

The proposed Directive on multi-territorial licensing for
online music –
Is competition a good idea?

Nuno Sousa e Silva

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The proposed Directive on multi-territorial licensing for online music – Is competition a good idea?♦

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ABSTRACT: Traditionally, collecting societies worked on a territorial basis, granting single repertoire and territorially restricted licences. Their activities had been, to a considerable extent, subject to competition law based intervention. Internet has challenged territoriality and, at the same time, created new forms of exploitation of works. On that basis, the former justification for territoriality was put into question by some commentators and the Commission itself. Building on former initiatives and case law, the Commission has on July 2012 presented a proposal for a Directive which, among other things, addresses this problem, establishing a scheme for multi-territorial licensing for online music. This paper briefly evaluates the Proposal in that regard, concluding that it should be abandoned.

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“Few things in life are less efficient than a group of people trying to write a sentence. The advantage of this method is that you end up with something for which you will not be personally blamed.”

—Scott Adams

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♦♦ Master of Laws. LLM. IP (MIPLC). Trainee-Lawyer. Guest lecturer at the Portuguese Catholic University (Porto) E-mail: nsousaesilva@gmail.com

Contrary to patents or trademarks, copyright arises with act of creation¹ and though it is subject to territoriality – meaning that the conditions and the extent of protection in a certain national territory will be determined by the applicable law in that territory – the access to protection will not depend on further action by the right holder on that territory.² Therefore, the act of creation can grant the creator “worldwide” protection.³ Albeit copyright has a limited territorial scope (every author will have a copyright per territory), the possibilities of economic exploitation (mainly through licensing) do not depend on the amount of national or regional registrations owned but instead on whether a certain national law recognizes copyright in a particular creation. Nothing prevents an author from granting a worldwide licence through a single contract.⁴

To hold copyright in a certain country does not mean one is able to exploit it. Traditionally an author would need to find a publisher or an editor, someone interested in using the work, in order to grant a licence or assign copyright(s) for each national territory. However, as Pierre Sirinelli⁵ points out, “Transboundary use of works is now a fact. The new technical media ignore space and time. The use of works is no longer restricted to a particular territory or linguistic area. Many works (music, images, statues, paintings, utilitarian works...) do not in any

¹ Sometimes fixation, as in the United States of America [US Copyright Act, 17 U.S.C. § 102(a)].

² Pursuant to Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works of 1896: “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”.

³ As explained by Goldstein and Hugenholtz (2010: 91 ff) this results from the interaction of territoriality, national treatment and the minimum harmonization operated by the Berne Convention and the TRIPS Agreement.

⁴ One example is Youtube’s terms of service (<http://www.youtube.com/t/terms> 8.4 “You hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website”) Accessed 29 April 2013.

⁵ Sirinelli (1999:1).

case depend on the language spoken by the people to whom they are addressed". In fact, before the appearance of the Internet it would be unthinkable that a production by a South-Korean artist known as PSY, would become the most viewed video of Youtube⁶, a website which, in 2011, had more than 1 trillion views, around 140 views per each person on Earth.⁷

Internet has challenged territoriality and, at the same time, created new forms of exploitation of works. While the latter lead to the creation/recognition of new rights,⁸ territoriality remains untouched.⁹ If one wants to use a work in the EU market (s)he will still need to get 27 licenses for 27 different copyright(s).¹⁰ In order to minimize this, Collecting Societies¹¹ have established some schemes to make it easier to obtain a licence¹² that is valid in more than one country. One example is CELAS, a company created by two collective management organizations (the German GEMA and the British PRS) set up to represent a certain set of EMI Music Publishing's repertoire for online and mobile exploitation in Europe-¹³ Other examples are the Nordic countries extended

⁶ "As of April 1, 2013, the music video has been viewed over 1.5 billion times on YouTube, and it is the site's most watched video" <http://en.wikipedia.org/wiki/Gangnam_Style> Accessed 18 April 2013.

⁷ <<http://www.youtube.com/yt/press/statistics.html>> Accessed 18 April 2013.

⁸ Prominent are the so-called WIPO Internet Treaties of 1996, consisting of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These have, among other things, provided "for the first time a general, exclusive distribution right at the multilateral level" (Lewinski, 2008:451) and the "making available" right (see e.g. Ginsburg, 2004: 234 ff.). On the treaties, in detail, see Ficsor, 2002a.

⁹ Dreier (2013:138) brings to our attention that the recent decision *Murphy* (C-403/08 and C-428/08) "might affect territorially split licensing of copyright within the EU."

¹⁰ This is a problem due to the high transaction costs it represents. Eechoud and others (2011:307).

¹¹ Throughout this paper I will use interchangeably "Collective Management Organizations" (CMOs) "Collecting societies" and "collective rights management". On the notion see below **1.1**.

¹² Or several, since one has to distinguish between the economic aspect of the operation (one single operation) and its legal configuration.

