis requires each collective rights manager to cooperate with others in the other territories, if a commercial user's service is accessible in another territory. In practice, this means that a commercial user requires a license from *each and every* relevant collective rights manager in each territory of the EU in which the work is accessible."<sup>31</sup>

<sup>29</sup> *Working Document, supra* note 9, at 27 tbl.4.

<sup>30</sup> Affiliated societies are precisely the ones the Commission's proposal will seek to eliminate, because of their "middle-man" quality. An affiliated society is the entity that enters into reciprocal agreements with foreign management societies when copyrighted works are available in other territories, thus being able to commercially exploit the foreign repertoire in its own territory. *See id.* at 28.

<sup>31</sup> *Working Document, supra* note 9, at 8 (emphasis added).



¶18 This practice poses two problems: first, not all collective rights management societies have entered into bilateral representation agreements, which means that Europe has a pierced network and there is “no seamless system that covers the aggregate EU repertoire for any type of right or any form of exploitation;”<sup>32</sup> and second, the cooperation between collecting societies is made through reciprocal representation agreements,<sup>33</sup> the numbers of which can rise to astronomic levels if a collective rights manager wants to have Europe-wide coverage. The Commission Staff did its math and concluded that:

In order for these reciprocal representation agreements to cover at least the aggregate repertoire of all European collective rights managers for one particular form of exploitation of one particular right (e.g. the public performance right used in a streaming services) in all European territories, by way of example, it is necessary that European collective rights managers conclude among themselves a minimum of 300 bilateral reciprocal representation agreements. This is based on the hypothesis that there would be a minimum of 25 collective rights managers per category of right on each Member State, each manager has to have a reciprocal representation agreement with the 24 other managers. In order to determine the total number of bilateral combinations necessary among 25 European collective rights manager, the number of combinations of k (=2) out of n (=25). This can be determined according to the following formula:<sup>34</sup>

$$\frac{n!}{k!(n-k)!} = \binom{n}{k} = \frac{25!}{2! \cdot 23!} = \frac{24 \cdot 25}{2} = 12 \cdot 25 = 300$$

¶19 Given these practical constraints, most national collective rights management societies tend to enter into alliances that *facilitate* transnational

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<sup>32</sup> *Id.* at 9.

<sup>33</sup> The Commission Staff notes that “[t]he term ‘reciprocal’ in the context of these private agreements means ‘in return for of an identical grant.’ It does not connote ‘reciprocity’ for which there is a specific meaning in international law especially in the international copyright conventions i.e. where rights are granted by one country to its nationals, the nationals of another country can only have the benefit of those rights where there is commensurate recognition of these rights by the other country.” *Id.* n. 10.

<sup>34</sup> *Id.* at 8. A quick aside: something is deeply wrong when someone has to resort to a formula to figure out this number; a number that is per se frightening in a regional system whose primary economical goal is to establish and strengthen an internal market.

management of digital rights,<sup>35</sup> but nonetheless present an important drawback. The model agreements and the bilateral reciprocal representation agreements “concluded pursuant to . . . [these alliances] apply a series of restrictions which are contrary to the fundamental EU principle that services, including collective management of copyright or individual services associated with the collective management of copyright, should be provided across national borders without restriction based on nationality, residence, [or] place of establishment.”<sup>36</sup> The consistency of these restrictions with the principles of European unfair trading law has not yet been analyzed by the European Court of Justice. However, in the case of *Ministère Public v. Tournier*,<sup>37</sup> where the owners of a discotheque complained that SACEM was charging them an excessive fee, the court held that charging higher royalties in one State when compared to another was a violation of unfair trading law.<sup>38</sup> Nevertheless, the court did say that such discrimination might be permissible under objective and relevant reasons.<sup>39</sup> If the same reasoning was to apply to the bilateral reciprocal

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<sup>35</sup> See e.g., International Confederation of Societies of Authors and Composers, <http://www.cisac.org> (follow “CISAC and Authors’ Rights” tab) (last visited Aug. 21, 2009); Bureau International des Sociétés Gérant les Droits d’Enregistrement et de Reproduction Mécanique, <http://www.biem.org/content.aspx?PageId=122&CountryId=0&SocietyId=0> (last visited Aug. 21, 2009); Societies’ Council for the Collective Management of Performers’ Rights, <http://www.scapr.org> (last visited Aug. 21, 2009).

<sup>36</sup> *Working Document*, *supra* note 9, at 9.

<sup>37</sup> Cour d’appel [CA] [regional court of appeal] Aix-en-Provence, July 13, 1989, ECR 1989, 2521 (Fr.), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987J0395:EN:HTML>.

<sup>38</sup> See EC Treaty, *supra* note 3 at Art. 82 (“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”).

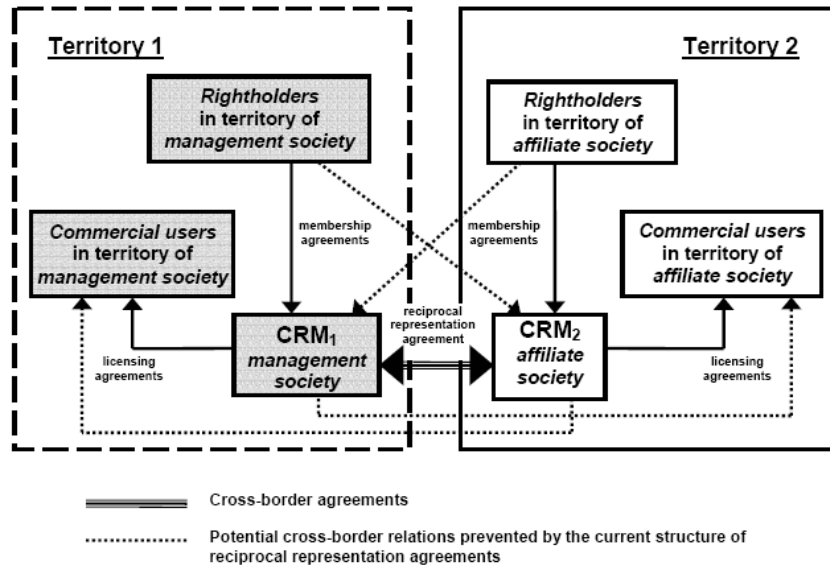
<sup>39</sup> Cour d’appel [CA] [regional court of appeal] Aix-en-Provence, July 13, 1989, ECR 1989, 2521, 46 (Fr.) (“Article 86 of the Treaty must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the Common Market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a

agreements, this would be yet another case where competition rules are applied to rescue copyright holders, which is a frequent scenario in Europe.

¶20 However, the *Tournier* case was decided in 1989, when the Internet had not yet acquired its instantaneous and global qualities. It is therefore arguable that today there will be much less “objective” or “relevant” grounds for restrictions that are territorial in nature.

¶21 The Commission Staff has summarized the current panorama of transnational management of music-related rights in the following scheme, concluding that “the core service elements ‘cross-border grant of licenses to commercial users’ and ‘cross-border distribution of royalties’ do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services.”<sup>40</sup>

**Overview of the potential cross-border services that are currently prevented by the structure of reciprocal agreements among collecting rights managers<sup>41</sup>**



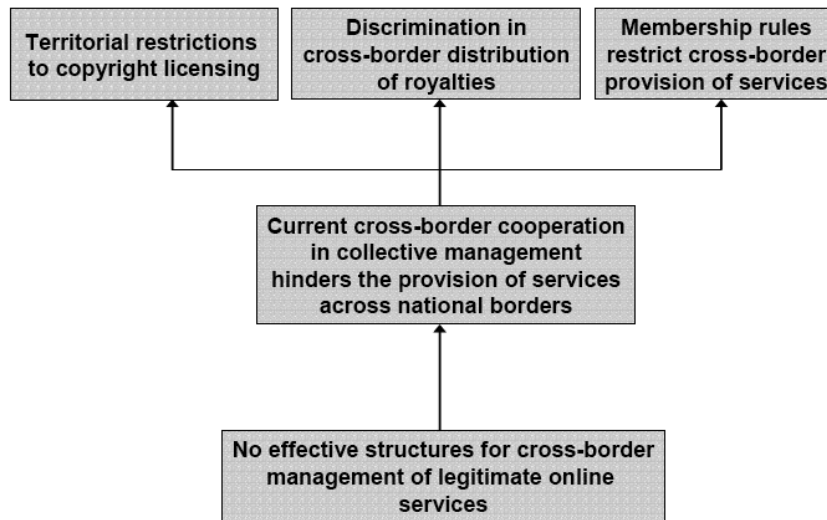
consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to *objective and relevant* dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.” (emphasis added).

