The Interaction between Copyright, Neighbouring Rights and International Licensing Procedures:

The High-Wire Balancing Act of Rights Management in the Digital Age - Past, Present and Future of Music Licensing

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JULIA WERNER

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Abstract

The rapidly progressing digital transformation of the music market and an ever more complicated music licensing process is frustrating the user's demand for faster, easier and unlimited access to the entire world music repertoire, providing impetus for concern.

This dissertation traces the development process of radio technology from analogue to online streaming services and examines the associated international laws, regulations and respective licensing practices in order to understand the struggles online music services face when seeking cross-border licences for the online use of musical works.

The aim is to find a suitable solution that guarantees sufficient international licensing of musical works and provides for easy access to the world music repertoire.
The research focuses on the European Union and the United States of America as both have recently introduced legislation in order to improve online licensing of musical works.
However, a special focus is on the development process of the European Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online use in the Internal Market (CRM-Directive) as the first to introduce standards for the operation of rights managing entities and the general collective management of rights in musical works.

One of the key findings is that collective rights management organisations are an important factor for enhancing a global online licensing regime but, due to their national regulation and operation, such a regime needs technical support to make international music licensing possible.
Therefore, this dissertation examines the possibilities of an international licensing system that combines regulations from the European CRM-Directive and the American Music Modernization Act of 2018 with an interoperable database system for rights managing entities.

This research argues for a harmonised global online licensing system that is detached from specific national copyright regulations and accompanied by an interoperable database system that allows for easy access to international licences while at the same time guaranteeing fair remuneration to all right holders. The main conclusion drawn is that in order to overcome the existing licensing controversies strong and consistent international rights management standards combined with database technology rather than legislation alone could provide for easier cross-border licensing and fair remuneration of right holders.

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Ehara taku toa i te toa takitahi, engari, he toa takitini
Success is not the work of one, but the work of many
Erfolg ist nicht die Arbeit eines Einzelnen, sondern die Arbeit vieler

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"Music is essentially any note between twelve octaves. Twelve notes and the octave repeats. It's the same story told over and over. All that the artist can offer the world is how they see those twelve notes."[1]

[1] Bill Gerber, Jon Peters, Bradley Cooper, Todd Phillips, Lynette Howell Taylor (Producers) and Bradley Cooper (Director) *A Star is Born* [Motion Picture] (Warner Bros. Pictures, United States, 2018).

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Index of Abbreviations

AKKA-LAA	Copyright and Communication Consulting Agency/Latvian Copyright Agency (authors CMO Latvia)
ALAI	Association Littéraire et Artistique International
AM Radio	Amplitude-Modulation Radio
AMU	Amalgamated Musicians Union
ARESA	Anglo-American Rights European Service Agency
ARMONIA	Pan-European Hub of 9 CMOs granting pan-European licences to online music services
ASCAP	American Society of Composers, Authors and Publishers, New York
Berne Convention	Convention for the Protection of Literary and Artistic Works
BIEM	Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique
BMI	Broadcast Music Inc., New York
BMVI	Bundesverband Musikindustrie (German branch of IFPI)
Brussels Convention	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
Buma/Stemra	Het Bureau voor Muziek-Auteursrecht / Stichting STEMRA, Hoofddorp (authors CMO Netherlands)
C3S	Cultural Commons Collecting Society)
CCETT	Centre Commun d'études de Télévision et Télécommunication (France)
CIS-Net	Created in 1998 by CISAC allowing CMOs to view each other´s databases and interoperate to a certain extent
CISAC	International Federation of Societies of Authors and Composers
CJEU	European Court of Justice
CMO	Collective Management Organisation
CMO-Act	Act on the Management of Copyright and Related Rights by Collective Management Organisations (Germany)
COFDM	Coded Orthogonal Digital Frequency Modulation
CRM-Directive	Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online use in the Internal Market
DAB	Digital Audio Broadcast
DARS	Digital Audio Radio Service
DDX	Format for processing usage reports used by CMOs
DEAL	Direct European Administration Licensing
Directive Regulations	The Collective Management of Copyright (EU Directive) Regulations 2016
DMB	Digital Multimedia Broadcast
DPMA	German Patent and Trademark Department
DRM (radio)	Digital Radio Mondiale
DRM	Digital Rights Management
EAU	Eesti Autorite Ühing (authors CMO Estonia)
EBU	European Broadcasting Union
EC	European Commission
EC-Treaty	Treaty establishing the European Community
ECL	Extended Collective Licensing System

EEA	European Economic Area
EESC	European Economic and Social Committee
ETSI	European Technical Standard Institute
EU	European Union
FIM	International Federation of the Phonographic Industry and International Federation of Musicians.
FCC	United States Federal Communication Commission
FEC	Forward Error Correction
FM Radio	Frequency-Modulation Radio
GATT	General Agreement on Tariffs and Trade
GDPR	General Data Protection Regulation
GEMA	Gemeinschaft für Musikalische Aufführungsrechte (authors` CMO Germany)
GRD	Global Repertoire Database
G&T	Governance and Transparency
ICE	International Copyright Enterprise Service Limited
IFPI	Federation of the Phonographic Industry
IFFRO	International Federation of Reproduction Rights Organisation
ICMP	International Confederation of Music Publishers
IMJV	International Music Joint Venture
IMPEL	Independent Music Publishers E-Licensing
IMR	International Music Register
InfoSoc	Directive 2001/29/EC of the European Parliament and of the Council of 22.05.2001 on the harmonisation of certain aspects of copyright and related rights in the information society
ICANN	Internet Corporation for Assigned Names and Numbers
IPDA	International Performers Database Association
IPI	Interested Party Information
IPO	Intellectual Property Office (UK)
IPR	Intellectual Property Rights
IPR Communication	EC’s Communication on A Single Market for Intellectual Property Rights
IRT	Institut für Rundfunktechnik (Germany)
ISP	Internet Service Provider
ISWC	International Standard Work Code
JOL	Joint Online Music Licensing
KODA	Selskabet til Forvaltning af Internationale Komponistrettigheder i Danmark, Gentofte (authors CMO Denmark)
LACNR	Law on Copyright and Neighbouring Rights (Germany)
LATGA-A	Lithuanian Copyright Society
MCPS	Mechanical-Copyright Protection Society (performers CMO United Kingdom)
Merlin	Global Digital Rights Agency for the World's Independent Label Sector
MMA 2018	United States of America Music Modernization Act (2018)
MPA	Music Publishers Association
MPEG	Audio Compression or Bit-Rate Reduction System
MPI	Max-Planck Institute for Intellectual Property and Competition Law
MRL	Multi-Repertoire Licensing

MTL	Multi-Territorial Licensing
NCB	Nordisk Copyright Bureau
NMPA	National Music Publishers' Association
P-2-P	Peer-to-Peer
PEDL	Pan-European Digital Licensing
Polaris Nordic	Joint venture of Koda, TONO and Teosto for online licensing of music
PRS	Performing Right Society (authors CMO United Kingdom)
RCA	Radio Cooperation of America
RIAA	Recording Industry Association of America
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
RRA	Reciprocal Representation Agreements
SABAM	Société Belge des Auteurs, Compositeurs et Editeurs (authors CMO Belgium)
SACEM	Société des Auteures Compositeurs et Editeurs de Musique (authors CMO France)
SCAPR	Societies' Council for the Collective Management of Performers' Rights (United States)
SESAC	Society of European Stage Authors and Composers (United States)
SGAE	Sociedad General de Autores y Editores, Madrid (authors CMO Spain)
SIAE	Società Italiana degli Autori ed Editori, Rom (authors CMO Italy)
SOCAN	Society of Composers, Authors and Music Publishers of Canada, Société Canadienne des Auteurs, Compositeurs et Editeurs de Musique, Don Mills (authors CMO Canada)
SOLAR	Pan-European digital rights for Anglo-American Repertoire of Sony/ATV and EMI managed by PRS and GEMA
SPRO	Swedish Patent and Registration Office (Sweden)
STEF	Samband Tónskálda og Eigenda Flutningsréttar, Reykjavik (Iceland)
STIM	Svenska Tonsättares Internationella Musikbyra, Stockholm (authors CMO Sweden)
TEOSTO	Säveltäjäin Tekijänoikeustoimisto, Helsinki (authors CMO Finland)
TFEU	Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union
TONO	Norsk Komponistforenings Internasjonale Musikkbyra, Oslo (authors CMO Norway)
TRIPS	Agreement on Trade-Related-Aspects of Intellectual Property Rights
UGC	User Generated Content
UMPI	Universal Music International
UNESCO	United Nations Educational, Scientific and Cultural Organization
VPRT	Verband Privater Rundfunk und Telemedien e.V. (Association of Private Broadcasters and Telemedia)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performance and Phonogram Treaty
WTO	World Trade Organisation

Chapter One
Introduction

NASCUNTUR AB HUMANO INGENIO OMNIA ARTIS INVENTORUMQUE OPERA
QUAE OPERA DIGNAM HOMINIBUS VITAM SAEPIUNT
REIPUBLICAE STUDIO PERSPICIENDUM EST ARTES INVENTAQUE TUTARI[2]

The motto chosen by the World Intellectual Property Organisation (WIPO) illustrates the importance of all works of art and inventions for the progress of civilization and the duty of states to ensure their protection.

For the first 200 years, copyright protection was mainly existent on a national level, focusing on preventing unauthorised use of protected works and was limited to making physical copies of books or sheet music.

While the scope of copyright protection was national in character the progressing industrial revolution, especially developments in infrastructure and transportation, opened foreign markets and soon created a problem for the national concept of copyright protection. This not only led to discussions over international copyright protection but the establishment of entities managing rights collectively for respective right holders.[3]

The development of recording and playback devices, and analogue radio broadcasting started the process of making music available for private use outside of theatres and concert halls, eventually demanding changes in copyright legislation and market structures to acknowledge new methods of exploitation and categories of right holders.

The advent of the internet and new portable recording and playback devices created a new market for music in which the exploitation and making available of music became limitless, demanding a rethinking of basic legislative structures concerning right holders, rights managing entities and licensing structures on an international level.

The technical development not only opened new possibilities to exploit musical works faster and to a greater audience, but also changed the business of making

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* Directive 2014/26/EU of 26.02.2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market (CRM-Directive).

[2] Motto of WIPO (World Intellectual Property Organisation) "Human genius is the source of all works of art and invention; These works are the guarantee of a life worthy of men; It is the duty of state to ensure with diligence the protection of the arts and inventions.".

[3] Daniel J. Gervais (ed) *Collective Management of Copyright and Related Rights* (3rd edition, Wolters Kluwer International, 2016) at 5; Atkinson, Fitzgerald *A Short History of Copyright* at 16.

music altogether. While ten years ago the average number of writers on a song was 3.52 it takes now an average of 4.53 writers to create a song.[4]

For example, the song "Shallow"[5] from the motion picture "A Star is Born (2018)"[6] is performed by Lady Gaga and Bradley Cooper, written by four songwriters including Lady Gaga, and produced by two producers including Lady Gaga, but that is only half of the story of what makes the song, numerous publishers, recording artists and engineers are also involved. [7]

According to Mike Smith, managing director of music publishing Warner/Chappell UK, the demands of the fast-moving online market created a need to fast-forward the process of creating music, and record labels started to bring in professional songwriters to speed up the process.[8] Most of the songs today are essentially a Frankenstein´s Monster, stitched together from dozens of demos, according to the British songwriter MNEK who was one of 13 people involved in writing Beyonce´s hit single "Hold UP[9]."[10] The more people involved in creating a song, the more people there are holding respective rights in the final song and are entitled to remuneration when the song is publicly exploited, creating a complex micro-system, and adding to an already highly complex market.

I Motivation and Research Focus

Current copyright legislation follows a one-size-fits-all approach granting right holders more or less the same package of rights to protect their works from

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[4] Mark Savage "How many people does it take to write a hit song?" (16.05.2017) BBC News <www.bbc.com/news/entertainment-arts-39934986>.

[5] Lady Gaga, Andrew Wyatt, Anthony Rossomando, Mark Ronson (Songwriter) and Lady Gaga, Benjamin Rice (Producer) *Shallow* from the Album *A Star Is Born Soundtrack tot he Motion Picture (2018)* (Recorded by Lady Gaga and Bradley Cooper, East West Studios, Greek Theatre, Los Angeles, California, 2018).

[6] Bill Gerber, Jon Peters, Bradley Cooper, Todd Phillips, Lynette Howell Taylor (Producers) and Bradley Cooper (Director) *A Star is Born* [Motion Picture] (Warner Bros. Pictures, United States, 2018).

[7] Lady Gaga and Bradley Cooper *A Star is Borne Soundtrack to the Motion Picture* (2018) Digital Booklet. The list of those involved in the publishing and recording of the song is three times longer and includes registrations across the board with BMI and ASCAP (published by Sony/ATV Songs LLC/SG Songs LLC (BMI), Imagem CV/Songs of Zelig (BMI), Stephaniesays Music and Downtown DLJ Songs(ASCAP), all rights are administered by downtown music publishing LLC; White Bull Music Groupe/Downtown DMP Songs (BMI) Warner-Barham Music LLC (BMI) administered by songs of universal (BMI)/Warner-Olive Music LLC (SACAP) admin by Universal Music Corp (ASCAP); numerous people are involved in the recording, the one that records, the assistants, mixer, engineers, master recorder and performing musicians (a total number of 12).

[8] Mark Savage "How many people does it take to write a hit song?" (16.05.2017) BBC News <www.bbc.com/news/entertainment-arts-39934986>.

[9] Thomas Pentz, Ezra Koenig, Beyoncé Knowles, Emile Haynie, Josh Tillman, Uzoechi Emenike, MeLo-X, Doc Pomus, Mort Shuman, DeAndre Way, Antonio Randolph, Kelvin McConnell, Karen Orzolek, Brian Chase, Nick Zinner (Songwriters) and Diplo, Beyoncé, Ezra Koenig (producers) *Hold UP* from the Album *Lemonade* (Recorded by Beyoncé Knowles, Parkwood, Columbia, 2016).

[10] Mark Savage "How many people does it take to write a hit song?".

unauthorised use. This has created a situation where a musical work is partially owned by numerous right holders categorised into two groups, authors and performing artists/record producers, holding two distinct types of rights. Authors hold the rights in the musical composition which includes the lyrics and the melody of a musical work, while performing artists/record producers hold the rights in the sound recording, usually a particular recording of a musical work. Despite existing international agreements and treaties, the scope and nature of those rights vary from country to country. Even though the differences are not substantial, they do impact the licensing process. The fragmentation of rights, right holders and repertoires was not a problem prior to the online revolution because most exploitations of musical works were limited to a specific territory in which the operating CMO was able to grant suitable licences. However, the online exploitation of musical works was no longer limited to a specific territory and called for suitable, preferably multi-territorial, licences.

As early as 2005, the EU raised concerns about the existing licensing system not being compatible in the online environment.[11] The approach of the EU to solving the licensing problems arising was to create a digital single market and harmonise copyright legislation and the system of rights management. Throughout the development of copyright in Europe, national CMOs have always played an important role in managing rights collectively by pooling international repertoires into one repertoire that can be licensed for use within the national territory. This has been accomplished through reciprocal representation agreements between CMOs, making it possible to license each other's repertoire for their territory of operation. The system of reciprocal agreements soon sparked controversy, especially regarding its compliance with competition law. The European Commission conducted a Study[12] concerning the matter, concluding that existing structures for cross-border collective management of legitimate online music services needed to be improved and raised to standards that fit the demands of the new online environment. The introduction of the freedom of choice for right holders in the Recommendation of 2005 lifted territorial restrictions and prompted large right holders to withdraw their rights from the management of CMOs, triggering a progressive fragmentation of the world repertoire in music. While right holders were no longer restricted to the CMO operating in their country of residence and free to assign the management of their rights to any CMO operating in the EU territory, CMOs could now license their repertoire without limitation for the entire

[11] European Commission *Commission Staff Working Document Study on a Community Initiative on the Cross-Border Collective Management of Copyright* (07.07.2005) Commission Staff Working Document at 23.

[12] European Commission *Commission Staff Working Document Study on a Community Initiative on the Cross-Border Collective Management of Copyright* (07.07.2005) Commission Staff Working Document at 23.

territory of the EU. This changed the scope of licences from territory limited world-repertoire licences to multi-territorial licences for the repertoire of the respective CMO.
In order to make multi-territorial licensing possible, the EU´s CRM-Directive focused on harmonising governance and transparency for CMOs in general and introducing additional regulations for CMOs granting multi-territorial licences structures and licensing methods of CMOs to change the system of licensing from national-multi repertoire to multi-territorial-mono repertoire.
Online broadcasters and music streaming services experience the consequences of copyright and consequently licencing systems that are not functioning in the online environment. The situation is especially frustrating for online broadcasters and music streaming services operating on an international level. To be able to exploit musical works online, a commercial user needs to clear the rights in the musical composition and the sound recording which are held by numerous right holders and managed by various entities.

II Scope and Limitations

This thesis is conducted primarily for the purpose of identifying the potential of the CRM-Directive´s approach to the establishment of an online licensing system with international potential in order to recommend a suitable online licensing solution. It is limited to European Legislation and Licensing Structures but makes brief comparisons to the United States and the MMA 2018[13] for clarification.
Most of the available research focused on the development of the CRM-Directive and its effects on online licensing and the relationship between collective rights management and competition law but to date an analysis of the CRM-Directives` potential for the establishment of an online licensing system with international potential is unexplored.[14] The demand for greater and easier access to musical works from any place imaginable justifies the need for more effective internationally harmonized licensing procedures to guarantee fairness for right holders and end-users alike. The results of this study will show whether the

[13] Public Law No: 115-264 (10/11/2018) Orrin G. Hatch-Bob Goodlatte Music Modernization Act, This bill updates copyright law by creating a new compulsory licensing system for digital music services that transmit sound recordings. It also provides for federal protection to sound recordings fixed before February 15, 1972, which are currently only covered by state law. It also authorizes royalties for producers, mixers, and sound engineers that made a creative contribution to a sound recording, accessible online <www.congress.gov/bill/115th-congress/house-bill/1551>.
[14] Danusha Mendis "Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online use in the Internal Market" in Arno R. Lodder and Andrew D. Murray (ed) *EU Regulation of E-Commerce*. (Edward Elgar Publishing, Cheltenham, UK, 2017); see also Afori Fischman "Proportionality – A New Mega Standard in European Copyright Law" (2014) IIC 2014, 889.