¹³ <<http://www.celas.eu/CelasTabs/About.aspx>> accessed 24 April 2013.

collective licence,¹⁴ the Santiago Agreement¹⁵ or the IFPI/Simulcasting.¹⁶ However, these models are considered to be far from satisfactory¹⁷ and have faced problems in terms of competition law.¹⁸

Beyond being a challenge to the very existence of copyright, the Internet has opened the debate on the need and desirability of Collective Management Organizations and which model of regulation should be applied.¹⁹ Amidst this debate and after several other initiatives, the Commission has, in July 2012, put forward a proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (hereinafter “the Proposal”).²⁰

The objective of this paper is to provide a brief analysis of the multi-territorial licensing scheme found in the Proposal. In order to do so I shall start by explaining briefly the way CMOs operate and have been regulated, focusing on the application of competition law to the reciprocal representation agreements

¹⁴ See Koskinen-Olssen (2010:283 ff.) and Axham and Guibault, (2011:25 ff.)

¹⁵ This concerned a one-stop shop for public performance rights. For more information visit <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38126> Accessed 28 April 2013

¹⁶ Mentioned *infra* at **1.4.2**. For a textual and graphic explanation of the models see Quintais, (2012:46-51, 86-93).

¹⁷ Woods, (2010:105).

¹⁸ Gervais (2011:436) notes: “(...) if you look at collective management from an antitrust perspective it is at its best a necessary evil”. This seems to be a common among competition lawyers Vinje and Niiranen (2005: 399) refers to “a rather special and lenient application of competition law to the conduct of collecting societies”. Santos (2012:122) states that “Another long-entrenched idea is that collective management is a cultural activity and therefore, to that extent, [Collecting Societies] are “special” undertakings to whom competition rules should apply differently – or not at all.” This is what Pereira (2006:24), refers to as the “aristocratic myth”. At the root of these divergences there is the fundamental question of competition law: are non-economic considerations relevant in the application of article 101 TFEU? (analysed *infra* at **3.2**).

¹⁹ Handke and Towse (2007:937): “It has been argued many times that technical solutions to digital rights management (DRM) will render CCS [Copyright Collecting Societies] obsolete as the market for copyright shifts online (...)”.

²⁰ Available from: http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf Accessed 18 April 2013.

aimed at multi-territorial licensing (1). After analyzing the scope and the functioning of the proposed system (2), I will look at the two regulatory models for CMOs and the question that underlies the choice: is it possible to foster competition between CMOs and, if so, what kind of competition do we want to promote? (3) I will conclude assessing whether the Proposal should be followed, changed or abandoned (4).

1. Collective Management Organizations

1.1 What are CMOs?

According to WIPO,²¹ "Collective management is the exercise of copyright and related rights by organizations acting in the interest and on behalf of the owners of rights."

Whenever someone wants to make use of a certain work, (s)he will have to "clear rights", i.e. obtain one or several authorizations for that use. Often, due to a phenomenon known as "fragmentation of rights" (multiple layers of rights, like copyright in the music and in the lyrics and/or multiple sub-rights, like the making available and the reproduction rights) an user (such as a broadcaster) will have to clear a considerable amount of rights (sometimes just for a single act of use²²), each with different owners. Obviously, this is far from practicable or reasonable. Unless other schemes were in place, services such as broadcasting would not be able to operate. So far, a substantial part of the solution to this problem has been collective management of copyright and

²¹ <http://www.wipo.int/about-ip/en/about_collective_mngt.html> Accessed 22 April 2013.

²² To solve that problem, CMOs issue the so-called "blanket licences" that are general authorizations, encompassing unlimited uses. It has been defined as "a license that gives the licensee the right to perform all of the works in the repertory for a single stated fee that does not vary depending on how much music from the repertory the licensee actually uses". *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at 69 (S.D.N.Y. June 11, 2001). *Merges*, (1996: 1293) pointed out that CMOs often transmute copyright from a property into a liability rule.

neighbouring rights. As Anke Schierholz²³ puts it: "Collective right management plays an important, if not indispensable role in the exercise of rights for mass uses, which can – for legal or practical reasons – not be handled well on an individual basis".

Collective Management organizations are legal entities usually set up by copyright (and/or neighbouring rights) holders in order to administer their rights, which traditionally means granting licenses and enforce rights on their behalf.²⁴ According to some, one should distinguish between "rights clearance organizations" and "collective management", only the latter having truly "collectivized aspects".²⁵

The Proposal defines 'collecting society', in its article 3(1)(a) as "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by more than one right holder, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members". This definition has been criticized due to the lack of emphasis on the collective character of collecting societies and their nature of trustees for the right holders.²⁶ It has also deemed to be too narrow (allowing for an easy circumvention) and wrongly limited to commercial users.²⁷

CMOs are intermediaries and deal with two categories of people.²⁸ They contract with right holders in order to represent them and manage their rights (the so called *upstream phase*) and thereafter contract on behalf of right holders

²³ Schierholz (2010:1150) (footnotes omitted).

²⁴ Moreover, as Gervais (2011:424) puts it: "in many countries authors and other right holders such as performers expect their collectives to do more than manage their rights". This is also a difference between copyright and *droit d'auteur* systems (Lewinski, 2008:61).

²⁵ E.g. Ficsor (2002:12).

²⁶ Drexl and others (2013: 19-21).

²⁷ Drexl and others (2013: 19-21). At the same time Quintais (2013: 67) is of the opinion that the definition "is extremely broad, there being no requirements of prior authorisation or legal form".