<sup>40</sup> *Working Document*, *supra* note 9, at 9.

<sup>41</sup> *Id.* at 29.

¶22 In the eyes of the Commission Staff, this rather complicated (and, above all, costly and time-consuming) scheme for cross-border licensing raises three major concerns: territorial restrictions to copyright licensing, discrimination in cross-border distribution of royalties and the existence of membership rules that may restrict cross-border provision of services.

**Summary of main problems with cross-border collective management of copyright for legitimate online music services<sup>42</sup>**

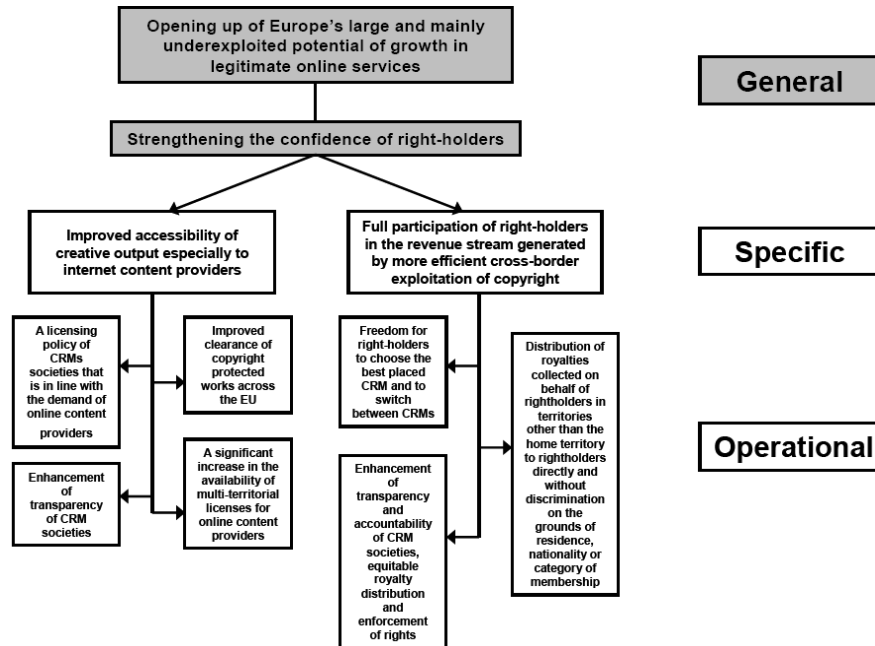


¶23 The Commission therefore sets a general goal to be achieved in the near future. This goal, in the Commission’s words, is “the opening up of Europe’s large and mainly unexploited potential growth in legitimate online services,” a desideratum that the Commission links to today’s lack of confidence of right-holders in the current cross-border management system.<sup>43</sup> These goals would be backed up by changes at the so-called “specific” and “operational” levels, as the following chart illustrates:

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.* at 31.

### Summary of the problems and goals to be achieved<sup>44</sup>



## II. THE MAY 18, 2005 RECOMMENDATION: THE DESIGN

¶24 The 2005 Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services<sup>45</sup> (hereinafter referred to as the Recommendation) is addressed to the Member States and “to all economic operators involved in the management of copyright and related rights within the Community.”<sup>46</sup> From its very beginning, the Recommendation shows, on the one hand, a

<sup>44</sup> *Id.* at 32.

<sup>45</sup> Comm’n of the European Cmtys., *Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services*, 2005/737/EC (May 18, 2005), available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l\\_276/l\\_27620051021en00540057.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_276/l_27620051021en00540057.pdf) [hereinafter *Commission Recommendation*].

<sup>46</sup> *Id.* ¶ 19.

polarized concern with users and legal certainty,<sup>47</sup> and on the other, online music services' business models, with rights-holders joining one of these two groups depending on the values or principles at stake. Its spirit is best embodied by recital 8, which states that:

In the era of online exploitation of musical works . . . commercial users need a licensing policy that corresponds to the ubiquity of the online environment . . . . It is therefore appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for rights-holders.<sup>48</sup>

¶25 Another goal of the Recommendation is to enhance the principle of freedom of choice, a principle that directly interferes with the traditional concepts of territoriality and even nationality. Recital 9 of the Recommendation states that:

Freedom to provide collective management services across national borders entails that rights-holders are able to freely choose the collective rights manager for the management of the rights necessary to operate legitimate online music services across the Community. That right implies the possibility to entrust or transfer all or a part of the online rights to another collective rights manager *irrespective of the Member State of residence or the nationality* of either the collective rights manager or the rights-holder.<sup>49</sup>

¶26 The picture becomes more interesting when we tie these principles to those of equitable remuneration and nondiscrimination, a liaison performed by recital 12, which adds “category of rights-holder” to residence and nationality as forbidden grounds for discrimination.<sup>50</sup> This view is furthered by recital 13, which underlines that “[t]here should be no difference in treatment on the basis of category of membership in the collective rights management society: all rights-holders, be they authors, composers, publishers, record producers, performers or others, should be

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<sup>47</sup> See generally *id.* (characterizing “users” as “commercial users”).

<sup>48</sup> *Id.* at recital 8.

<sup>49</sup> *Id.* at recital 9 (emphasis added).

<sup>50</sup> *Commission Recommendation, supra* note 48, at recital 12 (“Royalties collected on behalf of right holders should be distributed equitably and without discrimination on the grounds of residence, nationality, or category of rights-holder. In particular, royalties collected in behalf of rights-holders in Member States other than those in which the rights-holders are resident or of which they are nationals should be distributed as effectively and efficiently as possible.”).

treated equally.”<sup>51</sup> Residence and nationality also reappear at the level of the relationship between the collecting society and its member, with recital 11 stating that “[t]here should be no difference in treatment of rights-holders by rights managers on the basis of Member State of residence or nationality.”<sup>52</sup> Paragraph 9 will fully embody the principle of nondiscrimination, as applied to the granting of licenses to commercial users.<sup>53</sup>

¶27 Other principles stressed by the Recommendation are rationalization and transparency in the relationship between the different structures involved in cross-border management of rights.<sup>54</sup> The concept of rationalization seems to be connected with the notions of efficiency and effectiveness.<sup>55</sup> Unfortunately, the actual recommendations made by the Commission in the paragraphs to follow are too broad in scope to offer a substantive view of what steps rationalization may require collecting societies to take. Regarding transparency, however, Paragraph 14, which is dedicated to accountability, states that, “[c]ollective rights managers should report regularly to all right-holders they represent, whether directly or under reciprocal representation agreements, on any licenses granted, applicable tariffs and royalties collected and distributed.”<sup>56</sup>

¶28 Both transparency and rationalization requirements are connected with the Commission’s concerns with users: recital 13 explicitly articulates

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<sup>51</sup> *Id.* at recital 13 (“Additional recommendations on accountability, rightholder representation in the decision-making bodies of collective rights managers and dispute resolution should ensure that collective rights managers achieve a higher level of rationalisation and transparency and that rightholders and commercial users can make informed choices. There should be no difference in treatment on the basis of category of membership in the collective rights management society: all right-holders, be they authors, composers, publishers, record producers, performers or others, should be treated equally.”).

<sup>52</sup> *Id.* at recital 10 (“The relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should include a minimum protection for right-holders with respect to all categories of rights that are necessary for the provision of legitimate online music services. There should be no difference in treatment of right-holders by rights managers on the basis of the Member State of residence or nationality.”).

<sup>53</sup> *Id.* ¶ 9 (“Collective rights managers should grant commercial users licenses on the basis of *objective criteria* and *without any discrimination* among users.” (emphasis added)).