European approach to harmonising governance and transparency for CMOs and introducing additional regulations for CMOs offering multi-territorial licences is the right approach to establish a functioning online licensing system.
The findings of this thesis will be of benefit to international legislators, CMOs and commercial online music services as the research investigates the potential of an international online licensing system that suits the needs of all parties involved in making online licensing more efficient.

III Aim and Objectives

The overall aim of this research is to understand to what extent and in what way the European CRM-Directive contributes to the establishment of a more comprehensive international licensing system for the online exploitation of musical works.

Underpinning this aim are the following research objectives:

1. To review the development of international law for the public exploitation of musical works and to identify the key problems for the management of rights and the existing licensing methods;
2. To analyse, to what extent technical and legal developments in the field of public exploitation of music influence each other and the system of rights management and licensing methods;
3. To determine aspects of technology influential on legislation, with a particular focus on the development of analogue radio and streaming services;
4. To analyse how the CRM-Directive and the MMA 2018 change the situation in order to solve the existing problems; and
5. To determine the opportunity to strengthen the rights management and licensing system with a particular focus on the legal and technical possibilities.

IV Methodology

The methodology used in this research was carried out in accordance with conventional legal methods applied as defined in the following list.

1. Textual analysis of law and policy examining primary sources such as statutes, case law, directives and associated policy was the chief method applied. For particular problems or factually based issues the simple

issue, rule, analysis and conclusion method which requires identification of the legal issue, discovery of the relevant rules, analysis/connection of the rule to the facts and conclusion was employed.[15] On most occasions, online references were used. The approach taken was a textual one, relying predominantly on words and meanings rather than statistics.[16] This approach was predominant for the research and yielded significant information contributing to refining the enquiry and developing an original contribution. In particular, the analysis of international, European and North American copyright and neighbouring rights conventions, statutes and legislation influenced the central findings of the research.

Initially, consideration was given to international, European and North American case law relating to the public exploitation of musical works, but as the research progressed and the focus sharpened, greater attention was applied to the CRM-Directive and leading European cases. Online databases, predominantly LexisNexis New Zealand and Beck Online Germany, were used to conduct the case law search.

2. Textual analysis of secondary sources was another key method employed. A wide variety of literature was accessed, initially as background, and later to shape and extend the enquiries. The information gained enabled a predominantly qualitative approach, but the investigation also revealed quantitative information relating to the global music market and, in particular to the national and global status of right holders and rights managers in a range of respects. A wide range of search engines was used to discover online and hardcopy materials. The method employed was dominant and informed all chapters.

3. Another key element of this research is the methodological approach which reflects a mixed methodology based on doctrinal legal research. A holistic approach is utilised, integrating a brief analysis of international legislation focusing on the public exploitation of musical works and an in-depth analysis of the European CRM-Directive and its effects on multi-territorial licensing. The policy analyses were combined with comparative and historical inquiries in the legal, technical and economic fields to establish an internationally

[15] Nolasco, CARI, Vaughn, MS and del Carmen, RV "Toward a New Methodology for Legal Research in Criminal Justice" (03.02.2010) Journal of Criminal Justice Education 21 (1) 1-23 at 1.
[16] G Valentine "Tell me About...: Using Interviews as a Research Methodology" in Robin Flowerdew and David Martin (eds) *Methods in Human Geography: A Guide for Students Doing a Research Project* (Pearson Education, United Kingdom, 2005).

implementable online licensing solution that takes into account the different levels of legal and licensing systems. The European CRM-Directive was chosen since it was the first transnational attempt to end existing licensing controversies by regulating the operation of national CMOs and their system of granting multi-territorial online licences for the exploitation of musical works. Due to the cultural diversity and differences in national legislation and licensing procedures, the European example provides a practical example as it already incorporates solutions for problems an internationally implementable online licensing system would face.

Tracing the historical development of legislation, rights management, and rights related to the public exploitation of musical works in the context of changing technologies and economic structures best highlights the ways technical and legal developments influence each other. It was anticipated that this would illustrate how existing licensing problems came into being and provide the basis for a solution approach. To compare different solution approaches, this research examines the CRM-Directive and the MMA 2018 to identify the best solutions and incorporate such findings into the recommended solution.

V Research Structure

This research analyses how the interaction between copyright, neighbouring rights and international licensing procedures impacts right holders, managers and users in order to understand to what extent and in what way the European CRM-Directive contributes to the establishment of a more comprehensive international licensing system for the online exploitation of musical works. It reaches conclusions and makes recommendations in relation to opportunities to strengthen the licensing methods to better protect and fairly remunerate all classes of right holders. The overall structure of this research consists of five chapters composed as set out below.

Chapter One introduces the research and explains the related aim and objectives. It describes structure and details of the methodology applied.

Chapter Two investigates the particular historical development of international legislation concerning rights in musical works spanning from the invention of analogue radio to online streaming services. It does so in order to contextualise the law and to expose the challenges that fast technical developments and new possibilities of exploitation of musical works present. A focus on the development of the rights in musical works, especially those in relation to the public exploitation,

enables specific consideration, which becomes an important feature in analysing the law, licensing methods and drafting an alternative solution in subsequent chapters. The origin of rights in a musical work and the historical development of different classes of holders of different types of rights is a matter which underpins contemporary approaches to rights management and licensing methods. The segmentation of a musical work and the fragmentation of rights and right holders strengthens the differences in rights management and licensing methods, creating difficulties not only for commercial users but for approaches to harmonise the international licensing system.

Chapter Three examines the effect of the law related to the public exploitation of musical works in a specific industry by tracing the historical development of radio technology alongside the law and licensing procedures, referring back to the previous chapter. The licensing procedures for analogue radio and online streaming services in general and, in more detail, of Europe and the United States, are analysed as an example of two different legal and licensing systems to show different approaches to the licensing controversies with the European CRM-Directive and the United States Music Modernization Act 2018 and the obstacles to be overcome when recommending a satisfactory international licensing scheme.

Chapter Four analyses the theoretical dimensions of the research studying the legislative development of the CRM-Directive and its effect on the licensing systems of the European Member States. It examines the policy documents in the light of their regulations on governance and transparency for CMOs and multi-territorial licensing, and the attempt to harmonise collective management and the respective licensing procedures for the European online market.

Chapter Five identifies the existing problems in Europe and the United States by analysing the licensing controversies using the example of online streaming services and the respective international legislation. It examines the potential of the CRM-Directive and the MMA 2018 for an international licensing system to ground the research. Analysis of a potential solution that combines different aspects of the CRM-Directive and the MMA 2018 attempting to create a more suitable approach for the online market forms the basis of the chapter.

It draws a conclusion of the research findings and outlines areas where further research is required.

Chapter Two
Rights in Musical Works and their Management

"Music expresses that which cannot be said and on which it is impossible to be silent." Victor Hugo

Since the advent of the internet, copyright has proven to be a herculean task for lawmakers all over the world trying to find the right balance and satisfying the parties involved. This is aggravated whenever new threats appear to the creative industry, as the outcry for tighter copyright regulations and better protection for right holders follows swiftly. Is it really the legal framework that needs to be adjusted? And does the right holder really require more and better protection? Or is the purpose of refining copyright in this context just a matter of strengthening the market position of distributors and major record labels? It appears that we have lost sight of the aim of copyright to foster and protect creativity somewhere along the way, ignoring the regulatory needs of new technical developments in existing copyright regulations, unable to see what lies beyond the economic cloud that wafts around online music and copyright protection in general.

It appears the copyright system that was originally framed by references to the public good and ensuring public access to knowledge has now become a promoter of private interests by shifting the burden from rights owner to rights user. Who would have thought that the music consumer would be sued for how they used their computers in the privacy of their homes?[17]

This chapter investigates the definition of music and musical works and respective international legislation, rights granted and rights managing strategies in place to safeguard creators of such works, namely copyrights for authors and neighbouring rights for performers, phonogram producers and broadcasting organisations as the main parties. The focus will be on economic rights relevant to the public exploitation of musical works. Therefore, this research will not discuss moral rights of any class of right holders as they are irrelevant for licensing practices.

[17]Simon Frith, Lee Marshall(ed) *Music and Copyright* (2nd edition Edinburgh University Press, UK, 2004) at [4-5].

I Rights in the Musical Composition: Authorial Rights

When thinking of music, the first person that comes to our minds is the singer we link the voice to when we hear a song. However, that is not necessarily the person referred to as author in a legal context when it comes to contemporary copyright protection. It took centuries until author´s rights in their actual work, and especially in their musical work, were recognised as their own intellectual property copyright refers to today.

Historically, copyright law was developed over centuries by several key elements finally coming into a cohesive form in 1710 under the Statute of Anne.[18] Eighty years later in 1790, copyright law found its way into the legislation of the United States. The United States of America Copyright Act, 1790 was mainly based on the Statute of Anne, 1710.[19]

Continental European notions of copyright were similar to those found in the United Kingdom and the United States, namely to grant authors and companies that embody creative works exclusive rights to control the use of those works to ensure equitable remuneration and acknowledge their labour.[20] Nevertheless, the differences lay in the legal consideration of creativity. While early copyright codes of Anglo-American law focused on the embodied work itself, particularly the economic side, copyright regulations on the European continent primarily focused on the intellectual value of creativity. Those small but significant distinctions must be considered when trying to harmonise copyright on a multi-national level. It took a long time until creative works were found to be actual property and legally protectable. Not only the focus of copyright differs between common law and civil law legislation but also the type of creativity protected plays an important role in regard to rights granted under copyright legislation.

Copyright is said to subsist rather than exist because its existence depends on work that is eligible for copyright protection: so if someone writes a song, the song exists, but the copyright of the song subsists because without a song there would be no copyright.[21] The distinction between the song as the copyright protected work and the copyright of the song is important to understand the construct of copyright protection.

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[18] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned, 1710 (Statute of Anne).

[19] World Intellectual Property Organisation "An explanatory note concerning the origins of the United Kingdom intellectual property legal regime" WIPO <www.wipo.int/export/sites/www/wipolex/en/notes/gb.pdf> last viewed 05.04.2016; see also Benedict Atkinson and Brian Fitzgerald *A Short History of Copyright* (Springer International Publishing, Switzerland, 2014) at 3; and ARL staff "Copyright Timeline: A History of Copyright in the United States" (work-in-progress) arl.org <www.arl.org/focus-areas/copyright-ip/2486-copyrighttimeline#.Vt4PpubeOdg>.

[20] Atkinson and Fitzgerald *A Short History of Copyright* at 3.

[21] Frith, Marshall (ed) *Music and Copyright* at 6.

Buying a song online, for example, is buying the file that includes the musical work but not the copyright to the song. This restricts the use to whatever is authorised by the actual right holder.
So, it is important to know who the right holders of the copyrighted works are, where their rights come from, and what it means to use a copyrighted work online.

A Defining Musical Works and Musical Composition

Living in a digital world, we take music for granted because it surrounds us every day and accompanies us throughout our life. Rarely do we think about the creative process of music making and all the people involved in it. For most of us, music is only music when it is played so that we can hear it. To convert a creative idea into a recognisable and protectable piece of music, it needs at least to be somehow played or even fixed so that it is not only in the mind of its creator but recognisable for others. In the case of music, it means the fixation of the notation is only the first step in the process of creating a piece of musical work protectable by copyright law. To protect musical works, it is crucial to know what the term music refers to.
It is most likely that music evolved together with the human speech several thousand years ago and has surrounded us ever since.[22] Music takes a unique position in our everyday life, especially vocals, which have been part of our culture for a long time. All important rituals and special occasions are, and always have been, traditionally accompanied by music, chanting or singing.[23] Some songs and melodies have long traditions and were passed on from generation to generation containing advice, wisdom and knowledge wrapped in myth and legends about ancestors and a time long past.[24] Those songs then became a tradition and started to form the culture of particular groups of people.
In western cultures, the term music is most likely to have derived from the ancient Greece word *mousiké* which describes the art of the Muses practised by the *musikoi* (minstrels, poets, and sometimes dancers) marked by the unity of poetry, melody and dance.[25]
Prior to the ninth century when a music notation was invented, it was not possible to fix musical intonation on paper and make it readable and usable for outsiders.[26]

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[22] Nils Lennart Wallin, Steven Brown, Björn Merker *The Origins of Music* (MIT Press, Cambridge, UK, 2000) at 132.
[23] Vikas Shah "The Role of Music in Human Culture" (26.08.2017) thoughteconomics.com <thoughteconomics.com/the-role-of-music-in-human-culture/>.
[24] Richard Widdess "Music, Meaning and Culture" (2012) Empirical Musicology Review Vol. 7 No. 1-2 88 at 88.
[25] M. Paola Mitticac "When the World was Mousiké: on the Origins of the Relationship between Law and Music" (2015) Law and Humanities 9 1 29-54 at 29.
[26] Timothy D. Taylor *Strange Sounds: Music, Technology, and Culture* (Routledge, London and New York, 2001) at 3.

As old as music may be, the protection of music and the classification of musical works is relatively new to the scheme of copyright protection. Music was not seen as protectable by copyright law until the end of the nineteenth century when the concept of the musical work emerged as a result of developments in technology and the music markets.[27]

A common definition of music as it can be found in The Oxford Dictionary[28] reads:

> [Music consists of] Vocal or instrumental sounds (or both) combined in such a way as to produce beauty of form, harmony, and expression of emotion which can be represented in written or printed signs.

This definition includes nearly all kinds of vocal or instrumental sounds and is in line with modern legislation which tends to embrace every expression of sound.[29]

The first attempt to protect musical works was made in the Berne Convention in 1886.[30] After the Paris Act in 1896, the protection included "dramatic or dramatico-musical works" and "musical compositions with or without words."[31] There is no precise definition of those terms in the Berne Convention, and it remains unclear what is included. It can be assumed that the term "musical composition with or without words" stretches out and includes a broad spectrum of music from advertisement jingles to hymns, choruses and symphonies, to animal and other sounds.[32]

The question of defining musical compositions and the requirement of the fixation of a musical work for copyright protection has been left entirely to the members of the Berne Convention as defining the term of musical composition would mean to enter the "minefield of subjective, aesthetic judgement"[33] and therefore block out new musical forms from protection.[34] Therefore, the Member States deal with the question of defining the musical composition and the requirement of fixation differently.

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[27] Jason Toynbee "Copyright, The Work and Phonographic Orality in Music" SOCIAL & LEGAL STUDIES SAGE Publications London, Thousand Oaks, CA and New Delhi, Vol. 15(1) 77 at [77–99].

[28]Oxford Dictionary "Definition of Music in English" oxforddictionaries.com <www.oxforddictionaries.com/definition/english/music>.

[29] Paul Goldstein and P. Bernt Hugenholtz *International Copyright: Principles, Law, and Practice* (3rd edition Oxford University Press, Oxford, New York, 2013) at 201.

[30] Berne Convention for the Protection of Literary and Artistic Works, 1886, 1161 UNTS 30 (concluded in 1886, opened for signature 09.09.1886, entered into force December 5, 1887, revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967, at Paris in 1971, amended in 1979) (Berne Convention).

[31] Article 2(1) Berne Convention.

[32] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at 200.

[33] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at 200.

[34] Sam Ricketson and Jane C Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (vol. I and II, 2nd edition, Oxford University Press, UK, 2006) vol I at 427.

In Germany, for example, there is no definition of musical works in the Copyright Code but the accompanying commentary for the German Copyright Code provides a guideline and describes musical works as "something that is expressed through sounds which can be created in any possible way through the human voice, musical instruments, electronic or mechanical devices, animal, nature or any other sound sources." [35] This rather broad definition would include anything we can hear and grant it protection under copyright law. Therefore, it is also required that "the musical work is a personal intellectual creation which reaches a certain threshold of originality."[36] When deciding whether a musical work is protectable under copyright law or not, the German courts take into account the opinion of average people, familiar and interested in music.[37] The general impression of the musical work is crucial, whereas the threshold of originality does not need to be at a high level.

In the United Kingdom, musical work is defined in section 3(1)(d) of the Copyright, Designs and Patent Act, 1988 as "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music." The copyright protection implies fixation of the original musical work, as protecting the mere idea would be impossible.[38] A level of originality as demanded in section 1(1)(a) of the Copyright, Designs and Patent Act, 1988 includes, according to the skill and labour doctrine, "every work that is the result of its author´s own skill, labour, judgment and effort."[39] As the two examples show, the implementation of the basics given in the Berne Convention differs throughout the Member States making finding a consensus even more difficult.

While the definition of musical works is left entirely to national legislation, the clarification of the creators of musical works, namely authors and performers, is thus important when it comes to the rights granted by copyright law. An analysis of the different classes of right holders and their rights in musical works will be the focus of the next section.

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[35] Artur-Axel Wandtke and Winfried Bullinger (ed.) *Praxiskommentar zum Urheberrecht (Practice Commentary for Copyright Law)* (4th edition, C.H. BECK, Munich, Germany, 2014) at UrhG § 2 Rn. 68.

[36] Artur-Axel Wandtke and Winfried Bullinger (ed.) *Praxiskommentar zum Urheberrecht (Practice Commentary for Copyright Law)* (4th edition, C.H. BECK, Munich, Germany, 2014) at UrhG § 2 Rn. 68.

[37] Wandtke/Bullinger (ed) *Praxiskommentar zum Urheberrecht* at UrhG § 2 Rn. 71.

[38] s3(2) Copyright, Designs and Patent Act, 1988 (UK).