²⁸ The number of markets might differ as mentioned by Turner (2010:233).

with users, people interested in using the works and/or object of related rights (*downstream phase*).²⁹

1.2. Advantages/Justifications for CMOs

CMOs make licensing easier (or, in some cases, just possible). This has obvious advantages both for users (licensees) and right holders (licensors).³⁰ The fact that these operations occur also benefits society as a whole. Users will be able to provide consumers with new products and services and the exploitation of works will be made easier. In the words of Hadnke and Towse³¹, without collecting societies, "copyright law would be ineffective in some markets for copyrighted works: the majority of authors and users would not be able to grant or obtain permission to use many works of art, literature, music, film and other such works that copyright law protects". In economic terms, collecting societies represent a way of overcoming high, often unbearable, transaction costs.³²

At the same time, the operation of collecting societies benefits from economies of scale. The bigger their repertoire is, the less the cost of management per item will be.

An additional and relevant characteristic is the fact these organizations operate in a very specialized way. As Daniel Gervais³³ explains: "starting and operating a CMO is a complex task, one that requires specific expertise. Getting the rights, the metadata about works, authors, rights holders, contracts and contacts; designing efficient software and systems; getting people trained; providing

²⁹ Ficsor (2005:2).

³⁰ It should be mentioned that this association increases the right holders bargaining power. This idea is also formulated as "protecting creative authors and performing artists against large exploiters of the copyright industry" (e.g. Case 127/73 BRT v. SABAM [1974] ECR 313 §9).

³¹ Handke and Towse (2007:937).

³² It must be noted that CMOs often have very improper behaviour, for an interesting and amusing list see Band (2012).

³³ Gervais (2011:433).

service to rights holders and users; processing usage and distribution data; and dealing with the legal complexities of copyright are not for the faint of heart.” These circumstances represent a significant barrier to entry.

All of the aforementioned partly explains why these organizations are generally in a monopoly or dominant position.³⁴ Furthermore, this position is sometimes granted or at least fostered by operation of the law (legal monopoly).³⁵ This circumstance has generated concerns and led to regulatory intervention, mainly by means of competition law.³⁶

1.3. Concerns under 102 TFEU: abuse of dominant position

As in *Wouters*³⁷ where the CJEU held that Members of the Bar carried on an economic activity and, hence, were undertakings, so could authors and copyright holders be regarded as undertakings and collecting societies as an association of undertakings. But this does not seem to be the approach followed, collecting societies are seen as undertakings themselves.³⁸ In fact such

³⁴ Cfr. the GEMA decisions: Commission Decision 71/224/EEC- GEMA I [1971] OJ L 134, Commission Decision 72/268/EEC- GEMA II [1972] OJ L 166 and Commission Decision 82/204/EEC- GEMA III [1981] OJ L 94 and cases: 127/73 *BRT II* [1974] ECR 51 and 7/82 *GVL/Commission* [1983] ECR 483.

³⁵ Quintais, (2012: 42 ff.), defines and explains three levels of restrictions imposed to the rights holder: voluntary collective licensing, blanket licenses and mandatory collective management. Italy and Austria are two examples mentioned by Drexl (2007:1) of mandatory collective management. Another example is Article 9 (1) of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248 which reads: “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.”

³⁶ Considerations regarding free movement of goods are also present in this regulatory framework. In the words of Pereira (2006:26) “Competition policy is not an objective in itself but rather one of several means to achieve the common market”.

³⁷ Case C-309/99 *Wouters* [2002] ECR 1577 §48-49.

³⁸ See e.g. the decision GEMA I (n34). In Case 7/82, *GVL v Commission* [1983] ECR 483 §32 the argument according to which CMOs should be considered “undertakings entrusted with the operation of services of general economic interest” pursuant to article 106(2) TFEU was rejected.

considerations define the boundary between the application of article 101 and 102 TFEU.³⁹ Of course that, in some situations, these articles can and will overlap.

As a result of their dominant position, collecting societies find their freedom of contract restricted by article 102 TFEU. The conditions imposed to right holders must be reduced to the necessary for the purpose of collective management.⁴⁰

This means that the longer the duration of commitment to the society, the narrower its scope must be, in terms of categories of works and forms of exploitation, in order to avoid an abuse of dominance, under Article 102 TFEU.⁴¹

Concerning users the focus of the Commission's intervention has been exploitative behaviour,⁴² controlling excessive royalties/ administrative costs.⁴³

A dominant position might justify an obligation to contract with right holders and/or with users. However, as Josef Drexl⁴⁴ explains (following Bese, Kerby & Salop), imposing such an obligation might have the effect of erecting barriers to entry. As CMOs have to accept membership of every right holder on a non-discriminatory basis, these will choose the one that is in a better position and, due to economies of scale that will be the one that is already on the market. This rule fosters concentration. Therefore, he concludes, "the legal duty of

³⁹ Jones (2012: 301-331). This is a problem quite common in the interface of IP and competition law. For instance, it is very much debated regarding FRAND commitments and Standard Setting Organisations, whether such obligation could and should arise out of article 101 or 102. Is the holder of a standard essential patent an undertaking in a dominant position (a case for 102) or is the dominant position the outcome of a collusion by the undertaking that have set the standard (thus a problem to be analysed under 101 TFEU)?