<sup>54</sup> *See id.* at recital 10 (“Fostering effective structures for cross-border management of rights should also ensure that collective rights management achieve a higher level of rationalisation and transparency, with regard to compliance with competition rules . . .”).

<sup>55</sup> *Commission Recommendation, supra* note 48, at recital 12.

<sup>56</sup> *Id.* ¶ 14.

the relationship between those two principles and the ability of commercial users, as well as rights-holders, to make “informed choices.”<sup>57</sup>

¶29 Finally, paragraph 4 will add the principle of diligence to the ones listed in the introductory recitals.<sup>58</sup>

¶30 If one stopped reading the Recommendation at the end of the recitals, the most important trends characterizing the path that the Commission has chosen to follow would already be recognizable: after acknowledging the constraints placed on the online music market by a strong territorial approach and detrimental effects of such an approach on users (burdened by legal uncertainty and a country-to-country based access to music), copyright holders (bound to rigid licensing schemes that are likely to diminish their revenues) and collecting societies (prevented from having wider, more efficient, regional business models), the Commission relies heavily on the principle of nondiscrimination (which will materialize in paragraph 13) as a means of counterbalancing the loss of territoriality that a pan-European, or even a multinational licensing scheme, would imply. Attached to nondiscrimination, there is a set of other principles aimed at promoting a more expeditious and robust licensing process: transparency, efficiency, and equitable remuneration, whose ultimate practical effect is to empower copyright holders. From an economical point of view, copyright holders are the ones who arguably have more to gain from a multi-territorial licensing scheme and, consentaneously with this perspective, the Commission spends much of its time focusing on ways to strengthen their position vis-à-vis the collecting societies.<sup>59</sup>

#### A. *The Online Music Market*

¶31 One problem with the content of this Recommendation is that some of its definitions – and roughly a quarter of its length is spent on definitions – are tautological. Consider, for instance, paragraph 1 (d): “multi-territorial license means a license which covers the territory of more than one Member state).”<sup>60</sup>

¶32 Other definitions are far more helpful, such as the one contained in paragraph 1 (a), which specifies that for the purposes of this

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<sup>57</sup> *Id.* at recital 13 (“Additional recommendations on accountability, rights-holder representation in the decision-making bodies of collective rights managers and dispute resolution should ensure that collective rights managers achieve a higher level of rationalisation and transparency and that rights-holders and commercial users can make informed choices . . .”).

<sup>58</sup> *Id.* ¶ 4 (“Collective rights managers should apply the utmost diligence in representing the interests of rights-holders.”).

<sup>59</sup> *See id.* ¶ 3.

<sup>60</sup> *Commission Recommendation, supra* note 48, ¶ 1(d).



Recommendation, “management of copyright and related rights” includes “the grant of licenses to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to right-holders.”<sup>61</sup>

¶33 The most interesting part of the Recommendation is probably the introduction of a definition of online rights,<sup>62</sup> which are split into three categories:

- The exclusive right of reproduction of intangible copies made in the process of online distribution of musical works.<sup>63</sup>
- The right of communication to the public of a musical work either in the form of a right to authorize or a right to prohibit pursuant to Directive 2001/29/EC,<sup>64</sup> or a right to equitable remuneration pursuant to Directive 92/100/EEC<sup>65</sup> – and here the Recommendation specifies that these rights apply to webcasting, internet radio and simulcasting,<sup>66</sup> or “near-on-demand services received either on a personal computer or on a mobile telephone.”<sup>67</sup>
- The exclusive right of making available a musical work pursuant to Directive 2001/29/EC – including on-demand and other interactive services.<sup>68</sup>

¶34 Paragraph 5 addresses the relationship between rights-holders and collective rights managers in the online licensing environment. It is a

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<sup>61</sup> *Id.* ¶ 1(a), (h) (“[A] ‘commercial user’ means any person involved in the provision of online music services who needs a license from rights-holders in order to provide legitimate online music services . . .”).

<sup>62</sup> *Id.* ¶ 1(f).

<sup>63</sup> *Id.* ¶ 1(f)(i).

<sup>64</sup> Comm’n of the European Cmty’s., *Directive of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, 2001/29/EC (May 22, 2001), available at [http://eur-lex.europa.eu/pri/en/oj/dat/2001/l\\_167/l\\_16720010622en00100019.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2001/l_167/l_16720010622en00100019.pdf).

<sup>65</sup> Council of the European Cmty’s., *Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property*, 92/100/EEC (November 19, 1992), available at [http://ec.europa.eu/internal\\_market/copyright/docs/docs/1992-100\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/docs/1992-100_en.pdf).

<sup>66</sup> *Working Document*, *supra* note 9, at 7 n.1 (“A simulcast is a ‘simultaneous broadcast,’ and refers to programs or events broadcast across more than one medium at the same time. Streaming allows data to be transferred in a stream of packets that are interpreted as they arrive for ‘just-in-time’ delivery of multimedia information. A webcast is similar to a broadcast television program but designed for internet transmission.”).

<sup>67</sup> *Commission Recommendation*, *supra* note 45, ¶ 1(f)(ii).

<sup>68</sup> *Id.* ¶ 1(f)(iii).

provision crafted with the intent of giving rights-holders the maximum autonomy and freedom of choice.<sup>69</sup> It establishes a set of minimum criteria that should govern the relationship between rights-holders and collective rights managers: rights-holders have the ability to determine the online rights that they want to entrust for collective management; the ability to “determine the territorial scope of the mandate of the collective rights managers;”<sup>70</sup> and the right to withdraw any of the rights that they have entrusted to a particular manager,<sup>71</sup> and “transfer the multi-territorial management of those rights to another . . . manager, irrespective of the Member State of residence or the nationality of either the . . . manager or the right-holder.”<sup>72</sup>

¶35 Paragraph 6 places upon the collective rights manager the correlative duty of informing “right-holders and commercial users of the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire and the applicable tariffs.”<sup>73</sup>

¶36 The principle of equitable remuneration materializes in paragraph 10,<sup>74</sup> coupled with the provisions on deductions, both reflecting the Commission’s concerns with transparency and information; in this sense, paragraph 11 requires that:

Contracts and statutory membership rules governing the relationship between collective rights managers and right-holders for the management, at Community level, of musical works for online use should specify *whether* and *to what extent*, there will be deductions for purposes other than for the management of the services provided.<sup>75</sup>

¶37 Information and transparency will play a crucial role in the successful development of any kind of multi-territorial music license that Europe may come to implement, since most of the non-legal obstacles to the expansion of collecting societies – even of the ones that operate at a

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<sup>69</sup> See *id.* ¶ 5(a).

<sup>70</sup> *Id.* ¶ 5(b).

<sup>71</sup> *Id.* ¶ 5(c) (noting that rights-holders have to give “reasonable notice of their intention” to withdraw.).

<sup>72</sup> In cases of transference of management, paragraph 5(d) imposes that, “without prejudice to other forms of cooperation among rights managers,” all online rights have also to be withdrawn from “any existing reciprocal representation agreement concluded amongst them.” *Id.* ¶ 5(d).

<sup>73</sup> *Commission Recommendation*, *supra* note 45, ¶ 6.

<sup>74</sup> “Collective rights managers should distribute royalties to all rights-holders or category of rights-holders they represent in an equitable manner.” *Id.* ¶ 10.

<sup>75</sup> *Id.* ¶ 11 (emphasis added). Paragraph 12 further specifies that this information is to be provided “[u]pon payment of royalties.” *Id.* ¶ 12.

national circumscribed level – is precisely the mistrust felt and expressed by a large number of rights-holders (particularly the small and medium sized ones).<sup>76</sup>

¶38 At least in theory, this scheme should give rights-holders a greater ability to control and exploit their online rights, while at the same time solve some of the mistrust issues that have undermined their relationship with collecting societies. As mentioned above,<sup>77</sup> paragraph 14 also plays an important role in establishing accountability rules that ensure that collective rights managers will provide information on a regular basis about the applicable tariffs and the royalties that have been collected.<sup>78</sup>

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<sup>76</sup> Tilman Lueder, Head of the Copyright Unit – DG Internal Market and Services, made some interesting remarks on this topic:

This is an especially thorny area. Collective management has not always [been] seen as a “fair deal” by artists and rights-holders, particularly those who don’t live in countries where royalties are collected on their behalf. For example, a pending complaint alleges that the Scottish actor Sean Connery has never received €95.963 from the French collective rights management society ADAMI because ADAMI states that it does not have Mr. Connery’s address.