[39] A. Rahmatian "Originality in UK Copyright Law: The Old Skill and Labour Doctrine under Pressure" (2013) IIC (2013) 44 at 4; see also most importantly, *University of London Press v. University Tutorial Press* [1916] 2 Ch 601 at 609–610 (per Peterson J); *Ladbroke (Football) v. William Hill (Football)* [1964] 1 WLR 273; *Independent Television Publications Ltd. v. Time Out Ltd.* [1984] FSR 64.

B Origins of Authorship

The development of the printing press in the fifteenth century was a trigger for the development of intellectual property and copyright.[40] The printing press made it possible to make unlimited copies of written works in a much shorter timeframe than before and challenged the established printing businesses and the system of royal privileges.

In Europe between the fifteenth and eighteenth centuries, the protection of creative works like books started through a system of sovereign privileges granted almost entirely to printers, protecting the economic value of the work and not the author's intellectual creation as intellectual property.[41] The sovereign privileges were granted as letters patent which constituted the first copyright granted not to authors but to publishers who printed material the government approved of.[42]

1 England

English publishers were organised in the Stationers' Company guild which enjoyed a monopoly over all sanctioned printings until 1694 when the House of Commons voted not to extend such monopoly privileges.[43] As a consequence, English publishers came face to face with growing competition amongst themselves and the threat of pirated copies flooding the market and leading to enormous drops in the price of printed goods. The Stationers' Company guild saw the answer in lobbying for the rights of authors. The plan contrived was that the rights granted to authors would automatically pass over to the Stationers' Company upon the author's death.[44] In 1710, the Parliament responded by issuing what is seen as the first national Copyright Act, the Statute of Anne.[45] The Statute assigned copyright to authors not to publishers but only for a limited time of fourteen years with one possible renewal of fourteen years.[46] The plan of the Stationers Company´s to win back their former monopoly position backfired because expiring copyrights could not be assigned exclusively to one publisher.[47] The concrete achievement of the Statute of Anne was that the legitimacy of printing rights depended only on authorship and the

[40] Joanna Demers (ed) *Steal This Music* (University of Georgia Press, Athens, GA, USA and London, 2006) at 14.
[41] Prof. Dr. Ulrich Loewenheim (ed.) *Handbuch des Urheberrechts (Copyright Law Compendium)* (Verlag C.H. Beck Munich, Germany, 2010) at Part 1, Chapter 1, § 2 A. I. 1. Re. 2.
[42] Demers (ed) *Steal This Music* at 14.
[43] Demers (ed) *Steal This Music* at 14.
[44] Demers (ed) *Steal This Music* at 14.
[45] Statute of Anne, 1710.
[46] Demers (ed) *Steal This Music* at. 15.
[47] Demers (ed) *Steal This Music* at 15.

labour that actually produced the text rather than on randomly granted royal privileges.[48]

Nevertheless, the English publishers were not the only ones that devised a plan to preserve their monopoly position.

2 France

In France, the battle between the Parisian and the country printers in the sixteenth and seventeenth centuries led to the advocacy of author's rights. French printers like their English counterparts, were hoping that authors would sell their rights to publishers because of the expenses of publishing their own books.[49]

In 1777, Louis XVI waived a copyright privilege for authors which had an indefinite duration only if it was not transferred to a publisher.[50] Once transferred to publishers, the privilege expired with the author's death. This royal privilege for authors was not long-lasting and, as most of the royal privileges, was abolished after the French Revolution of 1789.[51] It took four years until the Parliament released the French Literary and Artistic Property Act 1793[52] which granted authors exclusive reproduction rights that lasted for the lifetime of the author and ten years *post mortem auctoris*[53] and influenced German, Swiss and most civil law countries copyright regimes.[54]

3 German territories

Like those of the English and French, the leaders of the German territories had the problem with printing and reprinting but in a different dimension. Until the late nineteenth century there was no unified German state but a patchwork of independent states and duchies like Austria, Prussia, Baden, Bavaria and Saxony.[55] Book printers operating within the German territory were confronted with a high level of book piracy because of a common language and literary culture along with

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[48] Anne Barron "Copyright Law´s Musical Work" (2006) Social and Legal Studies Vol. 15(1) ASGE Publication London 101-127 at 108.

[49] Demers (ed) *Steal This Music* at 16.

[50] Demers (ed) *Steal This Music* at 16.

[51] Demers (ed) *Steal This Music* at 16.

[52] Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs (Decree of the National Convention, of 19 July 1793, regarding the property rights of authors to writings of all kinds, of composers of music, of painters and illustrators).

[53] After the authors death.

[54] Makeen Fouad *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK, and French Law* (Studies in Law: Center for European Law, King's College, Kluwer Law International, London, The Hague 2000) at [7-15].

[55] David Saunders *Authorship and Copyright* (Routledge, London and New York, 1992) at 107.

the "absence of legislative interventions and effective agreements on and enforcement of trade regulation across the different states."[56]

The problem of book piracy led to an agreement between thirty-eight German states in 1815, the Act of the Germanic Confederation, with the scope of a "plan for uniform legislation on the liberty of the press, and also what steps are necessary to be taken to secure authors and publishers from an invasion of their copyrights."[57]

How difficult the situation was for authors trying to claim their rights of authorship is shown in the example of the well-known German writer Johann Wolfgang von Goethe. The basis for the protection of author´s works was still the system of privileges, therefore Goethe needed to approach thirty-nine sovereigns to obtain protection of his work in all German Federal States.[58] In 1825, Goethe made a claim before the Federal Diet to grant one privilege granting the protection in all German Federal States.[59] His claim failed but was one of the reasons the German States started to recognise the need for wider protection for authors and concluded bilateral agreements providing protection on the basis of formal reciprocity between 1827 and 1937.[60]

In1837, Prussia enacted the Law for the Protection of Property in Works of Scholarship and the Arts against Reprinting and Reproduction.[61] The Law focussed not only on reprinting but rather on artistic works and personal author's rights by granting them the right of reproduction, distribution, the right to perform unprinted dramatic and musical works, and the right to publish their own work. Whether the work was published or not, the protection granted was for the author's lifetime plus 30 years *post mortem auctoris*.[62] The Prussian Copyright Act inspired many other laws in the German territory and led to the Copyright Act of the North German Confederation in 1870 which was implemented into the Copyright Law of the German Empire in the following year.[63] This also led to a rethinking of copyright protection and sparked a philosophical discussion of the relationship between authors and their work.

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[56] Saunders *Authorship and Copyright* at 106.
[57] Saunders *Authorship and Copyright* at 107.
[58] Silke von Lewinski *International Copyright Law and Policy* (Oxford University Press, Oxford, UK, 2008) at [14-15].
[59] von Lewinski *International Copyright Law and Policy* at [14-15].
[60] von Lewinski *International Copyright Law and Policy* at [14-15].
[61] Martin Vogel "From privilege to modern copyright law" in Lionel Bently, Uma Sutherlsanen, Paul Torremans (ed) *Global Copyright – Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar Cheltenham, UK, Northampton, MA, USA, 2010) at 120.
[62] Vogel "From privilege to modern copyright law" at 120.
[63] von Lewinski *International Copyright Law and Policy* at 14-16.

4 Authorship in musical works

The acknowledgement of musical works did not come until the end of the seventeenth century when music publishing became more and more profitable.[64] Italian Opera became popular amongst the London high society from around 1690 while public concerts of vocal and instrumental music came into fashion during the second half of the eighteenth century.[65] The developments in printing, especially towards the end of the seventeenth century when engraving became more and more popular, made it possible to produce simple song sheets and reprint them cheaply as demanded.[66]

It was generally accepted by those involved in the trade of sheet music that the Statute of Anne only covered books and did not extend to musical compositions.[67] A key figure in establishing an English copyright in music was the German-born Johann Christian Bach who took two publishers to court in 1773 over the unauthorised publishing of his works. Lord Mansfield ruled in *Bach v Longman* [1777][68] that the protection of the Statute of Anne extends to musical scores and therefore protects music in notated form:[69]

> The words of the Act of Parliament are very large 'books and other writings'. It is not confined to language or letters. Music is a science; it may be written; and the model of conveying the ideas is by signs and marks. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetics, hieroglyphics. All these are conveyed by signs and figures.[70]

Lord Mansfield's ruling had a significant impact on the music trade making more and more music sellers and composers register musical works with the Stationers´ Company in order to protect their property provoking a flurry of litigation and clarification about the application of the Statute of Anne to music.[71] At the same time, new issues like the questions of the relationship of the words and the notation

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[64] David Hunter "Musical Copyright in Britain to 1800" (1968) Music and Letters 67 269-82; and David Hunter "The Publishing of Opera and Song Books in England 1703-1726" (1991) Notes 47(3) 647-85.
[65] Barron "Copyright Law´s Musical Work" at 115.
[66] Donald W. Krummel and Stanly Sadie (ed) *Music Printing and Publishing* (Palgrave MacMillan, Basingstoke, United Kingdom, 1990) at Chapter 8.
[67] Nancy A. Mace "Music copyright in late eighteenth and early nineteenth century Britain" in Isabella Alexander, Tomás H. Gómez-Arostegui (ed) *Research Handbook on the History of Copyright Law* (Edward Elger Publishing Limited, Cheltenham and Massachusetts, 2016) at 139.
[68] *Bach v Longman* [1777] 2 Cowp 623, 98 ER 1274 at 1275.
[69] Barron "Copyright Law´s Musical Work" at 117.
[70] *Bach v Longman* at 624.
[71] Mace "Music copyright in late eighteenth and early nineteenth century Britain" at 146.

of a musical work and the status of music adaptation and rearrangements arose soon after.[72]

During the sixteenth century, a system of copyright protection for composers in the German territory was based on an application procedure similar to the copyright praxis adopted in the Statute of Anne in England later on which entitled the author to conduct the proprietary notice '*Cum gratia et privilegio caesaris Mayest'* on any of his works.[73] Due to the Thirty Years´ War and the devolution of the German territories, the legal developments regarding copyright registrations were lost. In contrast to a copyright protection based on application, the intellectual property doctrine of the eighteenth century granted copyright protection automatically free from registration and led the way to a German copyright legislation based upon that legal concept.[74]

As a result of high demand for new literature and music during the eighteenth century, the artistic self-consciousness strengthened and soon demanded international regulation to protect musical works of authors and composers and to make it possible to earn a living by selling literary and musical works, freeing authors and composers from the burden of patronage.[75]

C Origins of International Protection of Author's Rights

When the consumption of music changed over time, driven by new technical developments which opened new possibilities to publicly exploit and consume musical works, the call for protection intensified.

One of the change points came with the invention of the 'cottage' or upright piano in 1828, which brought music from concert halls and opera houses into private homes, enabling a broad middle class to make their own music at home.[76] This invention opened up a new market for sheet music, as notation was required to play music accurately in the privacy of the home. Sales of sheet music reached around 20 million pieces a year[77] and gave the concept of acknowledging musical works as creative work more significance.

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[72] Mace "Music copyright in late eighteenth and early nineteenth century Britain" at [150–152].

[73] Hans Jörg Pohlmann „Zur neuen Sicht der Musikurheberrechtsentwickung vom 15. bis 18. Jahrhundert" ("The new view on music copyright developments from the 15th to the 18th century") (1961) Die Musikforschung 14. Jahrg. H. 3 (Juli/September 1961) at [259-275].

[74] Hans Jörg Pohlmann „Zur neuen Sicht der Musikurheberrechtsentwickung vom 15. bis 18. Jahrhundert" ("The new view on music copyright developments from the 15th to the 18th century") (1961) Die Musikforschung 14. Jahrg. H. 3 (Juli/September 1961) at [259-275].

[75] Barron "Copyright Law´s Musical Work" at 124.

[76] Toynbee "Copyright, The Work and Phonographic Orality in Music" at 82.

[77] Toynbee "Copyright, The Work and Phonographic Orality in Music" at 82.

In 1877, a recording and playback device was invented by Thomas Alva Edison in America.[78] The device was able to fix sounds on a recording medium making it possible to replay them on demand at any time. In the early twentieth century, that triggered a rapid development of new devices with the aim to make recording and playback devices even more perfect. This challenged existing copyright legislation concepts focusing on the protection of works fixed on paper and not on re-playable flat discs or records. That soon demanded a rethinking of the specification of the tasks of musical works and the classification of the parties involved in the formation process.[79]

At about the same time as the phonogram was invented, another invention gained attention and challenged copyright once again. In 1901, the radio made it possible to send music to a receiver via airwaves and later online via the internet and discussions about the international protection of authors gained new momentum.

The starting point of international copyright can be seen in the bilateral agreements within the German Confederation established between 1820 and 1830 which inspired others like Austria and Sardinia to follow.[80] Those bilateral agreements eventually led to drafting the Berne Convention of 1886[81] in which authors' rights were widely recognised internationally for the very first time.[82]

Very soon it became apparent that the regulations made under the Berne Convention were not sufficient to protect all parties involved in the formation process of musical works, especially in regard to new technical developments. New technical inventions like the phonogram and the radio brought new possibilities of using musical works. Since the Berne Convention, the international community has made numerous attempts to secure and improve the protection of right holders in various international Conventions and Treaties. The most important international treaties relating to the online exploitation of musical works are the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[83] and the WIPO Copyright Treaty (WCT).[84]

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[78] Patrick Feaster "Speech Acoustics and the Keyboard Telephone: Rethinking Edison's Discovery of the Phonograph Principle" (2007) ARSC Journal 38 1 at [10-43].

[79] Toyenbee "Copyright, The Work and Phonographic Orality in Music" at 78.

[80] Jorgen Blomqvist *Primer on International Copyright and Related Rights* (Edward Elger Publishing Limited Cheltenham, UK and Northampton, MA, USA, 2014) at 8.

[81] Berne Convention.

[82] Goldstein, Hugenholtz *International Copyright – Principles, Law and Practice* at 40.

[83] Agreement on Trade-Related-Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation, opened for signature 15 May 1994, 1869 UNTS 299 (entered into force 1 January 1995).

[84]WIPO Copyright Treaty (adopted in Geneva 1996) (WCT).

1 Berne Convention

One of the first to encourage the legal protection of authors and their intellectual work was well known French writer Victor Hugo who established the Association Litéraire et Artistique International (ALAI) in 1878 to promote the legal protection of authors and their intellectual work.[85] He believed that:

> Any work of art has two authors: the people who confusingly feel something, a creator who translates these feelings, and the people again who consecrate his vision of that feeling. When one of the authors dies, the rights should totally be granted back to the other, the people.[86]

The work of Victor Hugo and ALAI was one of the driving forces behind the Berne Convention[87] which still provides the basis for today's copyright legislation.[88] Victor Hugo believed that an intellectual work is equally connected to the author and the public and therefore, the rights granted should be shared between those two groups. This view is reflected in the Berne Convention[89] which grants authors time-limited rights over their works and free access to those works for the public afterwards. As described earlier, the classification of musical works was difficult and it was never defined in the Berne Convention, maybe because as Victor Hugo noted; music expresses something more than we can say with words.

Since its first draft, the Berne Convention has been reviewed and adjusted many times; in Paris 1896, Berlin 1908, Rome 1928, Stockholm 1967, and again in Paris 1971, amended 1979.[90] As of May 2019, the Berne Convention counts 172 contracting parties, including Australia (1928), Canada (1928), France (1887), Germany (1887), New Zealand (1928), Spain (1887), Sweden (1904), the United Kingdom (1887) and the United States (1989).[91]

With the Berne Convention, authors had achieved legal protection of their works combined with rights to use, publicise, rent or sell their works exclusively and to gain the protection of their moral rights for the first time in history.[92] The

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[85]Association Litteraire et Artistique International "Who are we?" <www.alai.org/en/presentation.html>.

[86]"Victor Hugo – Political life and exile" Wikipedia.org <en.wikipedia.org/wiki/Victor_Hugo#Victor_Hugo_and_music>.

[87] Berne Convention.

[88] "Victor Hugo – Political life and exile" Wikipedia.org <en.wikipedia.org/wiki/Victor_Hugo#Victor_Hugo_and_music>.

[89] Article 7 (1) Berne Convention grants protection for the lifetime of the author plus fifty years after his death. After that time period the work is free for public use i.e. the rights to the work enter the public domain.

[90] Loewenheim *Handbuch des Urheberrechts (Copyright Law Compendium)* at Part 1. Chapter 1 § 2, A. III. 3.

[91] WIPO "WIPO-Administered Treaties Contracting Parties Berne Convention" (3 May 2019) WIPO <www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15>

[92] The Paris Act established minimum standards for economic and moral rights, see Goldstein, Hugenhotz *International Copyright: Principles, Law, and Practice* at 41.

Convention still provides the basic rules for the protection of authors' rights internationally and has been transferred into the national law of participating members.

The protection of authors under the Berne Convention is based on the principle of national treatment, Article 1 Berne Convention, which protects author's rights in their literary and artistic works in all countries to which the Convention applies, regardless of the author's citizenship.[93] The rule of national treatment means that no matter what nationality the authors might be, they enjoy the same rights as nationals do in each contracting state.[94]

A definition of what is understood to be included in protected literary and artistic works can be found in Article 2 Berne Convention, where it is stated, that literary and artistic works include "every production in the artistic domain, whatever may be the mode or form of this expression, such as […] musical composition with or without words."[95] The use of the word 'expression' indicates that the mode or form in which the work is expressed is irrelevant in regard to the protection granted.[96] However, the Convention leaves the opportunity to restrict the protection of works in general to only those "which have been fixed in some material form" to national legislation of the respective members.[97] That means the decision whether a fixation of the simple idea is needed to trigger copyright protection lies in the hands of national legislation.

The Berne Convention lacks a definition of the term author but does, however, define the object of protection which shall include inter alia "writings, dramatic or dramatico musical works, choreographic works, musical compositions with or without words, drawings and paintings."[98] Therefore, creators of such literary and artistic works could be seen as authors protected within the meaning of the Berne Convention but it is again left to national legislation to decide.[99]

The general standard of protection granted to literary and artistic works differs insignificantly in civil and common law countries, but it is agreed, that the work has to be the product of its author's own intellectual efforts and not copied from other works.[100]

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[93] Article 1 and Article 3 (1) (a) and (b), (2) Berne Convention.