⁴⁰ Case 127/73 *BRT v. SABAM* [1974] ECR51 §11 ("It is desirable to examine whether the practices in dispute exceed the limit absolutely necessary for the attainment of this object, with due regard also to the interest which the individual author may have that his freedom to dispose of his work is not limited more than need be").

⁴¹ Turner (2010:235).

⁴² Drexl (2007:23).

⁴³ But not only as demonstrated by the recent Daft Punk case (COMP/C2/37.219 *Banghalter & Homem Christo v SACEM*) at p.12 considering the statutory requirement of collective management an abuse under Article 102 TFEU.

⁴⁴ Drexl (2007:8).

collective societies to contract with all interested right-holders does not appear as “preventive” legislation, responding to the God-given natural monopoly, but rather as the very cause of such a monopoly.”⁴⁵

1.4. Concerns under 101 TFEU

Out of the practice relating to article 101 TFEU and CMOs, the most relevant aspect to understand Part III of the Proposal regards agreements between national collecting societies about reciprocal representation.⁴⁶

1.4.1. Earlier framework

As previously mentioned nothing in copyright law prevents a right holder from granting a worldwide licence. As a matter of fact CMOs are traditionally entrusted with the management of the worldwide rights of a certain author.⁴⁷ However, the possibilities of monitoring and enforcing these rights are highly dependent on the location of CMOs. Hence, it is usual for national CMOs to enter into reciprocal representation agreements (RRAs). According to these agreements, a CMO of a Member-State will represent the right holders of another Member-State in its territory of activity (and vice-versa).⁴⁸ To this effect there is nowadays a wide and established network of RRAs.

Though they have advantages, these agreements represent a territorial restriction to the management of rights, namely by limiting the issuance of licences to a national territory. It was debated whether these agreements had

⁴⁵ Drexl (2007:8).

⁴⁶ The other two aspects dealt with are the relations of CMOs with right holders and with users.

⁴⁷ Schierholz (2010: 1155): “The mandates (...) usually cover the worldwide exploitation of rights although CRMs traditionally only issue licences for domestic uses. International representation is guaranteed by bilateral reciprocal contracts concluded between the different national CRMs of a specific repertoire”.

⁴⁸ As explained in Van Bael and Belis (2010:622) “each society acts as both principal in respect of its own works and agent in respect of the works of the other society”.

“as their object or effect the prevention, restriction or distortion of competition within the internal market”.⁴⁹ It was held that “the reciprocal representation contracts in question are contracts for services which are not in themselves restrictive of competition in such a way as to be caught by [101 TFEU]. The position might be different if the contracts established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad”.⁵⁰ So, as long as there was not a clause in these contracts that partitions markets by forcing CMOs to refuse licences to foreigners (or foreign established) users, they were not infringing competition law. In fact, competition law seemed to impose non-discrimination and to forbid an exclusivity clause.

Two later cases, decided by the Commission, are important to understand the current Proposal: *IFPI/Simulcasting* and *CISAC*.

1.4.2. IFPI/Simulcasting

The International Federation of the Phonographic Industry (IFPI) had drafted a model reciprocal agreement to be celebrated between record producers' rights administration societies for the licensing of "simulcasting". Simulcasting, was defined as “the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals”.⁵¹ Under this agreement the reciprocal licensing was not territorially limited.⁵² However, an interested user could get a multi-territorial licence from

⁴⁹ Article 101 (1) TFEU.

⁵⁰ Case 395/87 *Ministère public v Tournier* [1989] ECR 2521 §20.

⁵¹ Case COMP/C2/38.014 — IFPI "Simulcasting" [2003] OJ 58 – 0084, §2.

⁵² *Id.*, §15: “(...) the right to simulcast on the Internet, given that it necessarily involves the transmission of signals into several territories at the same time, is not covered by the existing "mono-territory" licenses granted by collecting societies to broadcasters where the simulcast includes the repertoires of several collecting societies. According to the parties, the Reciprocal

one CMO only,⁵³ the one established in his/her territory (this is the so called one-stop shop model, with a restrictive clause).

Due to this restrictive clause, users could only get the multi-repertoire and multi-territorial licence with one CMO, this meant that there would not be competition between CMOs for users, as the latter could not choose among the former. Therefore the Commission considered that the Agreement violated Article 101 (1) TFEU. After having been notified, the participating CMOs agreed to change the way prices were set, discriminating royalties from administrative fees which sufficed for the Commission to exempt the agreement under 101 (3) TFEU.⁵⁴ This decision has been criticized by its incongruence. In the words of Christoph B. Graber⁵⁵: "The Simulcasting case leaves us with the impression that the Commission, although having reservations against the existing [Collective Rights Management] systems in terms of efficiency and competition, was ultimately unable to present an alternative model that would promise a better solution".

1.4.3 CISAC

On 16 July 2008 the Commission adopted a decision considering that the model agreement drafted by CISAC⁵⁶ and used in reciprocal representation agreements celebrated between 24 European CMOs, was restrictive of

Agreement is intended to facilitate the creation of a new category of licence which is simultaneously multi-repertoire and multi-territorial."