....

Transparency is important because foreign authors and other holders of copyright don’t always know how proceeds from their royalties are being spent. In some cases, domestic collecting societies take a cut of royalties to support cultural initiatives or even retirement funds. These initiatives are often undertaken for the sole benefit of domestic rights-holders. We are thinking about an obligation that requires collective rights management societies to indicate clearly the deductions they make before distributing royalties for activities such as pension funds and cultural promotion. National borders are clearly also an issue in this area. Content providers such as publishing houses and music companies increasingly see the national management of copyright as an impediment to the rollout of trans-border online services. We need to introduce clear rules on the terms and tariffs that online service providers have to pay for copyright licenses. Service providers must be able to contest tariffs – particularly in cases where the tariffs are so high that it makes it hard to launch or operate web-based delivery models.

Tilman Lueder, Speech at the 13<sup>th</sup> Annual Conference on International Intellectual Property Law & Policy: Legislative and Policy Developments in the European Union (2005), available at

[http://ec.europa.eu/internal\\_market/copyright/docs/docs/fordham2005\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/docs/fordham2005_en.pdf).

<sup>77</sup> See ¶ 27 *supra*.

<sup>78</sup> See *Commission Recommendation*, *supra* note 45, ¶ 14.

¶39 The Recommendation finishes with the follow-up provisions, inviting both Member States and collective rights managers to report on a yearly basis to the Commission on “the measures they have taken in relation to” the Recommendation and “on the management, at Community level, of copyright and related rights for the provision of legitimate online music services.”<sup>79</sup> The Commission also assures the Member States that it will monitor “on a continuous basis” the development “of the online music sector in the light of this Recommendation” and evaluate the need “for further action at Community level.”<sup>80</sup>

¶40 It took the Parliament almost two years to answer back to the Commission. In the meantime, the Commission itself released a Working Document that is essentially an *ex post* explanation of the *ex ante* Recommendation economic assessment of possible solutions regarding transnational management of rights.<sup>81</sup> There were, of course, reactions from the music, broadcasting, and cultural industries in general, but not a single Member State took any step forward with respect to this issue.<sup>82</sup> Eventually, the first move belonged to the collecting societies themselves.<sup>83</sup> The legal landscape, nevertheless, remained still.

### B. A Preliminary Assessment

¶41 The most disappointing aspect of this Recommendation is its nature. If the European Commission was convinced that this was indeed the way for Europe to move forward, it is frustrating to see what could have been a quasi-revolutionary act turn into an act that appears together with other acts “with no binding force.”<sup>84</sup> Given the size and potentialities of the European online music market and all its ramifications, a stronger approach to the problem was absolutely needed. 2005 was the time to seize the opportunity – to catch the train while it was still leaving the station. Perhaps the Recommendation’s form was chosen instead of any other binding instrument due to understandable doubts about the overall suitability of this approach in a mosaic like Europe. Additionally, had the Commission been bold enough, it could have even been more farsighted and ventured to touch other copyright-related domains, such as broadcasting. This field is particularly interesting because it is surrounded by great legal uncertainty. The Internet has led to the dissemination of copyrighted works under a hybrid form; works that are downloaded via on-demand services but

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<sup>79</sup> See *id.* ¶¶ 16–18.

<sup>80</sup> See *id.* ¶ 18.

<sup>81</sup> See *Working Document*, *supra* note 9.

<sup>82</sup> If anything, there was only a big disappointment, see *id.* at 36 (explaining the continued legal uncertainty from failure to act).

<sup>83</sup> See *id.* at 36–37.

<sup>84</sup> See EC Treaty, *supra* note 3, at art. 249.

also share the characteristics of broadcasting. Europe, however, does not have a provision regulating this potential overlap. When it comes to music, it would have been particularly helpful to have some sort of guidance on whether these cases fall within the “making available” right,<sup>85</sup> or whether they are left for broadcast regulation to address.

¶42 Clearly, the Commission is not misunderstanding the nature of the problem – and the proof is this very Recommendation, which accurately diagnoses it:

Licensing of online rights is often restricted by territory, and commercial users negotiate in *each* Member State with *each* of the respective collective rights managers for *each* right that is included in the online exploitation.<sup>86</sup>

¶43 There are too many ‘eaches’ in the equation. But while it grasps the smaller problem, the Commission seems unable to see the bigger picture: that a binding act is needed and that the boundaries of music dissemination via the Internet might not be as clear as one might initially think. Still, this is a shift from the traditional “upwards” harmonizing tendency that the Community has been so fond of where Intellectual Property is concerned. If Hugenholtz is correct in stating that the European Institutions keep aiming at the wrong target,<sup>87</sup> this time the Commission seems to have pointed at the right one, although we are still waiting for it to fire the first shot.

### *C. The Commission Staff Working Document and Other Options*

¶44 The 2005 Recommendation is the final product of the Commission’s investment in the protection of a fairly new but nonetheless solid grounded market: the online music licensing business. Prior to its enactment, the Commission sought to evaluate the status of that market through a series of studies,<sup>88</sup> having found that the current European business model was a source of inefficiency.<sup>89</sup> The Recommendation thus arose as an answer to the constraints that territoriality placed upon market fluidity, the legal uncertainty that surrounded the emergent urge to license, and the lack of transparency in the relationship between rights-holders and collective rights managers.

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<sup>85</sup> See *Commission Recommendation*, *supra* note 45, at recital 5.

<sup>86</sup> *Id.* at recital 7 (emphasis added).

<sup>87</sup> HUGENHOLTZ ET AL., *supra* note 5.

<sup>88</sup> *Id.*

<sup>89</sup> See *id.* at 22 (detailing the fragmented, inconsistent, and static nature of existing Directives).

¶45 However, besides other strategic options such as initiating the process for the enactment of a binding act regulating cross-border music licensing, the Commission did have other substantive choices that it could have pursued. It is important to address those other solutions the Commission at some point envisioned, eventually dismissed, but came to light in July of the same year.

¶46 The Commission Staff Working Document presents three approaches to cross-border management of rights under a section entitled “Policy Options,”<sup>90</sup> described as being the following:

- Do nothing<sup>91</sup>
- Eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between collective rights managers<sup>92</sup>
- Give rights-holders the choice to authorize collecting societies of their choice to online rights for the entire European Union<sup>93</sup>

¶47 It is odd – and it is certainly not a very good sign – to see a “do nothing” solution even considered after the findings of major inefficiencies in the copyright licensing system.<sup>94</sup> This puzzling part of the Commission Staff Working Document was obviously one of the main targets of criticism of the several reactions that followed its publication.<sup>95</sup> The conclusion under this so-called policy option is that there would probably be a limited form of multi-territorial license, anyway, but “there would be no choice as to the collective rights manager who would provide this license.”<sup>96</sup> According to the Commission Staff, “this would mean that multi-territorial licenses could only be given for online exploitation and by the collective rights manager in the territory where the licensee has its ‘economic

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<sup>90</sup> See *Working Document*, *supra* note 9, at 33-34.

<sup>91</sup> *Id.* at 33.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 34.

<sup>94</sup> This line of reasoning is matched throughout the *Working Document* by charming statements such as, “Doing nothing will have no impact outside the EU.” *Id.* at 43. The *Working Document* also discusses the internal and external effects of each one of the three options. See *id.* at 34–57.

<sup>95</sup> See, e.g., Position Paper, European Broad. Union, Initial EBU Comments on Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright (Aug. 19, 2005), available at [http://www.ebu.ch/CMSimages/en/leg\\_pp\\_crossborder\\_collectivemanagment\\_190805\\_tcm6-40156.pdf](http://www.ebu.ch/CMSimages/en/leg_pp_crossborder_collectivemanagment_190805_tcm6-40156.pdf) (“Option 1 (do nothing) is indeed not acceptable”).