[94] Elizabeth White "The Berne Convention´s Flexible Fixation Requirement: A Problematic Provision for User-Generated Content" (2013) Chicago Journal of International Law Vol. 13 No. 2, 685-707 at 690.

[95] Article 2 (1) Berne Convention.

[96] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol I at 407.

[97] Article 2 (2) Berne Convention.

[98] Article 2 (1) Berne Convention.

[99] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol I at 359.

[100] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at 191.

The Berne Convention introduced important basic principles and a series of provisions determining the minimum protection of authors in relation to their works. One of the principles, the principle of national treatment, guarantees that an author's works are protected in all contracting states in the same way as national works would be. Another important principle is the principle of automatic protection which ensures that the protection of authorial works does not depend on compliance with any formality. Amongst others, the Berne Convention recognizes the exclusive rights of authorising the public performance, the communication to the public, the broadcast of the musical work and the right to exclusively authorise the reproduction of the work. This will be discussed in more detail later.

2 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

An important step on the way to international protection of intellectual property rights can be seen in the negotiation process for the revision of the General Agreement on Tariffs and Trade (GATT) which introduced the subject of protection of intellectual property and led to the establishment of the World Trade Organisation (WTO) and the adaptation of the TRIPS Agreement. [101]

The challenge of the TRIPS negotiations was to apply the basic principles of both the GATT and the hitherto existing relevant intellectual property treaties.[102]

The TRIPS Agreement provides in its Article 9(1) that Members shall comply with the Berne Convention, except for Article 6*bis* Berne Convention which grants moral rights to authors. The TRIPS Agreement had to integrate the principle of national treatment, minimum standards, no or limited formalities, and introduced additionally the most-favoured-nation clause which ensures that advantages granted to nationals are granted to all WTO Members.

National treatment is granted under Article 3(1) of the TRIPS Agreement and applies explicitly to the protection of intellectual property. An author can gain protection if he is a national of another WTO Member, or has a habitual residence there, or has first published his work in a WTO Member State or simultaneously outside and inside a WTO Member, or must fulfil the criteria under Article 4 Berne Convention by analogy.

The principle of minimum standards of rights arises from Article 1(1) and (3) TRIPS Agreement. Articles 9-14 of the TRIPS Agreement contain the standards for copyright and neighbouring rights.

The most-favoured-nation clause principle, which was newly introduced and had not existed under any intellectual property convention prohibited discrimination between foreign works, namely if a privilege is granted to one trading partner it

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[101] J.A.L. Sterling *World Copyright Law (*2nd edition Sweet & Maxwell, London, UK, 2003) at 682.
[102] von Lewinski *International Copyright Law and Policy* at 276; see also the Preamble of the TRIPS Agreement.

must be granted to others too if the clause is not exempt by Article 4 phrase (a) and (b) of the TRIPS Agreement.[103]
The TRIPS Agreement conforms with the Berne Convention in granting authors the same minimum rights and term of protection.

3 WIPO Copyright Treaties (WCT) [104]

While the WTO was set up and the TRIPS Agreement was negotiated, the WIPO summoned Committees of Experts in 1991 to consider the problems that arose with the technological development during the 1980s and 1990s and their relation to the protection of authors, performers and phonogram producers as the most affected parties. Long and detailed negotiations took place until the final draft of a WIPO Copyright Treaty (WCT) protecting authors of musical and other works was passed in 1996.
The WCT adopts existing principles of the Berne Convention, namely the principles of national treatment, minimum rights and no formalities but not the concept of the most-favoured-nation clause as laid down in the TRIPS Agreement as a result of the more trade-related aspects of such a concept. The WCT is in line with the Berne Convention and grants authors reproduction, distribution and communication rights but responds to new technological developments and newly introduced an exclusive right of making works available online covering a highly important kind of exploitation of works.[105] The basic rights granted to authors by the three international regulations involved in the online exploitation of musical works are analysed hereafter.

D Author's Rights

The analysis of economic rights granted to authors by the Berne Convention and all the following Agreements and Treaties focuses on rights relevant for the use of musical works online and disregards other types of protected works as they are irrelevant to the scope of this thesis.
The Berne Convention grants authors of musical works exclusive economic rights and protection of their works. Traditionally, economic rights are split into two categories, classified by their form in material and non-material rights. The first category protects the reproduction of the work in a material form which results in the so-called reproduction right, Article 9 Berne Convention. The second category protects the communication to the public in a non-material from resulting in the

[103] von Lewinski *International Copyright Law and Policy* at 281.
[104] WIPO Copyright Treaty (adopted in Geneva 1996) (WCT).
[105] von Lewinski *International Copyright Law and Policy* at 493.

right of communicating the work to the public, Articles 11 and 11*bis* Berne Convention.[106]

Taking the different legal copyright regimes of their members into account, the Berne Convention aimed to set minimum standards for rights granted to authors that are suitable for all parties. Over time, the Berne Convention has had numerous revisions and new rights have found their way into the document. However, it was not until the Berlin Revision (1908) that cinematographic adaptation and the mechanical reproduction of musical works were acknowledged.[107] Broadcasting and moral rights were added by the Rome Revision in 1928, and public performance rights by the Brussels Revision twenty years later in 1948.[108] Amongst others, the Berne Convention grants authors the exclusive right to authorise the reproduction and communication to the public of their works. The TRIPS Agreement and the WCT adopted the basic rights granted by the Berne Convention, modified and added to them. The right of reproduction, communication to the public, and the making available right are concerned whenever music is played on the internet.

1 Reproduction rights

The oldest principle of copyright legislation is to prevent unauthorised copying of a written creative work. Therefore, most of the national copyright codes and legislations granted authors of such work an exclusive right to authorise the reproduction of their work, namely the right to distribute by sale or rental, broadcast and otherwise communicate the work to the public.[109] However, it was not until the Stockholm and Paris Act in 1967 and 1971 that the reproduction right was properly included into the Berne Convention. Before the Stockholm and Paris Act, the reproduction right in the Berne Convention was only concerning specific aspects of reproduction like limitations relating to the reproduction of certain newspaper articles, the rights of mechanical reproduction, and reproduction in the context of broadcasting and adaptations for cinematographic purposes.

While the granting of a reproduction right on the basis of national treatment appeared to be sufficient over a long time, the problem of private reproduction led to rethinking and the incorporation of an exclusive right of reproduction as a minimum standard in the Berne Convention. One of the reasons for the late entry of reproduction rights into the Berne Convention could be the problem of finding a definition that was broad enough to cover all reasonable exceptions without making

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[106] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol I at 580.
[107] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol I at 581.
[108] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol I at 581.
[109] von Lewinski *International Copyright Law and Policy* at 138.

the right illusory.[110] Another reason was that the reproduction right was taken for granted because every member of the Berne Convention generally provided for reproduction rights for authors on a national level which automatically formed part of the Berne Convention due to its national treatment regulations.[111]

Today, Article 9(1) Berne Convention provides that authors should have the exclusive right to authorise the reproduction of their literary and artistic works in any manner or form. It is further clarified in Recital (3) that any sound or visual recording is considered a reproduction. The broad and technology-neutral wording in Article 9(1) and 9(3) Berne Convention makes it clear that there is no distinction between reproduction and fixation, both are protected equally under the Berne Convention.[112] The granting of reproduction rights in 'any manner or form' indicates that authors' reproduction rights are not limited and include the exclusive right to copy the work in total or part whatever the physical form of the copy.[113] The definition of the scope of reproduction and to what degree a partial work can be protected is left entirely to national legislation. Being one of the first rights protected by Copyright Acts, it was generally understood within the countries of the Union, that "reproduction is any incorporation of the work in material form, resulting in a duplication or separate copy of the work."[114] In the German Copyright Act, for example, the right of reproduction is defined as "the right to make copies of the work by whatever method and in whatever form" while the Copyright Act of the United Kingdom defines copying as a "reproduction of a work in any material." The definitions show that the reproduction right first used in conjunction with literary works extended to adaptation, arrangements and other alterations of works which became possible due to new forms of physical and digital copies.[115]

While the TRIPS Agreement incorporates Article 9 Berne Convention in its Article 9(1) without making any changes, the WIPO Copyright Treaty (WCT) incorporates Articles 1-21 plus the Appendix of the Berne Convention in its Article 1(4) adding an agreed statement concerning the reproduction right reading:

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a

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[110] WIPO *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971*) (WIPO, Geneva, 1978).
[111] Jane C. Ginsburg, Edouard Treppez *International Copyright Law – U.S, and E.U. Perspectives, Text and Cases*, (Edward Elger Publishing, Cheltenham, UK and Northampton, MA, USA, 2015) at 311.
[112] Blomqvist *Primer on International Copyright and Related Rights* at 106.
[113] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol. I, at 622.
[114] von Lewinski *International Copyright Law and Policy*, 2008 at 139.
[115] Ginsburg, Treppez *International Copyright Law* at 312.

> protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[116]

The statement was added after the question of whether or not temporary storage qualifies as reproduction arose because of new online transmissions via streaming services, a system widely used by online broadcasters without taking care of the actual problem.[117] An early proposal made during the negotiations of the WCT that included the "protection of direct and indirect reproductions of authors' works, whether permanent or temporary, in any manner or form" was dropped from the treaty attributable to the conclusion that such a regulation would do little to contribute to copyright revenues but unnecessarily interrupt fluent network communication.[118] The precise definition and scope of the reproduction rights play an important role when it comes to the use and licensing of copyrighted content online, especially when transmitted via streaming technology, as will be discussed in context later.

2 Right of communication to the public

The communication of the work to the public was first conducted through the representation or performance of the work in a theatre or other public places like galleries for artworks, and opera houses for musical works. With the advent of new technology and the possibility to literally `take creative work wherever you go,' it was possible to perform music using sound recordings, transmission by wire or wireless, or stream a concert live or on-demand online without physically being in the theatre or place the performance takes place. While new technology brings a broad range of possibilities to exploit authors' works, the right of communication to the public can be split into two parts classified by the depiction of the work. First, there is the public performance, which means that the performance takes place in a public space before an audience, and second, the communication to the public by transmission, through such means as broadcasting, and dissemination by wire, including cable.[119]

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[116] Diplomatic Conference on Certain Copyright and Neighboring Rights Questions *Agreed Statements Concerning The WIPO Copyright Treaty* (23.12.1996) WIPO Document CRNR/DC/1996 at Article 1(4).

[117] Blomqvist *Primer on International Copyright and Related Rights* at 109.

[118] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at [308-309]; see also Diplomatic Conference on Certain Copyright and Neighboring Rights Questions *Basic Proposal for the Substantive Provision of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Conference* prepared by the Chairman of the Committee of Experts on a Possible Protocol to the Berne Convention Article 7 (30.08.1996) WIPO Document CRNR/DC/4.

[119] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. I at 704.

The exclusive right to authorise the public performance and any communication to the public of musical works is laid down in Article 11(1) Berne Convention. Public performance in the context of Article 11(1)(i) relates to performances in the presence of an audience, while the addition of ´by any means or process' refers to performances where a sound recording or film is played in a discotheque or movie theatre.[120] The right of authorising the public performance is internationally, in general, understood as "the right to authorise a performance made by a performing artist or by means of some device for a public who is present at the same locality."[121] The term 'public' is not defined in the Berne Convention or in any international treaty concerning intellectual property that followed. Therefore, defining the scope of the term public is once again left to the Contracting Parties. Studying the structure and other pecuniary rights granted under the Berne Convention, the meaning of public must be interpreted as referring to the author's capacity to authorise performances or communications of his works to a substantial number of unrelated persons.[122] The meaning of public in most Member States depends on the manner of exploitation. Public performance, therefore, excludes a circle of family and close friends[123] whereas broadcasting via satellite requires an "indeterminate number of potential viewers" for the communication right to become effective.[124]
The second right granted that belongs to the communication right is the exclusive right of authorising communication to the public. Communicating the work to the public in the context of Article 11(1)(ii) relates to the transmission of sounds by wire through a cable operator to a remote place.[125] Due to the systematic basis of the Berne Convention, the communication right granted under Article 11(1)(ii) does not include broadcasts and broadcasting which are protected separately under Article 11*bis*(1) Berne Convention but wireless transmission by radio waves and cable transmission of the signals representing the work.[126] The legal definition of the term 'communication' is left to the Contracting Parties, but it is widely agreed that communication is composed of transmission (emission plus conveyance) and actual or potential reception.[127] When it comes to the online environment and

[120] Sterling *World Copyright Law* at 621.
[121] Blomqvist *Primer on International Copyright and Related Rights* at 130.
[122] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. I at 704.
[123] Glodstein, Hugenholtz *International Copyright: Principles, Law, and Practice*, at 325; see also s15(3) German Copyright Act, 1965.
[124] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at 325; see also Case C-192/04 *Lagardère Active Broadcast v Sociétépour la Perception del la rémunération équitable (SPRE) and Others* [2005] ECLI:EU:C:2005:475.
[125] Sterling *World Copyright Law* at 621; see also Silke von Lewinski *International Copyright Law and Policy* at 148.
[126] Sterling *World Copyright Law* at 373.
[127] Sterling *World Copyright Law* at 174.

satellite broadcasting, the place of communication which implies transmission and reception becomes a very important decision criterion.

Under Article 11*bis*(1) Berne Convention, authors are granted another right that falls within the category of communication rights, namely the right to authorise the broadcasting and re-broadcasting of their works by any other means of wireless diffusion. The broadcasting right includes terrestrial radio, television broadcasting, and satellite broadcasting.[128] Re-broadcasting means the broadcasting of a work by an organisation other than the organisation that first broadcast that work.[129]

The chosen term 'by wire' extends the communication to the public right from wireless means to wired digital retransmission which then includes that a broadcaster which also audio or video streams its own broadcast transmission online does not need to obtain a separate authorization for webcasting its transmitted broadcast.[130] However, the rights under Articles 11(1) and 11*bis*(1) Berne Convention do not clearly cover all aspects of digital communication and only acknowledge digital communication that resembles cable transmission and broadcast of preselected programming to a passive public while online radio is based on on-demand communication and requires the public to be active.[131]

The rights of communication to the public have been incorporated without changes or additions into the TRIPS Agreement, Article 9(1). The WCT includes the communication rights in Article 1(4) and Article 8 but extended the reach of what was granted under communication rights in the Berne Convention trying to close the gap that was left by taking advantage of new developments in technology, especially regarding the internet and the on-demand availability of content.[132]

3 Making available right

The making available right is an element of the exclusive right of communication to the public and gives the author the chance to control the placing of his work on the internet and other online services accessible to the public from a place and at a time chosen by the public (on-demand).[133]

The WCT acknowledged the rights granted under Articles 11(1) and 11bis(1) Berne Convention under Article 8 and added an exclusive right of authorizing:

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[128] von Lewinski *International Copyright Law and Policy* at 149.
[129] von Lewinski *International Copyright Law and Policy* at 150.
[130] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. I at 737.
[131] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. I at 742.
[132] Goldstein, Hugenholtz *International Copyright: Principles, Law, and Practice* at 324.
[133] Sterling *World Copyright Law* at 387.

> […] any communication to the public, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

This comes with an agreed statement that makes clear, that "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention." This means that telecommunication services and internet providers are not liable for infringing communications to the public originated by others.[134]

The key concept of this right is the element of on-demand availability on the internet or other online services. It covers the offering of works for access to members of the public and the process of transmission to the user at their choice regarding the time and place.[135] To trigger the making available right, it is sufficient that the possibility that members of the public can access the work is given, while the actual act of accessing the work by a member of the public is not necessary.[136] The right is limited to a remote transmission whereas the minimum distance between the place from where the work is transmitted and the place where it is received is not required, as long as a transmission process from one to another occurs, the making available right is triggered. The making available right has been especially worded in a neutral way, and it is, therefore, irrelevant what technical form is used to make works available to the public now and in the future. This includes all acts of streaming where the user can listen to or watch the transmitted work at the same time as transmission occurs. Another requirement is the individual choice of the place and the time of accessing the work. It excludes radio or TV programmes by traditional means or through digital networks and all precast programmes transmitted to the public at a certain time, and includes models that offer a choice of accessing, for example, musical works at any time during which the service is offered.[137] The requirement of choice of place is fulfilled when there is more than one device from which the content can be accessed.

Therefore, anyone that uploads content to a server in such a way that members of the public are able to access the content not only reproduces the work but makes it also available and triggers reproduction and making available rights of authors.

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[134] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. I at 745.

[135] Jörg Reinbothe and Silke von Lewinski *The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP* (2nd edition., Oxford University Press, UK, 2015) at 136.

[136] Reinbothe, von Lewinski *The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP* at 137.

[137] Reinbothe, von Lewinski *The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP* at 139.

The degree of individual choice and the place of transmission will be crucial especially when it comes to services that offer a mix of both, precast programs with elements that can be chosen individually.

Table 1 Overview: Covered Rights by the Berne Convention and the WCT

Treaty	Rights Covered	Parties	Parties to the Treaty and exceptions
Berne Convention	Author's reproduction and communication rights	185	Germany, United Kingdom, France (1887), Sweden (1904) Austria (1920) Australia, Canada, New Zealand (1928) United StatesS (1989) China (1992)
WCT	Author's reproduction, communication and making available (on-demand-availability) rights	96	US (2002) Australia, China (2007) EU (2010) Canada (2014) New Zealand (2018)

E Summary

As old and widespread music might be, it was not until the end of the nineteenth century that the concept of musical works emerged and musical compositions were seen as protectable under copyright legislation. The early copyright acts that granted authors of literary work a right to prevent unauthorised copying of their work was widely recognised throughout Europe but national in scope and reach. The nationality of copyright and growing unauthorised reprinting of books called for legislative intervention and effective agreements guaranteeing basic standards and protection across the different states eventually leading to the enactment of the first international copyright legislation, the Berne Convention. The Berne Convention introduced minimum rights and standards for the protection of authorial works and was later accompanied by the TRIPS Agreement and the WCT. Amongst others, authors are granted exclusive rights to authorise the reproduction of their works and the communication and making available of those works to the public. Even though the three international regulations provide for minimum standards, membership is voluntary, and the enforcement of the protection granted is left to the Member States.