⁵³ The customer allocation clause was removed after being contested by the Commission. It remained in the Santiago Agreement, which, however, was not renewed after the objection. In the Proposal, rightholders are free to choose almost all aspects of their relationships with a CMO (see art. 5(2) and (3)).

⁵⁴ Frabboni (2009:382).

⁵⁵ Graber (2012:8).

⁵⁶ Acronym for "Confederation of Societies of Authors and Composers".

competition, violating article 101 TFEU.⁵⁷ The problem was said to lie in two clauses: the membership clause, which prevented an author from being member of different national collecting societies and the exclusivity clause, defining the territorial scope of action for the parties (CMOs), hence partitioning the internal market.⁵⁸

This model granted a multi-repertoire but single territory licence. One user could get a licence from the repertoire of other collecting societies; however that licence was restricted to the territory in which the CMO was operating.

The model contract was changed and, at the same time CISAC appealed. On 12 April 2013 the General Court ruled⁵⁹ that the Commission failed to provide evidence of a concerted practice and the decision was partially annulled.⁶⁰

2. The Commission proposal

In this context, in July 2012 the Commission presented a proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. It was based on the online music recommendations of 2005, a soft-law document where some solutions had been rehearsed.⁶¹

The Proposal consists of two main parts: the rules of organization and transparency that are to apply to all collecting societies (Title II) and the regulation of multi-territorial licensing services for online rights in musical works

⁵⁷ Case COMP/C2/38.698 – CISAC [2008] <
http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf>

⁵⁸ Axham and Guibault (2011:23-24).

⁵⁹ Case T-442/08 *CISAC v Commission* [2013] (not yet published).

⁶⁰ *ibid.* §132: "It follows from the above analysis that the evidence put forward by the Commission does not establish, to the requisite legal standard, the existence of a concerted practice between the collecting societies to fix the national territorial limitations."

⁶¹ See below n108 and Mazziotti (2011:757 ff.)

(Title III).⁶² These are preceded by Title I, covering general issues, followed by Title IV on enforcement measures and Title V with final provisions.

It is difficult to understand why the Proposal addresses in the same document two different aspects that spite being “certainly related” are diverse, when “dispute over the more controversial issue of multi-territorial licensing could block adoption of adequate governance and transparency rules for a long time.”⁶³

The following analysis will focus on Title III of the Proposal, its most important and innovative but also most controversial part.⁶⁴

2.1. Scope

Notwithstanding the amount of air one has to inhale before reading the title of the Proposal, its scope of application is quite narrow. According to Article 2, 2nd paragraph, of the Proposal:

“Title III and Articles 36 and 40 shall only apply to those collecting societies managing authors’ rights in musical works for online use on a multi-territorial basis.”

There are several restrictions that must be explained as it only applies to **online environment, online rights, authors’ rights on musical works**.

2.1.1. Online vs. Offline

In the traditional “offline world”, the main reason indicated to accept territorial restrictions was the need for local monitoring.⁶⁵ For instance, there was no

⁶² For an overall explanation of the proposal *see* Quintais (2013:65-73).

⁶³ Drexl and others (2013:19).

⁶⁴ Quintais (2013:72) refers to “the crown jewel of the proposal”.

⁶⁵ *Ministère public v Tournier* n51 §19-20 and Case 110/88 *Lucazeau v. SACEM* [1989] ECR 2811 §14. Drexl (2007a:260).

efficient way for a Polish collecting society to monitor what was happening in “offline” Portugal. This is why the reciprocal representation agreements were concluded and configured in a “mono-territory” basis.

However this does not apply in the same measure to online environment as the monitoring on the Internet can be performed from a distance.⁶⁶ The collecting societies started changing their agreements accordingly,⁶⁷ as they also started facing competition from individual administration of online rights.⁶⁸

It should be borne in mind that CMOs do not limit their activities to monitoring and – due to wide range of factors – the enforcement might be much more efficient if done locally.⁶⁹ In my view this also explains the position of the General Court in its CISAC decision.⁷⁰

2.1.2. Online rights

The proposal only applies to online rights. These are defined in article 3(1)(l) by reference to Articles 2 and 3 of the InfoSoc Directive.⁷¹ The rights in question are the reproduction right, the communication to the public and the making available to the public right.⁷²

⁶⁶ Axham and Guibault (2011:21-22). Santos (2012:125). IFPI/Simulcasting decision (n52), §17: “(...) the new possibilities offered by digital technology, namely the ability to carry out the monitoring of copyright exploitation from a distance”.

⁶⁷ In fact the Commission argued that the existence of other multi-territorial solutions (such as CELAS) showed that “a presence on the spot is not necessary [T-442/08 CISAC n59 §38].

⁶⁸ Drexl (2007a:262).

⁶⁹ Riis (2011:485). After all, the enforcement will often involve going to Court and one can hardly defend that a foreigner CMO faces the same practical conditions than a national one. Defending that the “justification for this territorial approach is no longer valid for on-line uses” see Toft (2006:7).

⁷⁰ n57.