<sup>96</sup> See *Working Document*, *supra* note 9, at 34.

residence.”<sup>97</sup> It is very basic logic, but at least the Working Document succeeds in realizing that this consequence would constitute “an undue hindrance to the provision of a cross-border commercial rights management service to users resident in other territories.”<sup>98</sup>

¶48 The second approach – elimination of territorial restrictions and discriminatory provisions in the reciprocal representation agreements – was described in the Working Document as a solution that would “introduce a single entry point and choice for commercial end users but it would not introduce increased choice as to collective rights manager at the level of for right-holders.”<sup>99</sup> This approach would improve the collection of royalties and their administration by the management society, at the same time that it would banish “customer allocation clauses.”<sup>100</sup> However, it would not completely eliminate the limitations on rights-holders’ freedom to choose a rights manager in a different territory and entrusting it with a pan-European management of his rights. The Working Document concludes that, if this is the path chosen, collective rights managers have no scope “to improve their services or differentiate their repertoires by actively competing for the business of right-holders.”<sup>101</sup> The only benefit of this approach appears to be, in the Commission Staff’s view, with respect to licensing, that this solution would “ensure . . . the territorial restrictions in classical reciprocity agreements that hinder the affiliate society from licensing the management society’s repertoire beyond its own home territory” would be “removed from all reciprocal representation agreements.”<sup>102</sup> But then again, it “will not resolve the issue that most CRMs are entirely dependent on reciprocal agreements in order to offer their repertoire.”<sup>103</sup> Moreover, “[t]his leads to a situation where almost no CRM has an attractive repertoire of its own, but all of them, by virtue of a network of reciprocity, offer an identical repertoire to commercial users.”<sup>104</sup>

¶49 The third option – allowing rights-holders to choose a particular collecting society to manage their online rights for all of Europe – was the approach chosen by the Recommendation. The Working Paper points out the advantages of such a solution:

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

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Current reciprocal representation agreements restrict the affiliated societies’ ability to grant multi-territorial licenses to content providers whose economic residence is located in its “home” territory – these are the so-called “consumer allocation clauses.” *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Working Document, supra* note 9, at 34.

<sup>103</sup> *Id.* at 34–35.

<sup>104</sup> *Id.* at 35.

- it cuts off the intermediary (the affiliate society), which is directly replaced by direct membership in a collective rights management society of the choice of the copyright owner.<sup>105</sup>
- in return, the inexistence of these intermediary societies, which as the holders of foreign repertoire “can limit the territorial authority of the licensor to clear the rights in its home territory only,” opens up the possibility of having a European-wide management of rights.<sup>106</sup>
- direct membership also eliminates the deductions that reciprocal agreements always imply, thus increasing the rights-holders revenues.<sup>107</sup>
- a market that is no longer shaped by territory not only increases the rights-holder choices and stimulates copyright management services to compete, but also forces some of these services to differentiate themselves “by offering different elements of the management services they provide for right-holders.”<sup>108</sup>
- generalized cross-border licensing will also lead to the formation of niche licensing markets,<sup>109</sup> which ultimately could be said to promote cultural diversity.

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<sup>105</sup> *Id.*

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

<sup>107</sup> The *Working Paper* suggests that this effect would favor “big rights-holders,” the ones “whose work is exploited on a large scale across the EU.” *See id.* at 35–36. But it is arguable that this will favor big, medium, and small rights-holders as well—the bigger ones because of the reduction in transaction costs, and the medium- and small-sized ones because they will proportionally benefit from the elimination of the reciprocal agreement deductions *and* they will now have the chance to have their music licensed in a much broader, quasi-non-territorial market.

<sup>108</sup> *Working Document, supra* note 9, at 35. These services would consist in differentiation “in terms of, e.g., the method applied in monitoring use made of works (detailed monitoring of all occasions where works are used as opposed to surveys).” *Id.* Other examples are “the speed in which royalties are remitted to right-holders or the level of detail in which a right-holder is informed of the different uses made of his protected works.” *Id.* According to the Commission Staff’s reasoning, these would be the appealing factors to small rights-holders.

*Id.*

<sup>109</sup> In the words of the Commission Staff:

The increasing diversity of online music services will create a demand for cross-border genre-specific licenses. . . . This development would increase efficiency thereby making [collective rights managers] more attractive to right-holders and commercial users alike. For a series of customer groups with a specific demand,



¶50 A comparison between Policy Options 2 and 3 shows that:

- at the level of competition, “[i]n Option 3, [collecting societies] would have to compete among themselves to attract right-holders, while in Option 2 [collecting societies] would compete to attract the business of commercial users. Option 3 can therefore be referred to as the ‘right-holders option’ while option 2 is more favourable to commercial users.”<sup>110</sup> However, the competition fostered by Option 2 leaves “in place the membership limitations contained in the underlying reciprocal arrangements,” which are a source of “static” service,<sup>111</sup> freezing competition between collecting societies, whereas Option 3, “by giving right-holders the possibility to freely choose and move among [collective rights managers], would create the competitive discipline that forces [collecting societies] to compete among themselves for right-holders and negotiate advantageous royalties on their behalf. If their services were either inefficient or too expensive, right-holders would move to another rights manager. This level of competitive threat would counteract any tendency toward monopoly at the Community level.”<sup>112</sup>

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Option 3 presents an alternative for the standardized and uniform service currently offered under the reciprocal agreements.

*Id.* at 36.

<sup>110</sup> *Id.* at 40.

<sup>111</sup> *Id.* at 41. This would happen because:

Removing the territorial restriction and customer allocation clauses would give all 25 potential entry points the unlimited ability to grant multi-repertoire licenses that, in addition, covers all 25 national territories; [t]here would be no variation as to the multi-repertoire and multi-territory service offered by the 25 competing [collecting societies]. Indeed, all the elements of the underlying rights management service remain static. This is because right-holders, under the current system of reciprocity, must remain members of their respective management societies and these management societies, in turn, would remain ‘locked-in’ into the network of reciprocal agreements; . . . In these circumstances, this static network of reciprocal agreements will, in due course, confer monopoly power onto the affiliate societies’ that commercial users have initially chosen as their single access point and freeze competition at that level. In addition, once the affiliate societies and their commercial users have an established course of dealing by putting in place mutually interoperable electronic monitoring and payment systems, there is the additional risk of ‘lock-in’ at the commercial users’ level.”

*Id.*

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

- at the level of trade flows, Option 2 would eliminate the two forms of territorial restrictions that govern the current reciprocal arrangements: “it would extend the affiliate society’s authority to license the management society’s repertoire beyond its home territory and thus grant a license that also covers the management society’s territory,”<sup>113</sup> and allow the affiliate society to “grant licenses also to commercial users whose economic residence it not within their home territory. Eliminating these forms of territorial restrictions will foster cross-border trade in collective online rights management in the Community.”<sup>114</sup> To the eyes of the Commission Staff, Option 3 would maximize these effects because “trade flows will no longer depend on the proper functioning of reciprocal representation agreements but on the direct relationship between right-holders and the [collective rights management societies] of their choice.”<sup>115</sup>
- at the level of innovation and growth, “Option 2 would stimulate the roll-out of new online services because the requisite Community-wide license would be available at a single access point to be freely chosen by the commercial user.”<sup>116</sup> The problem with this approach is that “obtaining the multi-repertoire and multi-territorial license at a single entry point by enhancing the network of reciprocal representation agreements among [collective rights management societies] would be costly and detrimental to right-holders. Given that royalties are channeled via both the affiliate and the management society, the cost of maintaining the web of reciprocity would be burdensome and corresponding deductions would be made by both the affiliate and the management society, before the right-holders are paid.”<sup>117</sup> Option 3, on the other hand, would create a single entry point for “all European repertoire for all European territories because the European repertoire will be split among a small number of [collecting societies].”<sup>118</sup>
- at the level of prices, the *Working Paper* indicates that “Option 2 would most likely achieve little in terms of pricing pressure on licenses taken out by commercial users. This is because these

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<sup>113</sup> *Working Document*, *supra* note 9, at 39.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 40.