The remaining national character of copyright, and the resulting differences in copyright codes of the members become problematic when it comes to the protection of international exploitation of musical works. The classification of exclusivity granted by the way of exploitation adds to the problem and makes it difficult to find common ground, especially in the enforcement of rights on an international basis.

II Rights in the Performance and Sound Recording

While the invention of Gutenberg´s printing press can be traced back to 1492, Edison´s invention of sound recording technology only occurred in 1877 and rose to importance during the early twentieth century.[138] Radio broadcasting based on the invention of sound recording and sound transmission started in the early 1920s, and television broadcasting, based on the invention of cinematography by the Lumière brothers in 1895, started about ten years later in the early 1930s. It was the development of technologies like this that made the importance of performing artists and the protection of their rights become the focus of attention.
The new technical developments made it possible to access musical performances after they had been publicly performed and/or were fixed on records, making them available for a broader range of people than ever before. Performing artists slowly lost control over the use of their performances and the simple concept of "no play - no pay" was no longer functioning.[139] The need for granting performers, producers and broadcasters rights in their fixed performance was ignored for a long time because of the belief that most of the created objects were productions of an industrial character not qualifying as literary or artistic creations protected under the Berne Convention.[140] The general feeling of the time was that the protection of such work lay more in the scope of unfair competition than copyright law owed to the works substantiality.[141] With the advent of technology, the recognition of performers, record producers and broadcasting organisations could no longer be ignored and increasing recognition under national copyright law eventually led to international acknowledgement.

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[138] von Lewinski *International Copyright Law and Policy* at 86.
[139] Owen Morgan *International Protection of Performer´s Rights* (Hart Publishing Oxford and Portland, Oregon, USA, 2002) at 4.
[140] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1205.
[141] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1206.

A Origins of International Protection of Performer and Performances

Before any international protection was granted to performers, they had no right of remuneration from the sales or exploitation of their fixed performance.[142]

It was not until 1910 that performers were recognised as authors of adaptations in some states, namely in the German, Swiss, Austrian, Czech, and Hungarian Copyrights Acts stating that performers cause "a transformation of works on devices for instruments which serve the mechanical communication for the hearing."[143] However, it was common practice in these countries to consider that these rights are transferred to phonogram producers. The British, Polish and Danish law, in contrast, provided protection to performers only through criminal law but granted phonogram producers protection under copyright legislation.[144]

The recognition of performers' rights on an international level began with the establishment of the International Federation of the Phonographic Industry (IFPI) in 1933 aiming to promote protection for the phonographic industry.[145]

After negotiations over possibilities to include performers' rights in the Berne Convention failed, the rights of recording artists (performers) together with those of phonogram producers (producers), and broadcasting organisations (broadcasters) were finally internationally recognised in 1961 by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations[146] (Rome Convention). The Rome Convention did not affect the protection of authorial rights in literary and artistic works granted under the Berne Convention but recognised a new group of right holders granting them similar rights in their fixed and unfixed performance. The Rome Convention was soon followed by the TRIPS Agreement of 1994[147] and the WIPO Performance and Phonogram Treaty of 1996[148] (WPPT).

The Rome Convention and the WPPT set the basics for the acknowledgement of mechanical rights or the so-called neighbouring rights granted to performers, producers and broadcasters on an international scale. The origins of performers rights and different classes of right holders and their respective rights are briefly introduced and compared with authorial rights hereafter.

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[142] Tana Pistorius "The Beijing Treaty on Audiovisual Performances" in Irini A. Stamatoudi (ed) *New Developments in EU and International Copyright Law* (Wolters Kluwer International, 2016) at 149.

[143] von Lewinski *International Copyright Law and Policy* at 86.

[144] von Lewinski *International Copyright Law and Policy* at 87.

[145] von Lewinski *International Copyright Law and Policy* at 87.

[146] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) I-7247 (496) (opened for signature from 26.10.1961 to 3006.1962, entered into force 18.05.1964).

[147] TRIPS.

[148] WIPO Performance and Phonogram Treaty in 1996 (WPPT), by 2016 the WPPT had 94 contractors including Australia (2007), Canada (1997), France (1997), Germany (1996), Spain (1996), Sweden (1997), UK (1997), United States (1997).

1 Rome Convention

Discussions over the inclusion of neighbouring rights into the Berne Convention started as early as 1908 at the Berlin Revision Conference of the Berne Convention where Great Britain suggested: "to include in the Convention a provision specifically giving international copyright protection, in suitable cases, to gramophone disks, pianola roles and so on." The British suggestion was opposed because "this subject was on the borderline between industrial property and copyright and might […] belong to the former category".[149] Twenty years later in 1928 at the Rome Revision Conference of the Berne Convention, proposals corresponding to national law regarding recognition of performers as authors of adaptations granting them adaptation rights and exclusive rights of broadcasting were again rejected as being outside the scope of the Berne Convention. It took another 33 years of discussion, negotiation and drafting until in 1960 the final Hague Draft which formed the basis for the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) was adopted and signed one year later in 1961 by eighteen countries,[150] entering into force in 1964.[151]

The Rome Convention protects performers' rights in their performances regardless of whether the performance has been fixed or reached a particular state of originality. The Rome Convention is based on the concept of national treatment, and grants certain protection in specific economic rights. Performers are granted national treatment and minimum rights with respect to their performance. One of the most important differences to the Berne Convention lies in the concept of national treatment. While the Berne Convention takes the nationality of the author as a most important point for granting protection, the Rome Convention disregards the nationality of the performer and focuses on the 'nationality of the performance', Articles 2(1), 3 and 4 Rome Convention.[152] The change of the concept of nationality from the Berne to the Rome Convention was necessary because of the variety of people that can be involved in a performance. The national treatment granted to performers is limited to the treatment given to national performers in regard to performances taking place, and are broadcast or fixed on national territory.[153]

The Rome Convention defines the meaning of performer in Article 3 (a) as:

> (a) "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

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[149] von Lewinski *International Copyright Law and Policy* at 87.
[150] Argentina, Austria, Belgium, Brazil, Cambodia, Chile, Denmark, Federal Republic of Germany, France, Great Britain, Iceland, India, Italy, Mexico, Spain, Sweden, Vatican, Yugoslavia.
[151] C Masouyé *Guid to the Rome Convention and to the Phonograms Convention* (Geneva, WIPO, 1981 RC 4.7.) at 7.
[152] Blomqvist *Primer on International Copyright and Related Rights* at 104.
[153] Sterling *World Copyright Law* at 652.

According to the definition, two conditions must be fulfilled to claim protection; first, it must be a certain type of person, and second, the person must perform literary or artistic works. The definition of performers appears to be self-explanatory at the first glance, but as soon as a performance like an opera, for example, includes various people acting on and behind the stage it can become difficult to draw the line between protected and unprotected performers under the Rome Convention.[154] It is widely agreed that the definition includes:

> all those who perform themselves, be it individually or collectively, such as soloists and members of ensembles, and those who do not immediately perform but have a direct influence on the concrete performance, such as stage directors and conductors of orchestras or other ensembles.[155]

The regulation of specific cases as to who falls into the category of protected performers under the Rome Convention is left to national legislation. The requirement that the performance has to be constituted of literary or artistic works refers to works in the sense of Article 2(1) Berne Convention.
The term 'performance' is not defined, but a logical conclusion would be that it means the unique collection of sounds and/or images brought to life by the activities of a performer.[156] It follows that a performer is a person who brings literary and artistic works to life through his or her performance before an audience.[157] There are different attempts to define performance in general, but the concept is difficult to capture in words. Erving Goffman´s[158] definition of performance is very wide and describes performing as a mode of behaviour that may characterise any activity. Schechner[159] narrows the definition when stating that performance is an activity done by an individual or group in the presence of and for another individual or group. Baumann[160] describes performance as a part of communication that implies the classic communication model: sender – channel – code – receiver and makes it clear that performance requires a receiving audience that evaluates the act of the performer that acknowledges evaluation. Harris and Reichel define performance as a part of an 'event' which can be described and located in time and place (setting),

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[154] Sterling *World Copyright Law* at 655.
[155] Records of the Diplomatic Conference on the international protection of performers, producers of phonograms, and broadcasting organisations, Report of the Rapporteur-Général (1968)39-40; see also Masouyé *Guide to the Rome Convention and the Phonograms Convention* at 7.
[156] Sterling *World Copyright Law* at 658.
[157] Morgan *International Protection of Performer´s Rights* at 15.
[158] Erving Goffman *The Presentation of Self in Every Day Life* (Penguin Books Ltd., UK, 1990).
[159] R. Schechner *Performance Theory* (2nd edition 1988, Routledge Classic, New York, 2003) at 22.
[160] Richard Baumann (ed.) *Folklore, Cultural Performances, and Popular Entertainments: A Communications-Centered Handbook* (OUP, New York, 1992).

in short, a context which has various possible relations to the performance itself.[161] All these different attempts to find a general definition of the performance show that it is not an easy task. The Rome Convention considered a definition of performance as superfluous, and once again leaves the definition and regulation of specific cases to the contracting states.

The Rome Convention sets the rules for minimum protection that must be granted to performers by the contracting states.

Performers should have the possibility to prevent unauthorised acts like communication of the performance to the public (including broadcasting), making a fixation of an unfixed performance and the reproduction of a fixed performance.

The protection of performers against rebroadcasting, fixation for broadcasting purposes, and the terms and conditions of the use of fixed performances by broadcasting organisations remain a matter of domestic law regulations in each member state. Member States are given the freedom to choose how to protect performers against those unauthorised uses of their performance which could be through the granting of exclusive rights, the law of employment, unfair competition, or criminal sanctions.[162]

Performers should have the possibility of receiving remuneration if their fixed performance is used directly for broadcasting or any other communication to the public, as of Article 12 Rome Convention. For visual and audio-visual works, the Rome Convention pleased the film industry with Article 19 which states that once a performance has been filmed, the performer has no further rights under Art 7 Rome Convention.[163] In Article 14 Rome Convention, the minimum protection of performances is twenty years computed from the end of the year in which the performance was first fixed, or the performance or broadcasting took place. Exceptions are made under Article 15 Rome Convention and include private use, the use of short excerpts relating to the reporting of current events, the fixation by broadcasting organisations of its own facilities and for its own broadcasts, and educational use.

2 TRIPS

Two developments during the 1970s affected the protection of intellectual property rights: the advent of new technologies like satellite transmission, and computer technology in general which fuelled digital content piracy (unlawfully produced

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[161] Joseph Harris and Karl Reichel "Performance and Performers" in Karl Reichel (ed) *Medieval Oral Literature* (Berlin, Boston, De Gruyter, 2016) at [142-143].

[162] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1213.

[163] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1213.

copies of protected material) of sound recordings, films and books.[164] Similar to the book piracy finally leading to the introduction of authorial rights, the protection of performers had to be fitted to new technical developments especially in regard to recording devices, leading to the drafting of the TRIPS Agreement.[165] In contrast to existing international conventions like Berne and Rome, the TRIPS Agreement, being more focused on trade relation than copyright protection in general, introduces obligations concerning copyright and related rights, dispute prevention, settlement procedures, and obligations concerning the enforcement of intellectual property rights.[166]

Under Article 14(1) TRIPs Agreement, performers are protected against unauthorised fixation of their fixed performance and the reproduction of such a performance. Article 14(2) TRIPs Agreement grants the possibility of preventing broadcasting by wireless means and the communication to the public of their live performance. Performers are granted protection for 50 years computed from the end of the calendar year in which the fixation was made, or the performance took place. The TRIPS Agreement refers to the Berne and Rome Convention in Article 14(6) in so far as the rights granted to performers under the TRIPS cannot extend what is permitted by the Rome Conventions regarding conditions, limitations, exceptions and reservations.

3 WPPT

While the TRIPS Agreement introduced obligations concerning enforcement of intellectual property rights and procedures to close the gap left by the Berne and Rome Conventions, digital technology and the expanding global information network grew in importance, raising essential and urgent issues. Therefore, WIPO adopted the Performances and Phonograms Treaty (WPPT) in 1996.[167] The WPPT was the greatest achievement in the international protection of neighbouring rights to that point.[168] The WPPT provides more definition of crucial terms like fixation and communication to the public.

The WPPT aimed to:

> […] develop and maintain the protection of the rights of performers and producers of phonograms […] as effective and uniform as possible' by recognizing new 'economical, social, cultural and technological developments' and provide for a

[164] Sterling *World Copyright Law* at 681.
[165] TRIPS Agreement.
[166] Sterling *World Copyright Law* at 682.
[167] WPPT was adopted in Geneva on 20.12.1996, at the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, and entered into force on 20.05.2002.
[168] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1233.

> ‘balance between the rights of performers and phonogram producers and the larger public interest’ in intellectual property especially in regards to ‘education, research and access to information’.[169]

Unlike the Rome Convention, the WPPT granted performers exclusive rights rather than the possibility to prevent certain unauthorised actions.
Performers are granted exclusive rights in their unfixed performance under Article 6 WPPT including broadcasting and communication to the public rights, and the right to fix unfixed performances. Performers are also granted the exclusive rights of reproduction, distribution, and making available of fixed performances in Articles 7 to 10 WPPT.
The WPPT tried to bridge the gap and incorporate a regulation regarding equitable remuneration for the direct or indirect use of phonograms for broadcasting or any other communication to the public which had provoked considerable controversy during the last decade and was the main reason countries like the United States never signed or became part of the Rome Convention. Other than the Rome Convention, the WPPT gave members the possibility to limit or not implement these remuneration provisions.
The discrepancy over equitable remuneration, especially in regard to broadcasting rights, is the basis for existing problems when exploiting musical works internationally.

B Performer’s Rights

The Rome Convention grants performers four rights: the right to make a fixation of their work; the right to authorise the reproduction, the right to authorise the public communication of their work; and a remuneration right. The possibilities of authorising certain actions granted under the Rome Convention were turned into exclusive rights under the WPPT and new rights like the making available right were established due to new technical developments. Only the rights related to the online use of musical works will be briefly examined hereafter.

1 Right of reproduction

With the fixation of a performance, it becomes immediately available to be exploited, with copying being the most important form of reproduction.
To enable performers to control the reproduction of their fixed performances was one of the main regulations performers had asked for.

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[169] WPPT Preamble.

The right of reproduction was first granted to performers by Article 7(c) Rome Convention. This was not like the corresponding reproduction right granted to authors in the Berne Convention as an exclusive right as a possibility to prevent the reproduction of their work. Reproduction is defined in Article 3(e) Rome Convention as *"*the making of a copy or copies of a fixation" which, due to the broad wording, also covers digital copies as far as it results in a tangible copy.[170] Only in three scenarios can a performer prevent reproduction: when the fixation was made without consent; when the reproduction was made for purposes other than consented; and where the fixation was made under an exception or limitation in Article 15(1) Rome Convention[171] and later reproduced for other purposes. This leaves the performer powerless when it comes to phonogram piracy as pirated phonograms are reproductions of fixations made with the performer's consent.[172] The reproduction right granted to performers under the Rome Convention was not satisfactory, being designed as a non-exclusive right leaving significant gaps in the protection of performers.

As for authorial rights, the TRIPS Agreement acknowledged performers' reproduction rights in Article 14(1) providing the possibility to prevent the fixation of their unfixed performance on a phonogram and the reproduction of such a fixation made without their authorization. It does not tackle the gaps left by the Rome Convention, but rather narrows the scope of the reproduction right.

The WPPT, as a corresponding treaty to the WCT for authorial rights, granted performers an exclusive reproduction right under Article 7 and gave them the right to "authorise the direct or indirect reproduction of their performances fixed on phonograms in any manner or form." The granted right only protects performances fixed on phonograms which are defined in Article 2(b) WPPT as:

> [The] fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audio-visual work.

The protection under Article 7 WPPT brings advantages for performers as it has been transformed into an exclusive right now covering authorised and unauthorised fixations giving performers more power to control the public exploitation of their

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[170] von Lewinski *International Copyright Law and Policy* at 208.

[171] Article 15 Rome Convention

> 1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
> *(a)* private use;
> *(b)* use of short excerpts in connection with the reporting of current events;
> *(c)* ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
> *(d)* use solely for the purposes of teaching or scientific research.

[172] Morgan *International Protection of Performer´s Rights* at 166.

work, especially when it comes to unauthorised copying and bargaining with producers.[173] The inclusion of direct and indirect reproductions now covers reproductions of broadcast performances as an explicit form. The wording "in any manner or form" and the Agreed Statement concerning Article 7 WPPT clarifies that all methods of reproduction are covered including those existing today and new developments of tomorrow like reproductions in digital form.[174] Under the Agreed Statement, a reproduction takes place if a protected performance or phonogram in a digital form is stored on an electronic medium. This raises the issue of whether storage includes temporary copies made automatically during the transmission process, as is the case for streaming, and leaves it to the Contracting Parties to define and resolve the issue as will be discussed later.

2 Right of communication to the public

In Article 7(1)(a) Rome Convention performers are granted the right to prevent:

> The broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation.

Broadcasting is defined under Article 3(f) Rome Convention as "the transmission by wireless means for public reception of sounds or of images and sounds." A definition of communication to the public was not included in the Rome Convention.

The distinction between broadcast and communication to the public lies in the form of transmission and having these specified together means both kinds of transmissions, by wire and wireless, are covered.[175]

Therefore, performers are granted the right to authorise the broadcast and communication to the public of their non-fixed performance only. If the performance has been fixed, it can be broadcasted and communicated to the public without the performers' consent irrespective of whether it is a consented fixation or a bootlegged fixation.[176]

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[173] Morgan *International Protection of Performer´s Rights* at 168.

[174] Diplomatic Conference on Certain Copyright and Neighboring Rights Questions *Agreed Statements Concerning The WIPO Copyright Treaty* (23.12.1996) WIPO Document CRNR/DC/1996 states that: "[T]he reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles".

[175] Morgan *International Protection of Performer´s Rights* at 155.