⁷¹ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167.

⁷² On the interpretation of these by the CJEU *see* Kur and Dreier (2013:295 ff.). Identifying and analyzing them in the context of P2p as the “legally relevant acts and exclusive rights” *see* Quintais (2012:30 ff.).

With the changing framework of exhaustion online and the innumerable questions that arise from the *Usedsoft* case,⁷³ it might be necessary (or not) to include the distribution right (Art.4 of the InfoSoc Directive), at least in the case of software.

2.1.3 Author's rights vs. Neighbouring rights

It is not clear from the wording of the Proposal whether only *stricto sensu* copyright is covered. If the neighbouring rights are not part of the MTL scheme then the system will be useless. Music online services cannot operate without clearing neighbouring rights such as phonogram producers' and performers' rights.⁷⁴ An alternative reading would be to say that the reference to Articles 2 and 3 of the InfoSoc Directive, which also mentions neighbouring rights, makes this inclusion.

However, there are hints on the contrary such as the mentioning of "works"⁷⁵ and the text of the Impact Assessment.⁷⁶ As this is yet a proposal, the Commission is still in time to correct this obvious flaw.

2.1.4 Musical works vs. other works

According to João Pedro Quintais⁷⁷ online music "was understood to be the only area giving rise to difficulties requiring legislative intervention".

⁷³ Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] (not yet published), holding that there is exhaustion of used software, so that its resale online is allowed. In the US a similar (now under appeal) case *Capitol Records, LLC v. ReDigi Inc.*, No. 12 CIV. 95 RJS, (S.D.N.Y. Mar. 30, 2013) decided otherwise.

⁷⁴ Drexl and others (2013:19).

⁷⁵ Drexl and others (2013:26).

⁷⁶ Drexl and others (2013:26). Quintais (2013:72) also believes the proposal excludes neighbouring rights.

⁷⁷ Quintais (2013: 67).

Nonetheless, the market for ebooks,⁷⁸ pictures and even movies, might face the same needs for borderless exploitation.⁷⁹

If music is, indeed, an area where fragmentation occurs more than in pictures or ebooks, the same is not necessarily true in the field of movies.⁸⁰ This differentiation might also be explained by the economic significance of musical works.⁸¹

2.2. The model - how is this to work?

The Proposal accepts and promotes RRAs. However, these have to be of a non-exclusive nature and the mandated collecting societies have to administer all rights on non-discriminatory terms.⁸²

According to the Proposal, collecting societies will have to be distinguished according to whether they grant or they don't grant multi-territorial licenses (MTL).

In order to be able to grant MTL, Articles 21 to 26 of the Proposal set certain requirements of transparency, accuracy and timely reporting and payment. If a collecting society meets these requirements and is granting or offering to grant MTL, another collecting society that does not grant or offer to grant MTL can

⁷⁸ Even though these works are dependent on the language, factors such as mobility and multilingualism (being actively promoted by the EU, *see* Communication on Multilingualism "A New Framework Strategy for Multilingualism" COM(2005) 596 final, available at http://ec.europa.eu/languages/eu-language-policy/multilingualism_en.htm) might help the creation of an European market for e-books. And in fact, the Commission has initiated some investigation in this sector, namely concerning Penguin's actions (*see* http://europa.eu/rapid/press-release_IP-13-343_en.htm).

⁷⁹ Drexler and others (2013:26).

⁸⁰ There have been some efforts to harmonise ownership of movies in the EU (cfr. Case Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] (not yet published).

⁸¹ MEMO/12/545 §4-5.

⁸² Article 28 of the Proposal, this last aspect is a restatement of Article 13.

“force” the “active” society into a representation agreement.⁸³ This results from article 29 (1) and (2) of the Proposal, which impose a duty to contract as long as the collecting society “is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works”.⁸⁴

Collecting societies can also outsource their MTL services⁸⁵ or transfer them to subsidiaries.⁸⁶ It is hard to understand the need for this differentiation. If these entities are managing copyright for more than one copyright holder, they will be considered collecting societies, according to Article 3 (a) of the Proposal, thus subject not only to the provisions mentioned in article 31 but to the whole Directive.

It is submitted that articles 27 and 31 of the Proposal could be merged in a single article stating that collecting societies may grant MTL directly or by employing external means. In any case they cannot escape liability.

In case a right holder’s collecting society does not grant MTL directly, or has entered into a representation agreement,⁸⁷ (s)he will be able to grant multi-territorial licenses for his/her online rights in music works directly to users or to allow any other collecting society to represent his/her online rights.⁸⁸ This solution purports to establish competition between authors and collecting societies. However, there will be a lack of sufficient incentives for those artists

⁸³ This cannot be said to be reciprocal. That’s precisely why Article 29 (2) of the Proposal allows the mandated society to charge a reasonable profit on top of its costs. According to Drexl and others (2013:29) this might make the system more expensive than MTL based on RRAs, as there will be a double charge.

⁸⁴ Graber (2012:12) welcomes this solution from the point of view of cultural diversity. He is, nonetheless concerned with the meaning of “same category”. I interpret category as referring to the kind of rights or fields of use and not to the kind of music.

⁸⁵ Article 27 of the Proposal.