<sup>117</sup> *Id.*

<sup>118</sup> *Working Document*, *supra* note 9, at 40. Notice, however, that it would maximize the incentive to create because “rights-holders receive royalties from their collective rights manager of choice *in line with actual use* made of their works.” (emphasis added). *See id.*

licenses will be governed by the tariffs applicable in the country where the copy-right protected work is accessible to the end consumer and possible competition with respect to administrative cost is a small part of a multi-repertoire and multi-territorial license.”<sup>119</sup> On the other hand, Option 3, by creating new opportunities for services and enhancing consumer choice, “would allow for premium content to be priced higher because it gives the collective rights manager who has attracted such content a very strong bargaining position vis-à-vis commercial users.”<sup>120</sup>

- The Commission Staff also considered that both Options 2 and 3 would potentially promote culture and foster creativity, since they “increase the overall amount of revenues created by copyright licensing in the online environment and thus ‘enlarge the pie’ to be distributed to all right-holders across the EU,”<sup>121</sup> but provided no convincing evidence linking the increase in revenues with the investment in culture; instead it followed a rather frail and speculative line of reasoning: “[Collective rights managers] may therefore engage in (1) a diversified sponsorship policy across more than one Member State showcasing domestic talent; (2) finding new audiences for various sectors of creation, notably in difficult fields like contemporary music as opposed to limiting it to national audiences only (3) cultural events featuring domestic content with an international platform; (5) financial support for musical and audiovisual productions on a national and international level.”<sup>122</sup> It may have a valid point, though, when it states that “[b]etter cross-border licensing would make available a larger variety of cross-border programming for the various language and cultural communities across Europe, wherever they reside.”<sup>123</sup>

¶51 The Working Paper takes some other prongs in consideration while comparatively reviewing Options 2 and 3, but some of them do not rise above the level of mere theoretical speculation, totally lacking supporting evidence.<sup>124</sup> The overall assessment points clearly to a prevalence of Option

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<sup>119</sup> *Id.* at 43.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 38.

<sup>122</sup> *Id.*

<sup>123</sup> *Working Document, supra* note 9, at 38.

<sup>124</sup> *Id.* at 43. Consider, for instance, the analysis of the level of the impact that the implementation of one of these systems would have outside the European Union: the Paper’s only assertion is that “[i]ntroducing enhanced royalty flow across national borders and introducing better multiterritorial licensing *might* lead to rights-holders from third countries, especially under Option 3, electing to

3's benefits over those offered by Option 2, a view that is consentaneous with the philosophy adopted by the Recommendation. The question now is: did the Commission Staff take the best approach to the problem? And, whether the previous question is answered in the affirmative or not, does the Recommendation succeed in promoting the goals the Commission is seeking to enforce?

¶52 Regarding the first question, the Commission Staff did perform an overall coherent analysis, although it relied on a major assumption that competition is the natural answer to the static and dynamic inefficiencies observed in the modus operandi of Europe's collective rights management societies.<sup>125</sup> A different view, supported by authors like Towse and Handke, suggests that these societies are actually monopolies or narrow oligopolies and that competition may well produce the opposite effect, an undesired increase in licensing costs.<sup>126</sup>

¶53 Towse and Handke's study offers a very interesting analysis of the economics of copyright licensing and points out that Europe's recent copyright policy (especially where cross-border management of rights is concerned) has been much closer to the Anglo-American tradition than to the continental *droit d'auteur* approach.<sup>127</sup> "[T]he predominance of economic objectives is not only a question of the preferences of current [European Union] decision-makers but it is built into the very legal structure of the [European Union]."<sup>128</sup>

¶54 The authors' inference that the measures proposed by the Commission are unlikely to improve the transnational music licensing scheme in Europe's collecting societies is rooted in the idea that the Internet and technology, especially digital rights management, are incapable of contradicting the tendency of economies of scale to reinstate monopolies.<sup>129</sup>

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have their rights managed by EU based collective rights management societies." *Id.* at 43 (emphasis added).

<sup>125</sup> *See id.* at 40–41.

<sup>126</sup> *See* Ruth Towse & Christian Handke, *Regulating Copyright Collecting Societies: Current Policy in Europe*, 2007 SOC'Y FOR ECON. RES. COPYRIGHT ISSUES 1, available at <http://www2.hu-berlin.de/gbz/downloads/pdf/SERCIACPapers/towsehandke.pdf>.

<sup>127</sup> *Id.* at 2 (noting that this is less a voluntary choice of the policy makers than a consequence of the legal architecture of the Union; "Article 151 of the Treaty, introduced with the Maastricht revision in 1991, requires the European Community to take cultural aspects into account in its actions but not to develop a cultural policy *per se*").

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.* at 10 (providing a particular view of the nature and role of collective rights management societies: not only do the authors believe that these societies are natural monopolies, but they also picture them as some sort of "common

They align with the economists that claim that “a natural monopoly is best left intact but unregulated,”<sup>130</sup> a view that, in the present case, clashes with the Commission’s position on the advantages of robust competition. As the authors put it, “whether the existence of a single supplier of collective rights management services for a particular bundle of rights is beneficial for society at large depends on the extent to which [collecting societies] exploit their monopoly position to raise prices or to tolerate inefficiencies within their organization or how successfully they can be regulated.”<sup>131</sup> The Commission would therefore have misevaluated the size of the European market; in markets as large as Japan and the United States, “there is no effective competition between collective rights management societies,”<sup>132</sup> a phenomenon that the authors link to the high fixed costs of entry. The consequences of promoting competition within the European Union could therefore lead to the appearance of a limited number of new collecting societies, but nevertheless “mergers would soon take place to benefit from economies of scale and network effects . . . and natural monopoly would reassert itself.”<sup>133</sup>

¶55 Treating collecting societies as monopolies or oligopolies is a position that also takes issue with the Commission’s argument that competition promotes innovation because it enables users to shop around for the society that best represents their interests. However, Towse and Handke argue that, even if this was true, it would lead to a “tragedy of the anti-commons,” in the sense that “excessive debundling of rights . . . would vastly increase search and other transaction costs for users.”<sup>134</sup> The Commission’s option for forcing collecting societies to operate at a Community-wide level would therefore be a “traditional” competition law approach that “ignores several important features of collecting societies.”<sup>135</sup> This fact leads the Authors to conclude that “[i]t is hard to see how the Commission can achieve its aims without changing copyright law. It could even be argued that the root of the problem lies with copyright law itself, which by proliferating rights has created the need for an ever more complex

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carriers” in the sense that they “are required to admit all eligible right-holders as members” or alternatively as “social insurance” societies, because “they operate similarly to an insurer that is regulated in order to provide an essential service for everyone in the market it serves, analogously, for example, to a private health insurer that is prevented from excluding high risk categories from its insurance”).

<sup>130</sup> Towse & Handke, *supra* note 124, at 11 (attributing this principle to William Baumol).

<sup>131</sup> *Id.* at 11.

<sup>132</sup> *Id.* at 12.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 13.

<sup>135</sup> Towse & Handke, *supra* note 124, at 14–15.

system of [collective rights management] societies to make it workable.”<sup>136</sup> This is another aspect of the paradox addressed by Hugenholtz, because “[w]ithout [collective rights management societies], the majority of creators and other right-holders would not be able to enjoy the benefits of copyright law, thus defeating its purpose. [Collecting societies] are the spontaneous private solution to government failure in the enforcement of copyright law; however, when they collaborated in order to facilitate online rights licensing it was dubbed collusive.”<sup>137</sup>

#### *D. Monitoring Process by the European Commission*

¶56 On January 17, 2007, the Commission called for comments that received eighty-nine replies from a wide variety of stakeholders.<sup>138</sup> After this monitoring process, the Commission concluded that there was a nascent market for EU-wide licensing of music for online services (it seems at least odd that four years after the Commission started its work, the market is still considered to be nascent) and that the Recommendation seems to have produced some impact. This fact would mean that no further measures would be needed, not even the repetition of the monitoring process, which would only take place “should a clear need to do so arise.”<sup>139</sup>

¶57 In a very short report of seven pages, the Commission summarized the replies received from the stakeholders, which are grouped in four categories: collecting societies, with almost half of the replies, (music) publishers, users (mostly broadcasters) and Member States (it is mentioned that eight Member States replied, although on the list of published replies one can only find six: France, Cyprus, Denmark, the Netherlands, Sweden and the UK).<sup>140</sup>

¶58 The call for comments was structured around several issues. The first question was whether it was necessary to have binding rules on a variety of topics such as licensing, transparency and governance, assignment and withdrawal of online rights. While most collecting societies and publishers were not inclined to binding rules, users took the opposite

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<sup>136</sup> *Id.* at 15.