[176] Morgan *International Protection of Performer´s Rights* at [156-157].

The TRIPS Agreement acknowledged the broadcasting and communication to the public right of performers under its Article 14(1) and brings no improvement in the scope of protection of the Rome Convention. The WPPT granted performers the exclusive right of authorising "the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and the fixation of their unfixed performances." Both broadcasting and communication to the public are defined under Article 2 WPPT:

> *(f)* "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;
> *(g)* "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

The clarification of the scope of protection by defining both broadcast and communication to the public adds clarity.

3 Right of making available

The making available right was introduced simultaneously in the WPPT and the WCT, responding to the development of new technology and the associated challenges. Under Article 10 WPPT performers are granted an:

> Exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

The classification of the WPPT implies that the act of making available as described in Article 10 WPPT is only covered by the right laid down in Article 10 WPPT and does not apply to any other right granted under Articles 1-9 and 15 WPPT.[177] The making available right granted under the WPPT corresponds with the making available right granted to authors under the communication rights in Article 8 WCT.

[177] Reinbothe, von Lewinski *The WIPO Treaties on Copyright, A Commentary on the WCT, the WPPT, and the BTAP* at 345.

4 Right of remuneration

The right of equitable remuneration was one of the most widely recognised rights on a national basis, and therefore one of the first rights to be included when the protection of performers on an international basis was discussed.[178] The right of equitable remuneration is merely a right to receive remuneration for the secondary use of performances that are fixed on phonograms. The remuneration right is not an exclusive right, and therefore performers have no right to authorise or prohibit the use of their fixed performance for broadcast or other communication to the public. Although it is not designed to be an exclusive right, it entitles performers to a share of the returns from the on-going exploitation of their work and gives them a better position negotiating with producers and third-party users.

The right of remuneration was included in the Rome Convention after lengthy debates and Article 12 now provides that:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

The right is limited to phonograms defined under Article 3(b) as "any exclusively aural fixation of sounds of a performance or of other sounds" excluding audio-visual fixations. Furthermore, the phonogram or copies of such must be ´published for commercial purposes` and used directly for broadcasting or communication to the public, excluding rebroadcasting or the communication to the public of a broadcast, for example, radios in a restaurant.[179] The calculation of the remuneration and the manner in which it has to be paid and shared between performers and record producers is left entirely to national legislation or the respective parties. Article 16(1)(a) Rome Convention gives contracting parties the flexibility to make reservations in respect of Article 12 which led to a possible effect that there might not be any remuneration for performers. Article 16(1)(a) provides four options regarding the application of Article 12 ranging from not applying the provision at all to restricting it in respect of certain uses and the nationality of the record producer. Therefore, the right of remuneration is not strong when applied internationally. To close the gap left by the Rome Convention, the European organisations representing performers and producers of phonograms IFPI and

[178] Morgan *International Protection of Performers´ Rights* at 172.
[179] Morgan *International Protection of Performers´ Rights* at 173.

FIM[180] reached agreements respectively as to the sharing of revenue among their members.[181]

The TRIPS Agreement following the Rome Convention did not include a remuneration right at all but the WPPT includes a remuneration right under Article 15 which corresponds with Article 12 of the Rome Convention. The remuneration right was the only right not to be elevated to an exclusive right due to the difficult nature of the provision, nevertheless, two improvements have been made.[182] The remuneration right under the WPPT now includes the indirect and direct use of fixed performances or phonograms and is now granted to performers and producers independently of each other. However, remuneration for performers is still not guaranteed internationally due to the flexibility of its application. Despite three international agreements on performers' rights, the drafting of the right of remuneration is still mainly left to the Nation States and remains fragmented without ensuring international legal certainty for performers.

C Origins of International Protection of Phonogram Producers and their Respective Rights

In the 1960s, the phenomenon of unauthorised copying of legally produced phonograms referred to as 'record piracy' became more and more of a problem for phonogram producers. Their rights were recognised in the Rome Convention but designed to be much weaker than those of authors and performers. The problem was that the majority of unauthorised copying took place in countries that were non-members of either the Berne or Rome Conventions. However, "the fight against record piracy required the collaboration of as many countries as possible on a worldwide scale."[183] The phonographic industry which was most affected by the increasing actions of unauthorised copying was pushing for a new international treaty since the Rome Convention did not include any protection against unauthorised copying. Within three years, and under the leadership of WIPO and UNESCO, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971) [184] entered into force in 1973. The Preamble of the Geneva Phongram Convention states that the protection of producers of phonograms against acts of piracy will benefit performers and authors in equal measure.

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[180] International Federation of the Phonographic Industry and International Federation of Musicians.
[181] Morgan *International Protection of Performers´ Rights* at 176.
[182] Morgan *International Protection of Performers´ Rights* at 176.
[183] Masouyé *Guide to the Rome Convention and to the Phonograms Convention* at 93.
[184] Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms UNTS No. 12430 (opened for signature 29.10.1971 to 30.04.1972 entered into force 18.04.1973 (Geneva Phonogram Convention).

Producers of phonograms were also recognised in the TRIPs Agreement of 1996 and finally granted exclusive rights in the WPPT of 1996.

1 Rome Convention

The first international agreement recognising the rights of phonogram producers was the Rome Convention. The term phonogram is commonly used in continental European Countries as a synonym for `sound recordings´ used in the Anglo-American countries.[185] Phonograms are defined under Article 3(b) Rome Convention as "exclusively aural fixations of sounds" not including audio-visual fixations where sounds are connected with images, in particular soundtracks of films.[186] This definition leads to controversies, especially in regards to technical developments that make it easy to combine images and sounds and significantly blurs the line between phonogram and film.

The producer of phonograms is defined under Article 3(c) Rome Convention as "the person who, or legal entity which, first fixes the sounds of a performance or other sounds." It follows that rights ownership is not limited to natural persons but includes legal persons or entities. Given that the making of a recording must be initiated by a human at some stage, the consequence is that where an enterprise has its employees making a recording, the enterprise and not the employee is considered the producer.[187] The protection does not include persons who reproduce from or remaster a first fixation or those only marketing or distributing a phonogram.

Article 2(1)(b) grants national treatment to producers of phonograms. The nationality of phonogram producers and the first fixation and first publication of the phonogram plays an important role in assigning eligibility for protection under the Rome Convention.

For national treatment, one of four criteria laid down in Article 5 Rome Convention has to be met. The producer of the phonogram has to be a national of another contracting state (criterion of nationality); the first fixation was made in another contracting state (criterion of fixation); the phonogram was first published in another contracting state (criterion of publication); and whether the phonogram was first published in a non-contracting state but within 30 days in a contracting state (simultaneous publication).

Due to controversies over the criteria, Article 5(3) Rome Convention gives the contracting parties the choice of applying only one of the last two criteria, together with the nationality as the only binding obligatory criterion. This compromise was reached because the aim of the Rome Convention to protect the phonographic industry could be best achieved through the protection of producers published and

[185] von Lewinski *International Copyright Law and Policy* at 198.
[186] von Lewinski *International Copyright Law and Policy* at 198.
[187] Blomqvist *Primer on International Copyright and Related Rights* at 104.

unpublished phonograms on the basis of nationality and the allowance to choose an additional criteria. However, an exception is in place and currently practised by Denmark and Sweden who grant protection to phonogram producers only on the criterion of fixation.[188]

In a case where the phonogram producer is a company or legal entity, the nationality is indicated on the basis of private international law and is either the location of the headquarters or the country under which law the company was established and still exists.[189]

While the definition of fixation follows from the definition of phonogram producer and phonogram, publication is defined "as offering of copies of a phonogram to the public in reasonable quantity."[190]

Phonogram producers are granted the exclusive right to "authorise or prohibit the direct or indirect reproduction of their phonograms" under Article 10 Rome Convention. Direct reproduction refers to the reproduction from a fixation while indirect reproduction means the fixation of a broadcaster which was made on the basis of a phonogram.[191] In addition, phonogram producers are also granted a remuneration right for secondary use under Article 12 Rome Convention, mirroring the right granted to performers. However, the remuneration right is subject to reservation as of Article 16 Rome Convention. Protection is granted for 20 years from the end of the year in which the fixation was made, Article 14(a) Rome Convention.

2 Geneva Phonogram Convention and TRIPS Agreement

During the 1960s, the problem of record piracy increased dramatically and forced the international community to react quickly. With the establishment of the Geneva Phonogram Convention under the leadership of UNESCO and WIPO, the protection of phonogram producers against illegal copying of phonograms was granted under a flexible system allowing the contracting states to choose the scope of protection.[192] The Geneva Phonogram Convention follows the Rome Convention and makes no changes to the set definitions. Phonogram producers are granted protection under Article 2 Geneva Convention, that is:

(1) the making of duplicates without the consent of the producer;

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[188] von Lewinski *International Copyright Law and Policy* at 195.

[189] W. Nordemann, K. Vinck, and P. Hertin, *Internationales Urheberrecht und Leistungsschutzrecht: Kommentar (International Copyright and Neighboring Rights, Commentary)* (Werner-Verlag, Germany, 1977). English edition by G. Meyer as a further co-author *International Copyright and Neighboring Rights Law: Commentary with special emphasis on the European Community* (R. Livingston, trans., VCH Publishers, Germany, 1990) at Art 5 RT n3.

[190] Article 3(d) Rome Convention.

[191] von Lewinski *International Copyright Law and Policy* at 2017.

[192] Sterling *World Copyright Law* at 674.

(2) the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public; [and]
(3) the distribution of such duplicates to the public.

The legal design and implementation of the protection granted is left entirely to the contracting states and can be granted as a specific right, under the law of unfair competition, or through penal sanctions.[193] The term of protection is 20 years from the first fixation or publication, Article 4 Geneva Convention. Due to the high flexibility granted by the Geneva Convention, it did little to improve the situation for phonogram producers internationally.
The TRIPS Agreement acknowledged phonogram producers and grants them the right to authorise or prohibit the direct or indirect reproduction of their phonograms, Article 14(2) TRIPS Agreement but did little to improve the situation of phonogram producers.

3 WPPT

The WPPT made changes to the existing international regulations and improved the protection of phonogram producers on an international level. The WPPT granted phonogram producers the same exclusive rights as performers, namely the rights of reproduction (Article 11), distribution (Article 12), making available their phonograms (Article 14) and the non-exclusive remuneration right for broadcasting and communication to the public (Article 15).

4 Right of reproduction

Article 11 WPPT grants producers of phonograms the exclusive right to authorise the direct or indirect reproduction of their phonogram in any manner or form. This corresponds with Article 10 Rome Convention but adds "in any manner or form" to cover reproduction by new digital technology. It was also agreed that Article 11 WPPT fully applies to the digital storage of protected phonograms which is understood as being a reproduction.[194]

5 Right of distribution

Article 12 WPPT grants phonogram producers the exclusive right to authorise to make the original and copies of their phonograms available to the public through sale or transfer of ownership. The making available right granted is in line with the right granted to performers under Article 8 WPPT and is an advantage to the Rome

[193] Article 3 Geneva Phonogram Convention.
[194] Sterling *World Copyright Law* at 740.

Convention which includes no such right. It is left to the contracting states to formulate rules on exhaustion of the distribution granted right as of Article 12(2) WPPT.

6 Right of making available

Phonogram producers are granted the exclusive right to authorise the making available of their phonograms to the public by wire or wireless transmission in such a way that members of the public may access them from a place and at a time individually chosen by them, as in Article 14 WPPT. This corresponds to the making available right granted to performers under Article 10 WPPT and covers the availability of phonograms by wire or wireless means in on-demand services.[195]

7 Right of remuneration

Under Article 15(1) WPPT phonogram producers are granted a right to a single remuneration for the direct or indirect use of phonograms published for commercial use like broadcasting or other communication to the public. This corresponds to the remuneration right granted to performers under the same Article.

The term of protection was raised from 20 to 50 years, and the calculation of the term of protection now starts with the year the phonogram was first published rather than the year of the first fixation as in the Rome Convention and TRIPS Agreement.[196]

D Origins of International Protection of Broadcasting Organisations and their Respective Rights

Regulations of rights for broadcasting organisations were made in the Rome Convention, mentioned in the TRIPs Agreement and modified in the Brussels Convention and the WPPT.

1 Rome Convention

Broadcasting organisations are the third group protected under the Rome Convention. There is no definition of what broadcasting organisations are in the Rome Convention, but a definition of broadcasting is given under Article 3(f) meaning "the transmission by wireless means for public reception of sounds or of images and sounds" and rebroadcasting is defined in Article 3(g) Rome Convention

[195] Sterling *World Copyright Law* at 740.
[196] Article 17(2) WPPT; see also Sterling *World Copyright Law* at 742.

as "the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation."

The definitions focus not on a group of people but on what broadcasting means in general. In context, broadcasting organisations refer to entities which organise the activity of broadcasting, in other words, the organisation which prepares or presents the material to be transmitted. The definition includes both radio and television broadcast, referring to sounds and audio-visual transmission. The definition includes transmission through Hertzian waves and leaves transmission by wire, such as cable-casting, webcasting (carried out by wire), cable retransmission and simulcasting out of consideration.[197] It remains unclear whether or not it covers encrypted transmission that requires decrypting by the recipient, like radio.[198] In Article 6(1) Rome Convention broadcasting organisations enjoy protection if either of two criteria is fulfilled; the headquarters of the broadcasting organisation is situated in another contracting state, and/or the broadcast was transmitted from a transmitter situated in another contracting state. If the transmitter is placed in a contracting state, any broadcasting organisation enjoys protection even though it has its headquarters in a non-contracting state.

Broadcasting organisations that fit those criteria enjoy minimum protection and national treatment under the Rome Convention. Like phonogram producers, broadcasting organisations are granted exclusive rights under Article 13 Rome Convention, namely the right to authorize and prohibit the rebroadcasting of their broadcasts, the fixation of their broadcasts, the reproduction of fixations made without their consent and of their broadcasts and the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee. It is left to the contracting states to apply the communication right or define the conditions under which the right may apply.[199]

The minimum duration of protection for broadcasting organisations is 20 years starting from the year in which the broadcast took place, Article 14 Rome Convention.

Exceptions to the protection granted to broadcasting organisations by the Rome Convention can be made in regard to private use, the use of short excerpts in regard to reporting current events, ephemeral fixation by broadcasting organisations, and the use for teaching or scientific research purposes.[200]

During the 1960s the use of satellites for the distribution of programmes carrying signals increased rapidly, and broadcasting organisations as the most affected

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[197] von Lewinski *International Copyright Law and Policy* at 200.
[198] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1216.
[199] Article 13(d) second half Rome Convention.
[200] Article 15 Rome Convention.

parties looked for better protection for their programmes transmitted via satellites. The Rome Convention left it unclear whether satellite transmission was protected, and broadcasting organisations were left alone with legal uncertainty. It was a question of whether the word broadcasting only included transmission that is directly received by the public, or if it stretched to cover all transmissions by satellite.[201]

2 Brussels Convention and TRIPs Agreement

In 1974, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite was adopted in Brussels (Brussels Convention). The Brussels Convention focused on the protection of programme-carrying signals transmitted via satellite by broadcasting organisations rather than creating a new exclusive right for broadcasting organisations.[202] In Article 1(ii) Brussels Convention 'programme' was defined as the "body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution;" and covers not only material protected by copyright but non-copyrighted material.[203] The carrying signal is defined as "an electronically-generated carrier capable of transmitting programmes."[204] The transmission via satellite simply means that any device in extra-terrestrial space capable of transmitting signals can be used.[205] Under Article 2 Brussels Convention the contracting states have an obligation to "take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal […] is not intended." It is left to national legislation to take adequate measure for preventing signal piracy, be it by granting a particular right or penal sanctions. The duration of the granted protection is not regulated and is left to national legislation.[206] The transmission via direct broadcasting satellites is excluded from the scope of the Convention altogether, Article 3 Brussels Convention.

The next step in protecting broadcasting organisations was the TRIPs Agreement. Under Article 14(3) TRIPS Agreement, broadcasting organisations are granted the right to authorise the fixation, the reproduction of the fixations, the rebroadcasting by wireless means of broadcasts and the communication to the public of television

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[201] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1227.
[202] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1228.
[203] Ricketson, Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* vol. II at 1228.
[204] Article 1 (iii) Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (entry into force 25.08.1979, adopted 21.05.1974) (Brussels Convention).
[205] Article 1(iii) Brussels Convention.
[206] Article 2(2) Brussels Convention.

broadcast. According to Gervais, Article 14(3) Brussels Convention, is the result of a compromise between members that already granted copyright protection to broadcasting organisations and those who did not.[207] The duration of the protection granted to broadcasting organisations is 50 years from the end of the calendar year of authorized publication or from the making of the unpublished work, as of Article 12 TRIPS Agreement.

3 WPPT

Soon after the TRIPs Agreement, the WPPT was adopted but did not include regulations for broadcasting organisations but modified the definition of the term broadcasting to include satellite transmission and the transmission of specific encrypted signals under Article 2(f):

> Broadcasting means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organisation or with its consent.

This modified definition did not make a distinction between broadcasting and rebroadcasting as the Rome Convention does in its Article 3(g), but it includes rebroadcasting.

In 2014, WIPO released a Working Document for a Treaty on the Protection of Broadcasting Organisations which aims:

> To provide protection to broadcasting organisations for their broadcast on traditional broadcasting and cablecasting media to enable them to enjoy the rights to the extent owned or acquired by them from owners of copyrights or related rights.[208]

It remains to be seen whether the treaty is going ahead or is incorporated into other future treaties or agreements.

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[207] Daniel J. Gervais *The TRIPS Agreement: Drafting History and Analysis* (4th edition, Sweet & Maxwell, London, UK, 2012) at [160-161].

[208] WIPO *Working Document for a treaty on the protection of broadcasting organisations* (2014) SCCR/27/2 REV.