⁸⁶ Article 31 of the Proposal. The wording of this article could be better, instead of listing articles 22 to 27 one-by one.

⁸⁷ The Proposal provides one year from the transposition of the Directive as transitional period.

⁸⁸ Article 30 of the Proposal.

that are more obscure or for those collecting societies that cannot generate enough revenue with their own repertoire, that's why this is considered dangerous from a point of view of cultural diversity.⁸⁹ Some submit that the small and medium CMOs are endangered by the loss of online rights on anglo-american and latin-american music.⁹⁰

In fact the solution found in the proposal is not the desirable multi-repertoire and multi-territorial licence but the single-repertoire, multi-territorial one. Therefore collecting societies will be interested in gathering only the most popular music and authors will look for the CMO which gives better prospects of revenue and (indirectly) exposure.⁹¹

It should be noted that, by article 5, authors remain free to change their collecting society, which might lead to the loss of a true sense of collectivity. Some powerful CMOs might then allure authors facing some success into changing "teams" by offering a better remuneration.⁹² This is yet another factor that might lead to concentration.

3. Two models for CMOs

To achieve the desirable effect of enabling MTL schemes, one option would be creating a "one stop shop", i.e., something like an European collecting society or

⁸⁹ Mazziotti (2011:792 ff).

⁹⁰ Mazziotti (2011:793): "This entails concrete risks of marginalization for local repertoires that are certainly higher for smaller domestic repertoires, like those of Eastern European countries and of Western European countries, such as Greece, Portugal, the Netherlands, Belgium and the Scandinavian countries".

⁹¹ Conceivably, if it is considered too complicated to get a licence to exploit a certain song, users will eschew it for another one.

⁹² Art. 12(1) of the Proposal mentions that "The collecting society shall carry out such distribution and payments accurately, ensuring equal treatment of all categories of rightholders." However, it is not clear how much can a CMO "offer" an author. In fact, it seems difficult to apply a competition based reasoning (comparable to the football players market) to this reality.

as it is called in the introduction to the Proposal “a centralised portal”,⁹³ where one could get an EU-wide licence. According to the Commission this option raises “significant concerns as to its compatibility with competition law”.⁹⁴

The other path, followed by the Commission, is creating conditions for competition between collecting societies. This is done by allowing every collecting society to grant MTL and trying to promote freedom of choice for right holders and representation agreements. However, since this involves the activity of more than one CMO, the prices (administrative cost plus “a reasonable profit margin”) increase.⁹⁵

The discussion between these two basic options – regulating a natural (or legal) monopoly⁹⁶ vs. fostering competition – is affected by the answer to a prior economic question: are CMOs an example of an unavoidable monopoly? If the answer is in the affirmative, trying to foster competition might turn out to be an useless endeavour and the best solution lies in the recognition and regulation of this monopoly.

On the other hand, even if competition is deemed to be possible, one still has to ponder if the model chosen by the Commission can effectively achieve that goal, and which kind of competition is the one to foster.⁹⁷

3.1. CMOs as natural monopolies

⁹³ Page 7 of the Proposal.

⁹⁴ Page 6 of the Proposal. See also MEMO/12/545 (p.7) and the Impact Assessment, all available at http://ec.europa.eu/internal_market/copyright/management/index_en.htm.

⁹⁵ See note 83 and accompanying text.

⁹⁶ As Posner (1969:548) explains: “A firm that is the only seller of a product or service having no close substitutes is said to enjoy a monopoly. (...) If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it”.

⁹⁷ There are opposed views even within the Commission cfr. Kur and Dreier (2013:284) and Riis (2011:486-7), or even between the Commission and the European Parliament, see Dietz (2004).

According to Drexl et al.: “the field of collective rights management is characterized by the economics of a natural monopoly”⁹⁸ and “this is due to the economies of scale”,⁹⁹ therefore. “the natural monopoly of collecting societies should be accepted as an efficient market solution”.¹⁰⁰ In fact, this is a common statement from economic analysis: CMOs are natural monopolies.¹⁰¹

The Proposal has chosen the competition model but “the Commission should also take into account that such a policy of introducing more competition in the market cannot act against the economic features of a natural monopoly”¹⁰² thus “the practical outcome of the Commission’s policy may not be too different from such portal”.¹⁰³

In fact, even when more than one collecting society is in the same market it does not mean that they are in competition. Users might still need to gather licences from both, so each society holds a dominant position for its own repertoire.¹⁰⁴ The existence of the monopoly is not only due to economies of scale.¹⁰⁵ CMOs constitute an efficient solution to the problem of fragmentation. If we want to promote competition, we will be promoting dispersion by fighting

⁹⁸ Drexl and others (2013:4).

⁹⁹ Drexl and others (2013:5).

¹⁰⁰ Drexl and others (2013:5).

¹⁰¹ Towse (2012), Katz (2009), Handke and Towse (2007) and Drexl (2007:15 ff.) (discussing natural and the legal monopoly). I will not go into the economic analysis myself as that would involve the measurement of costs (cf. n96).

¹⁰² Drexl and others (2013:5).

¹⁰³ Drexl and others (2013:6).