<sup>137</sup> *Id.*

<sup>138</sup> Non-confidential contributions are made available on the following website: [http://ec.europa.eu/internal\\_market/copyright/management/management\\_en.htm#contributions](http://ec.europa.eu/internal_market/copyright/management/management_en.htm#contributions).

<sup>139</sup> See Monitoring of the 2005 Music Online Recommendation [hereinafter Monitoring the Recommendation], at 1, 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).

<sup>140</sup> See *id.* at 3.

view and Member States showed concern that the non-legislative approach “circumvent[ed] the democratic process.”<sup>141</sup>

¶59 As far as E.U.-wide-licensing is concerned, the ultimate goal of the Commission’s recommendation, the monitoring processes acknowledged several initiatives that were announced or formed (Alliance Digital, ARMONIA, CELAS, PEDL, SACEM-UMPG, etc.).<sup>142</sup> Nevertheless, at the time of the adoption of the monitoring report, only one E.U.-wide license had been granted (CELAS with the mobile operator Omnifone covering the MusicStation download service for the EMI repertoire).<sup>143</sup>

¶60 The monitoring report also listed the obstacles for EU-wide licensing as reported by the stakeholders, ongoing litigation among collecting societies, withholding taxes and identification of works, as well as the stakeholders’ responses to the question of whether the Recommendation correctly set out the online rights.<sup>144</sup> Users seemed to be satisfied with the level of delineation or fragmentation of rights operated by the Recommendation, while collecting societies claimed that they were not properly defined.<sup>145</sup>

¶61 Finally, with regard to governance and transparency, collecting societies failed to see any problems surrounding this issue and mentioned a “Common Declaration” between ICMP/CIEM and GESAC that would contain harmonized minimum standards that were considered good practices.<sup>146</sup> The report also stated that users did not voice strong feelings about transparency and governance *per se*.<sup>147</sup>

¶62 If one thing has become clear after this monitoring report, it is that, at least for the time being, contrary to the views expressed by the European Parliament, which are summarized below, the European Commission seems to have lost the appetite for legislation in this area. Although it is fair to say the recommendation triggered some interesting movements among collecting societies, it is difficult to argue that it has achieved the objectives that the documents issued back in 2004 and 2005 considered necessary for the good functioning of an internal market in online music services. Therefore, it appears it would have been easy for the Commission to recommend the adoption of a binding instrument.

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<sup>141</sup> *See id.* at 4.

<sup>142</sup> *See id.* at 5–7.

<sup>143</sup> *See id.* at 6.

<sup>144</sup> *See* Monitoring the Recommendation, *supra* note 142, at 7.

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* at 8.

<sup>147</sup> *See id.*

### III. THE 2007 EUROPEAN PARLIAMENT NON-LEGISLATIVE RESOLUTION

¶63 The European Parliament Resolution of March 13, 2007,<sup>148</sup> was in certain ways a virulent response to the 2005 Commission Recommendation. However, it should be noted in advance that a significant part of the Parliament's dissatisfaction derived from its belief that the Commission "failed to undertake a broad and thorough consultation process with interested parties and with Parliament before adopting the Recommendation,"<sup>149</sup> which is "formally unacceptable" under European Law because "the Recommendation clearly goes further than merely interpreting or supplementing existing rules."<sup>150</sup>

¶64 But the Parliament also departs from the Commission's substantive approach to cross-border rights management regulation. It sees this moment as the opportunity to regulate a broader reality:

whilst the Recommendation is intended to cover only the online sale of music recordings, its broad wording also covers other online services (such as broadcasters' services) which happen to include music from such recordings but which would suffer from the legal uncertainty that the Recommendation creates as to which licensing regime would apply to such services.<sup>151</sup>

¶65 One of the measures that the Parliament will require the Commission to do after the initial considerations is to come up with a scheme that guarantees the efficiency and coherence of licensing systems, for example, "by enabling broadcasters to acquire rights in accordance with the copyright legislation of the Member State in which the program in question originates *and simplify the extension of existing collective agreements so as to include interactive online distribution of existing content (e.g. podcasting).*"<sup>152</sup>

¶66 Besides the different approach regarding the scope of cross-border regulation, the Parliament also believes that the freedom of choice so highly emphasized by the Commission should be "accompanied by appropriate measures to safeguard and promote the diversity of cultural expression,

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<sup>148</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, T6-0064/2007, [hereinafter European Parliament Resolution] *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0064&language=EN>.

<sup>149</sup> *Id.* ¶ A.

<sup>150</sup> *Id.* ¶ B.

<sup>151</sup> *Id.* ¶ W.

<sup>152</sup> *Id.* No. 6 (emphasis added).



notably by offering users, via one and the same collecting society, large diversified repertoires, including local and niche repertoires and in particular the world repertoire for broadcasters' services."<sup>153</sup> This is a concern in the July 2005 Working Paper, but that as a matter of policy was practically absent from the May 2005 Recommendation, which makes little sense.

¶67 The Parliament departs from the criticism in Towse and Handke's article, stating it is important to preserve the "existing system of reciprocal agreements and the reciprocal collection of royalties . . . so that competition is introduced on the basis of the efficiency and quality of the services that collective rights management societies can offer."<sup>154</sup> It also considers that "the system of reciprocal representation agreements should be maintained, as it enables all commercial and individual users without discrimination to have equal access to the world repertoire, ensures better protection for the right-holders, guarantees real cultural diversity and stimulates fair competition in the internal market."<sup>155</sup> However, this is not a radically opposite view to the one presented by the economic analysis of collecting societies. From the Parliament's perspective, monopolies may indeed occur in this segment of the internal market, but their negative outputs are avoidable: "with regard to possible abuses of monopolies, there is a need for better governance of some collective rights management societies through improved solidarity, transparency, non-discrimination, fair and balanced representation of each category of right-holders and accountability rules combined with appropriate control mechanisms in Member States."<sup>156</sup> Simultaneously, while favoring the existence of a plurality of competing entities, the Parliament associates the need to prevent forum-shopping with the above mentioned principles.<sup>157</sup>

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<sup>153</sup> *Id.* ¶ M.

<sup>154</sup> European Parliament Resolution, *supra* note 151, ¶ N.

<sup>155</sup> *Id.* ¶ O. It also invites the Commission to design a licensing scheme that should "avoid the over-centralization of market powers and repertoires by ensuring that exclusive mandates may not be granted to a single or a very few collective rights management societies by major right-holders, thereby guaranteeing that the global repertoire remains available to all collective rights management societies for the granting of licenses to users." *Id.* at No. 6. Number 7 of the Resolution presents even more assertive language: "*it is crucial to prohibit any form of exclusive mandate* between major right-holders and collective rights management societies for the direct collection of royalties in all Member States, as this would lead to the rapid extinction of national collective rights management societies and undermine the position of minority repertoires and cultural diversity in Europe," *Id.* at No. 7.

<sup>156</sup> *Id.* ¶ R.

<sup>157</sup> 'Forum-shopping' is defined as "users seeking out the collective rights management society that provides the cheapest licenses." *Id.* ¶ Q.