Table 2 Overview: International Treaties on Neighbouring Rights

Treaty	Rights covered and respective rights holders	Parties	Parties (amongst others) to the Treaty and exceptions
Rome Convention	Performers, Phonogram Producers and Broadcasters rights of reproduction and communication And broadcasters right of rebroadcasting	93	UK, Sweden (1961) Germany (1966) Austria (1973) France (1987) Australia (1992) Canada (1998) China, the United States and NZ are not parties to the Rome Convention
WPPT	Performers moral, reproduction, communication and on-demand-availability right; Phonogram producers reproduction and on-demand-availability rights	96	US (2002) Australia, China (2007) Germany, France, Sweden, United Kingdom, Austria (2010) Canada (2014) New Zealand (2018)
Phonogram Convention	Phonogram Producers reproduction rights	79	UK, France, Sweden, (1973) Germany, Australia, United States (1974) New Zealand (1976) Austria (1982) China (1993)

E Summary

Rights granted to performers and record producers on an international level are existent but not commonly recognised and acknowledged in national legislation. Not only the possibility that a sound recording can have numerous performers and record producers but the differences in national protection of such right holders becomes a problem when seeking authorisation for international use.

III Management of Rights in Musical Works - Licensing Practices and the Establishment of Collective Rights Management Organisations –

When Johannes Gutenberg invented the mechanical printing press in the 1450s, no one would have thought that it would mark the beginning of a rapidly growing market and bring not only pleasure but problems for creativity all over the world.[209] The possibility of making fast copies of literary works changed Europe, shaped copyright, and paved the way for today's rights management and licensing practices. From its beginnings, copyright legislation tried to ensure fair remuneration of artists for the use of their works. This aim quickly became the biggest challenge for copyright holders and intellectual property legislation.
Since the advent of the internet, accessing music online from all over the world at any time is reasonably easy and CMOs face the challenge to license their repertoire to new, evolving online music services which implies the availability of adequate licensing options nationally and internationally.[210] A brief historical overview of the development of CMOs and the business of music publishing will be given hereafter to clarify the role they are playing in the music market and the legal and technical problems they are facing when licensing music to online music streaming services.

A Early Licensing Practice

Early licensing was accompanied by censorship, since it was the responsibility of the state or equivalent authorities to issue licences to grant printers exclusive rights to print books or to permit their printing.[211] A printer needed two licences in order to print books or pamphlets, a printing licence issued by an official authority and a license from the copyright holder which granted the right to copy the work. Over the years, the state supervision of opinions through licensing rose until copyright legislation changed due to user demand and new technical developments. As discussed earlier, it was eventually accepted that the protection of musical works was important, and rights were granted to authors, and much later to performers, to ensure fair remuneration for both groups of right holders.
To ensure the management of rights granted as the main source of fair remuneration, it is important to know the market in which copyrighted material is used.

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[209] Atkinson, Fitzgerald *A Short History of Copyright* at 15.
[210] Daniel J. Gervais (ed) *Collective Management of Copyright and Related Rights* (3rd edition, Wolters Kluwer International, 2016) at 5.
[211] Atkinson, Fitzgerald *A Short History of Copyright* at 16.

B Market for Musical Works

Authors, performers and producers are granted exclusive rights under different copyright legislation, but the exploitation of those rights on the free market is solely their own concern. Musical works are mainly sold in two markets; the primary market which represents the market of sales of sound recordings or sheet music, and the secondary market representing the licensed use of recorded works by third parties.[212] In the primary market, the royalties payable which reflect the price of the item sold are negotiated on a contractual basis by the artists and the publisher or record companies using copyrighted works.

For centuries, music publishers purchased the copyrights of musical compositions from composers and songwriters, and organised the printing, publication and sale of the sheet music.[213] Difficulties in the exploitation of legally granted rights due to poor drafting of the law and lengthy procedures in civil courts led to growing unauthorised copying of sheet music, forcing publishers to take matters into their own hands. As a consequence, the Music Publishers Association (MPA) was established in the United Kingdom in 1881 pursuing unauthorised copying on behalf of its members.[214] Over the centuries and due to new technical developments, the business model of publishing musical works shifted from selling a product to managing copyrights and granting licences for the use of copyrighted materials to third parties.[215] The change from selling a physical product to selling licences for the use of a certain product in public opened a new market. Negotiating royalties payable in the secondary market is more complicated as various forms of exploitation make special arrangements to collect and distribute royalties from various users necessary.

The complexity of the secondary market and differences in existing national copyright legislation made controlling the use of copyrighted works impossible for the single artist. The problem of artists obtaining a fair pay-out of the profits made by theatres arose in France in the early seventeenth century and became a debate about the collective protection of rights.[216] With no support from the authorities, publishers and artists took matters into their own hands and established 'self-help' organisations in the early nineteenth century with the main task being to monitor the public use of their works, request compensation from the user and distribute this to their members.[217] Over the following decades, those self-help organisations

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[212] Frith, Marshall(ed) *Music and Copyright* at 63.
[213] Ruth Towse "Economics of Music Publishing: Copyright and the Market" (2017) J Cult Econ 41 403-420 at 405.
[214] Towse "Economics of Music Publishing: Copyright and the Market" at 406.
[215] Towse "Economics of Music Publishing: Copyright and the Market" at 406.
[216] Gervais *Collective Management of Copyright and Related Rights* at 5.
[217] Kung-Chung Liu, Reto M. Hilty (ed) *Remuneration of Copyright Owners Regulatory Challenges of New Business Models* (MPI Studies on Intellectual Property and Competition Law 27, Springer Verlag, Germany, 2017) at v.

became Collective Management Organisations (CMOs) and were established all over the world under different jurisdictions and business models.

C Development of Collective Rights Management Organisations (CMOs)

The development of CMOs and the consequent licensing practices took place over decades and was tightly intertwined with the changes in copyright legislation and technical developments, especially in sound engineering.

At first, the remuneration of artists was a contractual issue between artists and those who publicly exploited their work, most likely publishers or other third parties like theatres.[218]

With the new fashion of having small salon orchestras playing traditional music in a more informal environment away from grand opera and concert houses, the problem of monitoring the use of works became a large problem for single artists. Together with new technical developments, especially the phonogram, radio, TV and devices that could fix and reproduce artistic works, it became impossible for right holders to control the use of their works reproduced on various mediums and played on various occasions all over the world. However, monitoring and controlling the use of copyrighted material is the crucial point of copyright protection and the basis for securing equitable remuneration. If there is no possibility of controlling the use of copyrighted material, copyright protection comes to nothing.

Tradition has it that the establishment of the first collective society for artists of musical works and their public communication rights is credited to three French authors having dinner at Café Les Ambassadeurs were they heard the orchestra playing one of their songs. They refused to pay for their drinks until they were paid by the café owner for the use of their work in a public space.[219] After they had taken the café owner to court between 1847 and 1849, they set up an organisation in 1851 with its main task being to manage the exclusive authors' right of making their works available to the public. The so-called Société des Auteurs Compositeurs et Editeurs de Musique (SACEM) was the first Collective Management Organisation (CMO) to monitor the use of its members' musical works and ensuring that they were equitably remunerated.[220] SACEM served as a model for the founding of many other CMOs in Europe and around the world over the following decades.[221]

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[218] Liu, Hilty *Remuneration of Copyright Owners Regulatory Challenges of New Business Models* at v.

[219] Davide Stopps *How to Make a Living from Music* (2nd edition, Creative industries – Booklet no. 4, WIPO Publication No. 939(E), Geneva, 2014) at 50.

[220] Staffan Albinsson "A Costly Glas of Water The Burget v. Morel case in Parisian courts 1847-1849" (2014) Svensk tidskrift music forskning – Swedish Journal of Music Research vol. 96 2 at 2.

[221] Jörg Reinbothe "Collective Rights Management in Germany" in Gervais *Collective Management of Copyright and Related Rights* at 206.

Initiatives for legislative action to protect authors' rights were submitted in the 1820s from German composers like Ludwig van Beethoven and led to the establishment of the first German copyright law in 1837 which provided protection for authors when their works were performed, especially as operas and concerts.[222] However, it was not until 1901 that the German copyright law granted composers of musical works comprehensive public performance rights, laying the foundation for the establishment of the first German CMO in 1903. The society for authors' rights was initiated by Richard Strauss in Germany and led to the establishment of many competing CMOs in the German territory from which the GEMA was eventually established in 1947.[223]

With new technological developments like reproduction devices, the need for better protection of performers and producers' rights were demanded which, in the late 1950s, led to the establishment of collective societies for neighbouring rights modelled after existing authors societies.

Problems with monitoring the public use of protected works and a fair share of remuneration were not limited to domestic law. With the advent of digital transformation and the online use of protected work on the rise, the need for cooperation within national CMOs was unavoidable. As a consequence, Romain Coolus organised the Committee on the Organization of Congress for Foreign Authors' Societies in 1925 which led to the establishment of the International Confederation of Societies of Authors (CISAC) in 1926[224] as a response to the demand for establishing uniform principles and methods for the collection of royalties and the protection of works, and in order to ensure the best possible protection for all society members worldwide. Today, CISAC has 239 members in 221 countries which encompass all geographic regions and fields of creativity.[225]

In addition to CMOs for authors of musical works, world-wide cooperations between CMOs for performers (SCAPR), the recording industry (IFPI), and mechanical rights societies (BIEM) were established, trying to set standards for the ever-growing worldwide market for the use of licensed music.

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[222] Gesetz zum Schutz des Eigentums an Werken der Wissenschaft und Kunst in Nachdruck und Nachbildung of 11.06.1837, Kingdom of Prussa; see also Reinbothe "Collective Rights Management in Germany" at 207.

[223] Wandtke, Bullinger *Praxiskommentar zum Urheberrecht* at 3.

[224] Gervais *Collective Management of Copyright and Related Rights* at 6.

[225]CISAC "Members Directory" cisac.org (October 2017) <www.cisac.org/Our-Members/Members-Directory>.

1 Legal status of CMOs and their method of operation

The legal status of the CMO reflects the national legal system of the country of operation. The majority of existing CMOs are organised as not-for-profit social organisations, but in most countries, additional for-profit entities can co-exist.[226]

Due to a monopolistic approach in most of the European countries, CMOs are usually assigned the role of a public authority or given exclusive permission for registration. Usually, only one or two of such CMOs exist in each country, managing and licensing authors and performers combined rights either together or separately. However, in the United States and Canada, CMOs are managing different rights in the composition and sound recording separately.

Despite the majority of the European countries following a non-competitive approach when it comes to CMOs, the European Commission followed the example of the United States and opened the European market for competition between CMOs especially in regard to multi-territorial licensing in its CRM-Directive which will be discussed later.

For the acquisition of rights, CMOs usually follow one or more of five common methods: a full assignment of rights; a non-exclusive licence; an authorisation to act as agent; a *sui generis* regime or a legal licence combined with models of legal support such as implied licence, legal presumption, mandatory licence, or extended collective licensing.[227]

Under a system of full rights assignment, the mandate granted to a CMO by the respective right holder is exclusive and based on the right holder's choice. The right holder can choose which of the rights are to be managed collectively or individually, based on a management contract between CMOs and right holder. For the duration of the contract, the CMO can manage the assigned rights exclusively under its management scheme.[228]

In some countries, CMOs can acquire only non-exclusive mandates from right holders to manage their respective rights and usually act as agents negotiating with third parties on behalf of the right holders rather than on their own account.[229]

Another rights acquisition system relies on a *sui generis* concept under which CMOs are obliged to administer the rights of all right holders on equitable terms and grant licences to all users respectively.

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[226] Wenqi Liu "Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance" (2012) Journal of Intellectual Property Rights Vol. 17 46-54 at 47.

[227] Daniel Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" (2002) Vol 1, No. 2 Canadian Journal of Law and Technology 21 at 27.

[228] Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" at 27.

[229] Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" at 27.

A legal non-voluntary mandate is another way of acquiring rights. Under such a system, CMOs have the right to use specific works without explicit permission of the right holders but have to ensure equitable remuneration to the respective parties. To guarantee the functioning of rights acquisition by CMOs and safeguard right holders, different supporting systems exist in most countries. The three most common systems are the implied licensing, legal presumption, and extended collective licensing.

An implied licence or indemnity system limits the recourse that is available to right holders and shifts the liability to ensure whether an individual work is part of the licence before it is used away from the user. Such a concept goes against the principle of collective management that a CMO should acquire rights directly from right holders and not rely on indemnity as it would turn into a compulsory licence.[230]

The system of legal presumption reverses the burden of proof for the user who has to show that the respective CMO does not have the authority to license the work used. If the presumption is not rebuttable and the right holders are not granted a right to opt out, such a system could also become a compulsory licence system.

Another method is mandatory collective management which is usually used for compensating right holders for activities that usually cannot be licensed, such as private copying.

Another method, which is predominantly used in the Nordic countries is extended collective licensing. Following that system, a voluntary licence is combined with an extension to non-represented right holders. Whenever a certain number of the same class of right holders negotiate a licensing agreement with a user, that agreement is automatically extended to all right holders of the same class whether they are national or foreign. The different systems used by CMOs to acquire collectively managed rights and the supporting systems defining the scope of licensing such rights can become obstacles to third-party right users operating on an international basis. In addition to the acquisition of rights, CMOs have different tasks to fulfil depending on their organisation in each nation-state.

2 Main tasks of collective management organisations

The primary task of the first authors' societies was to represent right holders, monitor the use of their work, and collect royalties on their behalf whenever the work was used or made available to the public. The most common method was to grant licences to third parties allowing them to use their respectively managed

[230] Gervais "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective" at 29.

repertoire commercially and collecting the returned royalties on behalf of their members.

As a result of the fast advancing digital transformation in the twenty-first century, more and more complex digital products spread throughout all branches consisting of a conglomeration of texts, still or moving pictures and music, new technical services emerged demanding a suitable licensing scheme. The general principle of the digital world is to get fast access to any content at any time under unified standards. However, copyright legislation struggles to grant either barrier-free access to legal content or unified standards for copyright protected works exploited publicly online. It is widely left to national CMOs to find a way out of the maze and balance the needs of the artists and users.

However, there are two regulatory systems for CMOs which differ due to the differences in general national copyright legislation. Typically, the Anglo-American countries with their common law systems use a low-level regulation for CMOs which means that only user-related questions like the establishment of tariffs or disputes between parties are regulated by law, for example through a Copyright Tribunal in the United States and Canada.[231] The control of CMOs' activities is usually left to general competition and antitrust legislation in common law countries.

In contrast, CMOs in civil law countries are usually subject to a much higher degree of regulation which covers not only the relations between users and the establishment of tariffs but the relationship with right holders ensuring their wellbeing. Therefore, most civil law countries provide for specific control that prevails over general antitrust and competition law and gives CMOs a 'legal' monopoly position as they act on behalf of the nation-state.[232]

CMOs working in the common law systems are more likely to focus solely on the economic side of their member's rights whereas, in civil law countries, CMOs take care of their member's needs and include, in addition to economic, cultural and social aspects in their main tasks. Although the different approaches taken in regulating CMOs in the two legal systems seem to be minimal at first glance, they are often linked to fundamental cultural differences creating almost insurmountable problems when it comes to international cooperation between CMOs and ensuring fair remuneration, especially for foreign right holders.

The structures and natures of CMOs are far from harmonised and differ from jurisdiction to jurisdiction depending on the legal regime and practice. CMOs can, therefore, be set up as a for-profit or not-for-profit cooperation, parastatal entity, state agency, cooperative or other various types of associations requiring, or not

[231] Frith, Marshall *Music and Copyright* at 64; see also Silke von Lewinski *International Copyright Law and Policy* at 61.
[232] von Lewinski *International Copyright Law and Policy* at 61.

requiring governmental authorization to be set up.[233] The state of governmental supervision of CMOs reaches from control through competition law (e.g. the United States) to the establishment of specific governmental bodies or commissions (most European countries) working closely with the competition law enforcement agencies keeping an eye on CMOs' operating principles and compliance with competition legislation.[234]

However, once set up, most not-for-profit CMOs are expected to act as trustees for the right holders they are representing and conduct their additional "economic, cultural and social functions" satisfactorily.[235]

The tasks of CMOs as not-for-profit trustees of their members are the monitoring and licensing of the public use of managed works, the enforcement of statutory claims to equitable remuneration and the distribution of collected royalties to their members and other right holders represented. Additionally, in some countries, CMOs have to enhance the creation and enrichment of the cultural heritage and promote culturally essential works and contributions, and also to establish welfare and assistance schemes for their members.[236]

For example, the German Copyright Act was introduced in 1965 and explicitly recognized the role of CMOs as a key for the functioning and practice of the German copyright system.[237] The Act laid out the special position of CMOs in the copyright systems when it located them in the neighbourhood of state agencies, entrusting them with additional cultural tasks and equitable remuneration rights mandatory to collective management by CMOs.[238] The positioning of CMOs in regard to competition law, which was enacted only eight years before the Copyright Act in 1957, was becoming difficult, because CMOs usually hold a dominant position in their field of rights management, coming close to an unwanted monopoly. The view of the German Copyright legislator was that each work protected under copyright is unique and therefore not replaceable, and thus forms a monopoly in itself that results in a monopoly position of the right holder and consequently in a monopoly position of CMOs for its territory of operation.[239] To

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[233] Daniel Gervais "Collective Management of Copyright: Theory and Practice in the Digital Age" in Gervais (ed) *Collective Management of Copyrights and Related Rights* at 9.

[234] Gervais "Collective Management of Copyright: Theory and Practice in the Digital Age" at 9

[235] Peter Gyertyanfy "Why is a European Directive on Collective Management Necessary - A Perspective from a New Member State of the EU" (2005) 53 J. Copyright Soc'y U.S.A. 71-102 at 73.

[236] See for example Section 32 of the German Collecting Societies Act (VGG); see also Gyertyanfy "Why is a European Directive on Collective Management Necessary - A Perspective from a New Member State of the EU" at [73-74].

[237] Reinbothe "Collective Rights Management in Germany" at 209.

[238] U. Loewenheim, G. Schricker, A. Ohly, M. Leistner (ed) *Urheberrecht, Kommentar (Copyirght Commentary)* (5th edition, Beck Juristische Verlage, München, Germany, 2016) at Vor §§ 1 and following LACNR, Note 6.