¹⁰⁴ Drexl (2007:13): “Each single collecting society will dispose of a market dominant position since the repertoires of their counterparts do not constitute sufficient substitutes from the point of view of commercial users.”.

¹⁰⁵ Drexl and others (2013:33).

against market concentration. However, market concentration is precisely the *raison d'être* of CMOs, and one of its main advantages.¹⁰⁶

3.2. Allocative efficiency vs. Creative efficiency

A classical discussion under EU Competition law is whether non-economic considerations are relevant in the application of article 101 (3) TFEU.¹⁰⁷ Depending on the answer one to this question, the concerns with cultural diversity voiced by many¹⁰⁸ could or could not be given consideration in the framework of competition law as applied to the Reciprocal Representation Agreements.¹⁰⁹ Of course, there are efficiency gains resulting from one-stop shops which "can only be achieved by allowing a certain degree of collusion between the existing Collecting Societies".¹¹⁰

According to Josef Drexel:¹¹¹ "the Commission only argues in terms of a static competition-policy model, focusing on the output, price and quality in the sense of allocative efficiency, without taking into account the purpose of copyright law to promote creativity and (...) cultural diversity". However, for this author, promoting creativity is a competition law goal, according to the dynamic competition perspective.¹¹² Nevertheless this does not seem to be the Commission's understanding.

¹⁰⁶ Riis (2011:486): "the competitive situation in the USA has fragmented the repertoire and, for most users, fragmentation has raised the transaction costs associated with copyright clearance".

¹⁰⁷ On the question see Jones and Sufrin (2011:244 ff.) Odudu (2010: 599-613).

¹⁰⁸ Including the European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)). In the Academia see e.g. Graber (2012) and Drexel, (2007b:33ff.)

¹⁰⁹ Even though, Santos (2012:132) highlights (critically) non-economic goals were considered in the *CISAC* decision.

¹¹⁰ Santos (2012:132).

¹¹¹ Drexel (2007a:259).

¹¹² Drexel (2007a:273).

In any case, as this Proposal relates to a Directive and not (only) to the competition law thinking that informs several of its solutions, all positive and negative outcomes must be considered.

Annette Kur & Thomas Dreier¹¹³ find it “an open question whether the system proposed by the Commission will indeed lead to more competition and ultimately better consumer satisfaction or whether, to the contrary, it will lead to a concentration of collective management structures at the detriment of authors, performing artists and cultural variety in Europe, together with an increase in licensing cost to the disadvantage of consumers.” In the words of Josef Drexl¹¹⁴: “the question remains how systemic competition between collective and individual administration impacts on ‘creative competition’”.

This model might just mean that those artists that are away from the mainstream but could still get some revenue are forced to turn amateurs or choose alternative models for the exploitation of the works, often not relying on “traditional” copyright (such as creative commons licences).

4. Conclusion

I agree with my homonymous¹¹⁵: “the online world has forced copyright to a crossroad, but this is a tuning problem that cannot be solved by competition law.” Such finding is line with the idea that competition law is not a suitable means to regulate natural monopolies.¹¹⁶ It is necessary to deal with CMOs in a specific framework and the Commission should tackle the MTL problem

¹¹³ Kur and Dreier (2013:403).

¹¹⁴ Drexl (2007a:276).

¹¹⁵ Santos (2012:139).

¹¹⁶ Posner (1969:549). Towse (2012:29): “It has always been understood that natural monopolies require state regulation...”.

cognizant of the specific market structure of CMOs, their functions and purposes.

The levels on which competition might be fostered are different. Even though CMOs are service providers and one can expect that competition between them will produce a better outcome, this might be focusing the competition on an inadequate level. It has been argued that competition should be fostered between works and not at the level of collecting societies,¹¹⁷ whose aim is not a competitive one.¹¹⁸

However, even when accessing the one-stop shop model from the 'classic' competition law perspective, one cannot forget that there are efficiency gains (like saving search and negotiation costs) resulting from the one-stop shop. These arise precisely out of market concentration and collusion between CMOs.¹¹⁹ As collective management of copyright is a natural monopoly, the one-stop shop model is not only the efficient way of dealing with multi-territorial licensing but quite probably also the only possible one.¹²⁰

Unless it is not exact that CMOs operate in a natural monopoly this proposal to regulate MTL seems doomed to fail its objectives and should be abandoned.¹²¹

¹¹⁷ Drexl (2007a:281): "Instead of establishing a level playing field for competition between collecting societies to the benefit of music publishers, the Commission should work for a level playing field for competition between works."

¹¹⁸ Drexl and others (2013:33): "Competing for attractive repertoire and managing copyright catalogue is the core business of publishers and record companies, not collecting societies".

¹¹⁹ Santos (2012:132).

¹²⁰ Drexl and others (2013:5). Peifer (2010: 676) says: "Collective rights management is the silver bullet for any solution that is based on easy and affordable access. It might also become a favourite solution for right holders to accept that mass uses of works are only possible in the net if one-stop-shopping solutions for platform providers and for users become a reality."

¹²¹ Towse (2012:27) "So far, both law and economics support the view (...) that the collecting societies' monopoly is a natural monopoly that reduces transaction costs for both rights holders and users."

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