¶68 As a result of these considerations, the Parliament invites the Commission “to make it clear that the 2005 Recommendation applies *exclusively* to online sales of music recordings,”<sup>158</sup> and to present “a proposal for a flexible framework directive to be adopted by Parliament and the Council.”<sup>159</sup> Besides the principles that the Recommendation itself had sought to address (freedom of choice, transparency, equitable remuneration), the Parliament particularly stresses the importance of stimulating cultural diversity. In an interesting move, it ties this goal with the necessity of avoiding “downward pressure on authors’ revenues.”<sup>160</sup> This downward pressure on royalty levels will be avoided by “ensuring that users are licensed on the basis of the tariff applicable in the country where the consumption of the copyrighted work (the so-called “country of destination”) will take place, and help to achieve an appropriate level of royalties for the rights-holders.”<sup>161</sup>

¶69 Finally, the Parliament underlines the need to create an “alternative dispute resolution” mechanism, a system that shall be “effective and inexpensive” in order to avoid burdening users, particularly small and medium-sized ones, with unreasonable costs.<sup>162</sup>

¶70 The Parliament’s non-legislative Resolution is therefore both a critic to and an improvement of the 2005 Recommendation. Ultimately, it builds on many of the concepts and principles to which the Commission resorted, sharing its underlying pro-competition approach to online rights management across Europe.

¶71 Once again, everything lies in the hands of the Commission, a move that makes this story a rather circular one; circularity that brings us to the beginning of a series of events materializing into another opportunity of aiming and shooting at the right target. However, in Europe’s case, returning to the departing point will not exactly be a second chance. By missing the first train, Europe missed the opportunity to shape the market – for instance, if cultural diversity was one of the choices, by embedding it *ab initio* in the system. This leads us to one last question: can Europe’s future legislation on cross-border rights management be based on assumptions that were made in 2004 and 2005 when that market was in its big bang period, or should Europe start considering other solutions? Let us enunciate a (for the time being, a remote but not impossible) possibility: Europe has had a

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<sup>158</sup> *Id.* at No. 1 (emphasis added).

<sup>159</sup> European Parliament Resolution, *supra* note 151, at No. 1.

<sup>160</sup> *Id.* at No. 4 (“[The European Parliament c]onsiders also that the interests of authors and therefore of cultural diversity in Europe will be best served by the introduction of a fair and transparent competitive system that avoids downward pressure on authors’ revenues.”).

<sup>161</sup> *Id.* at No. 6.

<sup>162</sup> *Id.*

Community Trademark since 1996, and the system has been working fairly well.<sup>163</sup> Should this experience teach anything to Copyright Law? Certainly, it does not suggest there should be a European Copyright – at least not in a near future – but perhaps it could inspire a different online music licensing system than the one the Commission has been pursuing. It could imply abandoning the pro-competition approach and adopting a model closer to Towse and Handke's, with some sort of central European Office that nonetheless could integrate the existing major European collecting societies.

¶72 And while this option depends on the economic approach that we might relate to the role of collecting societies and to the role that new technologies play in a regional but still State-based system, there is yet another reason for us to consider the possibility of having a centralized rights management scheme and abolishing every kind of intra-State representation agreements – today's music distribution is not merely borderless, it is actively anti-territorial, which means it might be a good time to consider this an area where the old principle of territoriality simply does not make sense.

#### CONCLUSIONS: TERRITORIALITY RECONFIGURATED

¶73 The path followed by the European Commission regarding the creation of a pan-European license was portrayed in this article as a rather disappointing one, a sentiment which seems to be shared by scholars and those who work in the music business alike. Nonetheless, Europe's institutional awareness to the problem of collecting societies relying on old fashioned law and therefore following old fashioned business models did have the merit of attracting scholarly and social debate to this issue. Too meager a merit, it is true, particularly if we consider that the phenomenon of legitimate online music services hit the European market and started spreading around at a steadfast pace since 2004 regardless of the passivity of the law. In any event, the Recommendation did trigger the Parliament's attention, leading to a Resolution that seems to shed some light on the profile of a future pan-European license, applicable not only to the music field but also to most of the services that rely on the latest communication technologies.

¶74 That being said, it is at least questionable that the Resolution's proposals will smoothly materialize into European copyright law in the near future. Regardless of the position that we choose to adopt in the

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<sup>163</sup> The Office in Alicante received 43,000 applications in 1996; in 2007 the number surpassed 80,000. Trade Marks and Designs Registration Office of the European Union, Statistics of Community Trade Marks 2007, Overview of Applications, SSC009.01, [http://oami.europa.eu/pdf/office/SSC009-Statistics\\_of\\_Community\\_Trade\\_Marks\\_2007.pdf](http://oami.europa.eu/pdf/office/SSC009-Statistics_of_Community_Trade_Marks_2007.pdf).

confrontation between competition and natural monopolies, the Commission's stammering Recommendation is clearly a sign of immaturity. Non-binding recommendations and non-legislative resolutions are welcome, but their nature limits their weight. As the Working Document would put it: it is better to have the European institutions busy with this issue than having them doing nothing about it.<sup>164</sup> Europe's incapacity to seize the opportunity to regulate – or de-regulate, had that been the option – a new market when it first started to blossom, in a swirl of legal uncertainty and surrounded by the negative effects of music piracy, is not merely due to the Community's structural limitations imposed by the founding treaties. The fact that European copyright law has to resort to competition law to face some of its limitations is one of the sides of the coin; the other is that, while acknowledging that “the loss of territoriality brought about by the Internet” is “difficult to reconcile with traditional copyright licensing schemes,”<sup>165</sup> Europe is not departing from those schemes and is reading the principle of territoriality in the old-fashioned way.

¶75 More than the anxious response to technologies that are changing the way we communicate and our business models, the core question of cross-border right management lies in our relationship with the old paradigm of territoriality. And yet, although copyright is closely associated with territoriality, there is no longer very much in its essence that imposes territoriality *per se*, particularly in a world that the Internet and technology have rendered borderless. If we kept the same copyright rules for the next millennium and if by the end of that time the entire world officially spoke and wrote in Esperanto, there would probably be a couple of publishing houses operating at a worldwide level, just as today the largest Anglo-American publishing houses hold or co-hold the copyrights of the books they publish in most (if not all) of English speaking countries. It would be nonsense to say that these worldwide Esperanto publishers were bound by territoriality, no matter how many licenses and agreements they had to enter into (fault of an inefficient coordination of the substantive national laws) in order to be able to do business worldwide.

¶76 In its own particular way, music is Esperanto. The fact that it is being delivered instantaneously via digital means, unlike the hard-copy books in the example, should reinforce the idea that our assumptions regarding the role of territoriality have to be smoothed by the evidence that pops out of the real world.

¶77 When Berne abolished the formalities in order to get a copyright over a creative work, it was telling us that copyright was not patent law and

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<sup>164</sup> See discussion *supra* notes 94–101 and accompanying text (discussing the problems with “doing nothing”).

<sup>165</sup> Press Release, Europa, *supra* note 2.

that territoriality had its practical – and also theoretical – limits. When copyright management societies (even if ineptly) tried to form regional alliances in order to develop more expeditious business models, they were telling us that practice wants to be free of territorial constraints. Particularly recent history is telling us that the principle of territoriality cannot act as a barrier to commerce and innovation; that territoriality was a consequence of the time in which copyright was born, rather than its inseparable characteristic. Therefore, the principle needs to be reread in light of the recent developments. Which may tell us, after all, that territoriality might not be – or should not be, at the very least – a principle anymore.

¶78 Even if Esperanto book publishers had to get into a web of agreements due to territoriality constraints, their activity would not be territorial *in nature*; accordingly, copyrights could still be formally territorial, but in practice their territorial component would be significantly lessened by the way that the market operated. We could say that territoriality was still a part of the legal system, but the concept would basically translate its reminiscences, not its essence. Until the 21st century, territoriality was regarded as principle because it was a part of the copyright system *modus operandi*; now it has become a barrier to the system. We should not keep talking of territoriality as a principle in those areas where technology has created widespread distribution methods such as downloading, methods that are borderless *in nature* and that are the basis of an entire business model. The somewhat hesitant, still uncoordinated steps that we are witnessing in Europe are the beginning of the trend towards a demolition of territorial barriers. The law will probably get there after the market does, but it will eventually get there – and maybe a future article on these issues will be even called *territoriality lost*.