[239] Parliamentary Document *Explanatory Memorandum of the Government Bill* (23.03.1963) Bundestagsdrucksache IV/271 at 9 and 17.

meet the standard, and not conflict with competition law, a copyright-specific governmental body, the German Patent and Trademark Office, was established to control CMOs and prevent them from abusing their position in relation to right holders and users.

The German legislator recognised the special function of CMOs in discharging the State from its tasks to safeguard the exploitation of copyright and gave them an exclusive legal basis in the Law on the Administration of Copyright and Neighbouring Rights (LACNR) which was enacted at the same time as the German Copyright Act in 1965.[240] With the adoption of the CRM-Directive, the LACNR was replaced with the new Collecting Society Act of 2016,[241] still containing the obligations of CMOs to fulfil individual cultural and social tasks.

A different example of the differences in recognizing CMOs under the law is France. A specific legal framework for the activities of CMOs, neighbouring rights and remuneration rights was introduced in the French Copyright Act[242] in 1985. CMOs in France are civil societies and ruled by the Code Civil and therefore put on a level with family businesses. This is because their activities lie in the representation of their members, acting as their trustees, and not with the intention of individual profits.[243] CMOs are supervised by the French Minister in charge of cultural matters and monitored by a specifically founded body the CPC[244]. French CMOs grant assistance to creation, but there is no obligation to fund creativity and establish welfare and assistance schemes for their members as German CMOs are required to by law.

The differences in nature and tasks of CMOs have to be kept in mind when negotiating the establishment of international regulations for CMOs and their commercial relevance, especially in regard to licensing practices.

As CMOs are territorially restricted and only able to license their members' works for their respective territory of operation, new technical inventions making it possible to communicate works to the public across territorial borders has created a serious problem. With no international regulations in place, CMOs started to enter into reciprocal agreements allowing them to license each other's repertoire in their territory of operation. With advancing technology, especially the advent of the internet and the emergence of online streaming services operating on a worldwide basis, the solution of reciprocal agreements was no longer suitable and was

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[240] Law on the Administration of Copyright and Neighboring Rights (Urheberwahrnehmungsgesetz) of 09.09.1965, Bundesgesetzblatt, Teil I, 1965 (LACNR) at 1294.

[241] Act on the Management of Copyright and Related Rights by Collecting Societies of 24 May 2016, Federal Law Gazette I at 1190 as last amended by Article 4 of the Act of 01.06.2017, Federal Law Gazette I at 1416 (Collecting Societies Act).

[242] French Copyright Act, 1985 (Act No 85-660).

[243] Sylvie Nérisson "Collective Management of Copyright in France" in Gervais *Collective Management of Copyright and Related Rights* at 179.

[244] Commission permanente de contrôle des sociétés de perceptions et de répartitions des droits.

scrutinised especially by the EU. This will be discussed in conjunction with online streaming services and the European legislation introduced regulating CMOs.

D Aspects of International Legislation for CMOs

The collective management of copyrights first occurred in France on the initiative of right holders, triggering the establishment of CMOs all over Europe.

As far as international legislation is concerned, none of the existing international treaties and agreements on copyright and related rights include any propositions or regulations on how to enforce rights or their respective management.[245] Although Articles 11*bis*(2) and 13(1) Berne Convention and Article 12 Rome Convention deal with collective management of rights to some extent, it is left entirely to the Member States to exercise them and ensure their exploitation.

Nevertheless, attention was given to collective management in the late 1970s when new emerging technologies became more of a concern. WIPO recognized the importance of collective management, especially in the light of the emergence of new technology, and published numerous comprehensive studies which eventually led to the Forum on the Collective Administration of Copyrights and Neighbouring Rights held in Geneva in 1986. The Director General of WIPO spoke of the importance of collective rights management for exercising copyrights and neighbouring rights and identified the importance of correctly functioning collective administration systems to minimise the danger of unjustified collectivization of rights.[246] WIPO continued to study legal and practical aspects of collective management systems but adopting a regulation on collective management issues failed to be included in subsequent agreements, including TRIPS, WCT and WPPT.

Similarly to WIPO, the European Commission identified the difficulties of collective management systems, especially in regard to cross-border licensing of copyright-protected work and addressed the problem of the functioning of collective management organisations in 1995.[247] Nearly 20 years later, in 2014, the CRM-Directive was established and was implemented into national law of all EU Member States in 2016. The CRM-Directive established rules on transparency and good governance for the collective management of copyright and related rights, especially in the field of music and multi-territorial licensing of musical works for

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[245] Mihály Ficsor "Collective Rights Management from the Viewpoint of International Treaties with Special Attention to EU 'Acquise'" in Gervais *Collective Management of Copyright and Related Rights* at 33.

[246] Ficsor "Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU 'Acquis'" at 37.

[247] European Commission *Green Paper on Copyright and Related Rights in the Information Society* (19.07.2005) COM (95) 382 final.

the online users trying to create a harmonized legal framework for CMOs within the EU.[248]

It remains to be seen how the CRM-Directive can play a part in contributing to solving the problems associated with licensing music for the online use in the future. An in-depth analysis of the legal development of the CRM-Directive is provided in Chapter Four.

E Summary

The concept of nationally regulated collective rights management, together with differences in general copyright legislation, has led to an imbalance of the market affecting right holders negotiation powers, fair remuneration, and distribution of royalties. The invention of CMOs aimed to secure authors' rights and guarantee a revenue stream from the public exploitation of their work. The majority of national CMOs in Europe have been fostered by legislative initiatives in their individual countries due to the belief that collective management of protected rights through CMOs is the best possible solution to the problems of individual monitoring, licensing, collecting and enforcing granted copyrights. In most European countries, CMOs have facilitated efficient methods for collecting and dispersing royalties and negotiating licensing agreements for the use of their member's works in their respective territory of operation. While the operation of CMOs was territorially restricted at first, new technical developments brought the possibility of wider transmission ranges, making it possible to exploit musical works across borders. The most significant issue that occurs in the digital age is the question of the efficiency of CMOs' operation and compliance with competition and antitrust regulations, especially in regard to international licensing as required by new online streaming services.

IV Conclusion

The two main international Conventions on Copyright and Neighbouring Rights, the Berne and Rome Conventions, have laid the foundation for the rights of authors, performers, producers of phonograms and broadcasters in their works. Despite many revisions of both Conventions, two new agreements were needed to deal with problems arising from new technology. The WCT and WPPT acknowledge the online use of works and created a new exclusive making available right. The international Conventions and Treaties tried to unify the rights of authors,

[248] Lucie Guibault, Stef van Gompel "Collective Management in the European Union" in Gervais *Collective Management of Copyright and Related Rights* at 139.

performers, producers and broadcasters in order to introduce standardised protection for right holders in an ever rapidly growing online world.

However, leaving the method for exploitation of the basic principles of rights granted and exceptions thereof to contracting states and national legislation has created a patchwork of classes of right holders, rights, and rights management methods.

The WPPT set the first milestone in protecting performers' rights and placing them on an equal footing with authors when the economic rights granted were raised to the level of exclusivity.

The three primary economic rights that are important for musical works are the exclusive rights of reproduction, communication to the public, and the making available right all granted to authors, performers and where applicable to producers of sound recordings and broadcasters under the Berne and Rome Conventions and modified by the WCT and WPPT.

The rights of authors, performers, phonogram producers and broadcasting organisations prove to be far from unified on an international basis, which makes it unnecessarily difficult for the user of copyrighted works to play by the rulebook.

Leaving vital decisions concerning definitions, law enforcement and implementation of minimum standards to the contracting states creates a state of uncertainty and starts controversies when it comes to using protected material legally in the online world, especially when crossing national borders.

Nonetheless, the international differences in national legislation concerning the rights granted to respective right holders are not the only existing problems. With no international guidelines or regulations for the management of rights in place, differences in CMOs' operational systems and systems of royalty collection and distribution add to the controversies. With the new borderless environment of the online world, licensing agreements jumped from being national matters to becoming international problems of great concern. Controlling and enforcing intellectual property rights on an international basis is more than complicated, and involves not only the rights of artists but different legal and cultural beliefs. Multi-territorial licensing seemed to be the easy answer to tackling the remuneration problem and European CMOs began to set up international joint ventures agreeing on operational systems and models that help to make monitoring copyright exploitation easier. Other efforts to ease the licensing problems were made by splitting up the rights for the online exploitation of music and entrusting the management to newly developed private CMO-like entities specialising in licensing music for webcasting purposes like the C3S (Cultural Commons collecting society) project in Germany. However, different worldwide licensing systems and fragmented repertoires remain a serious problem, making negotiations over licences unnecessarily complicated and time-consuming for new online streaming services

wishing to enter and compete in the music market. For clarification of the problems arising in licensing musical works for the online use, this will be discussed in relation to the technical development from analogue radio through to online streaming services focusing on the technical side and the respective international legislation hereafter.

Table 3 Overview: Rights Regulated in International Legislation by Right Holders

Right holder / Rights	Authors	Performers	Phonogram Producers	Wireless Broadcasting Organisations
Reproduction Rights	Berne Convention TRIPS WCT	Rome Convention TRIPS WPPT EC Dir.92/100 EC Dir.2001/92	Rome Convention, Geneva Phonograms Convention TRIPS WPPT EC Dir.2001/29	Rome Convention TRIPS EC Dir.2001/29 EC Dr.92/100
Communication to the Public/ Live Broadcasting				
On-Demand Availability	WCT	WPPT EC Dir.2001/29	WPPT EC Dir.2001/29	
Wireless Rebroadcasting				Rome Convention EC Dir.92/100 EC Dir.93/83

Chapter Three
Development of Technical Capabilities for the Exploitation of Musical Works and the Licensing Struggle - Example of Radio

"It was indisputable that it was the mechanical means of reproduction and transmission which had in the space of a few years, transformed the actor, who, until then, had been master of his own performance and his own talent, into a supplier for a chain of industries which reproduced and used his talent unrestrictedly."[249]

Music is the world´s number one passion, transcending language, gender, age, and geographic borders, making it one of the most powerful markets and marketing tools not only for the multimedia industry.[250]

The revolution of music goes hand in hand with the technical revolution of playback and recording devices, and progressing broadcasting transmission ranges via radio waves and the internet.

When radio was first invented, it was only possible to broadcast over a short distance via AM and FM radio waves but with the technical advancements, it was soon possible to send programmes around the world making digital, satellite and, later, internet radio possible. The success of radio was always dependent on the technical possibilities and the availability of affordable equipment to the general public. While the technology progressed fast, legislation concerning the public exploitation of musical works got stuck in the past, unable to adjust to the future and its new possibilities. Not only legislators but the music industry were unprepared for the online revolution of music. Instead of adapting to an evolving music market full of possibilities to exploit musical works publicly, the industry chose to wait and stick to the tried and true, ignoring the progress in technology and the future it could have.

However, history repeats itself, and only as the music industry was threatened by recording and playback devices entering the market in the early twentieth century leading to the collapse of old market structures dependent on the sale of sheet music, it is now the internet that demands adjustment not only by legislation but business and licensing structures and methods.

The example of streaming services and their struggles show that even though new revenue streams are being developed, right holders are not satisfied with the accumulated remuneration and the demands for legal action to correct the

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[249] HL Vogel *Entertainment Industry Economics: A Guide for Financial Analysis* (4th edition, Cambridge University Press, Cambridge, UK, 1998) at 27.

[250] Eric Sheinkop *Return of the Hustle: The Art of Marketing with Music (*Palgrave MacMillan, Basingstoke, United Kingdom, 2016).

unacceptable market imbalance is becoming more and more urgent. For a better understanding of how the diversity of classes of right holders, rights granted and rights management and respective licensing methods created by legislation in response to new technology, this chapter analyses the example of radio technology from analogue through to online streaming services and the respective legislation dealing with problems arising from this. A special focus will be on the licensing methods and systems related to the public exploitation of musical works in Europe and the United States.

I From Terrestrial Radio to Online Streaming Services

What would a road trip be without singing along to a song played on the radio? Memories of summer holidays are accompanied by music or rather the fights over what radio station and song to listen to. The invention of terrestrial radio came a long way and it was not until the 1930s that radios were installed in cars.

The radio as a medium of communication is quite a young invention which started its triumph in the era of the `Golden` or `Roaring Twenties` a period of economic prosperity, jazz music and significant changes in lifestyle. The invention of automobiles, telephones, motion pictures, radio broadcasting and other electronic appliances accelerated consumer demands for music, especially in big cities like New York, Berlin and Sydney.[251]

The new technical developments forced the music industry to rethink their business models and alter revenue streams. While, in the early 1900s, the most important sources of music revenues came from the sale of sheet music and phono records, with the advent of new technology, especially the radio, physical music sales declined, and the music industry shifted to a system of licensing public performances to make up for the loss in selling phono records.[252]

More than 70 years after the music industry experienced its first big upheaval, the revolution is far from over and the music industry is, once again, confronted with the shift of revenue sources demanding another rethinking of licensing methods. How we listen to music might have changed over the years but the basic technology behind radio transmission remains the same.

Radio broadcasting is basically communicating from a sender to a receiver through the use of radio waves as a sound carrier. This technology brought the sound of music into our lives whether we are listening to terrestrial, satellite, digital or online

[251] Bärbel Schrader, Jürgen Schebera. *The "golden" twenties: art and literature in the Weimar Republic* (1st edition, Yale University Press, USA, 1988).

[252] Al and Bob Kohn *Kohn on Music Licensing* (4th edition Wolters Kluwer Legal & Regulatory, U.S., 2017) at 17.

radio. The story of radio is not only one about technology but legislation, ambition, social changes and power.

A Technical Invention of Radio

Today the term radio is mainly associated with terrestrial radio stations that broadcast to the general public. The term radio originally referred to the radio wave technology that makes it possible to transmit sounds between a sender and a receiver. The technology of sending sound from a sender to a receiver via radio waves is not only used for terrestrial radio broadcasting but satellite and online radio broadcasting and all sorts of wireless communication from cell phones, television, Bluetooth and Wi-Fi to microwave ovens and remote controls. The differences are in the configuration of the transmitter and receiver technology.

1 Long distance communication and terrestrial AM and FM radio

Long distance electronic communication was invented in the middle of the nineteenth century depending on cables as the transmitter, like the undersea cable that connected Europe with America allowing communication via telegraph and later telephone.[253] From the 1880s, people relied on communication via telephone for the transmission of news, music and whether reports, even opera performances could be received in 1909 through a pay-per-play phonograph service.[254]

The foundation for the invention of wireless communication via radio waves was laid by Scottish mathematician and physicist James Clerk Maxwell in 1864 when he predicted the existence of radio waves emerging when electricity passes through a wire.[255] Some twenty years later in 1887, the German physicist Heinrich Hertz experimented with early forms of wireless transmission and demonstrated that radio waves could be projected into space using rapid variations of electric current, proving Maxwell's theory of radio waves.[256] Italian-born Guglielmo Marconi saw the potential in Hertz´s technology and registered a patent for a wireless radio device in England in 1896.[257] Three years earlier, in 1893, Nikolai Tesla demonstrated a wireless radio device in Missouri but filed for Patent in the United States four years later.[258] Marconi used a spark gap transmitter that could only send Morse code but was unable to transmit the human voice or music. Canadian-born

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[253] Jack Lule *Understanding Media and Culture: An Introduction to Mass Communication* (FlatWorld, Boston, MA, 2012).
[254] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 287.
[255] J.A. Spiker "The Development of Radio" in Rashmi Luthra (ed) *Journalism and Mass Communication* – Vol. I (EOLSS Publishers Co. Ltd., Oxford, UK, 2009) at 168.
[256] Mary Bellis "The Invention of Radio Technology" (02.03.2018) ThoughtCo Humanities, History & Culture <www.thoughtco.com/invention-of-radio-1992382>.
[257] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at Chapter 7.2.
[258] Mary Bellis "The Invention of Radio Technology" (02.03.2018) ThoughtCo Humanities, History & Culture <www.thoughtco.com/invention-of-radio-1992382>.

Reginald Fessenden believed that voices could be transmitted by radio waves using a high-speed generator of alternating currents.[259] Building on Fessenden's belief, the engineer E. F. W. Alexanderson developed the Alexanderson alternator which was able to transmit the first radiotelephony broadcast of Fessenden's singing accompanied by a violin on Christmas Eve, 1906.[260]

The first to realise the value of wireless communication was the Navy and merchant shipping companies, making it mandatory to have a communication system onboard every vessel by 1910.[261]

The first ship to use a radio communication system in an emergency was the *RMS Titanic* in 1912 sending the emergency message S.O.S. in Morse code to nearby ships which contributed largely to the rescue of 700 people.[262] The focus of radio technology was on person-to-person communication, but the huge potential of the technology to make long-distance mass communication possible was realised soon after.

In 1915, the smaller and lighter but more powerful vacuum-tube transmitter, able to amplify signals, was developed combining inventions from Lee de Forest and John Ambrose Fleming.[263] One of the results of de Forest´s work was the invention of amplitude-modulated or AM radio allowing a multitude of radio stations to exist.[264] The knowledge of how to build a radio transmitter and receiver was soon leaked to the public, and amateur radios crowded the few airwaves sending messages to anyone within reach. This created congestion of the few existing airwaves, making it nearly impossible to establish a frequent radio transmission. This called for legal action, and in response, the use of radio waves was soon regulated through a licensing system limiting broadcast ranges for radio operation eventually leading to a ban of amateur radios in the United States altogether, by 1921.[265] In order to transmit sounds over the airwaves, a licence for a frequency had to be acquired from an authorised agency. The transmission range of AM radio was not over very long distances and additionally was troubled by static noise, delaying the establishment of terrestrial radio stations.

In 1933, Edwin Howard Armstrong invented frequency-modulated (FM) radio which improved the audio signal and decreased the noise static troubling AM

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[259] Spiker "The Development of Radio" at 107.
[260] Spiker "The Development of Radio" at 107.
[261] Christopher H. Sterling *Radio Broadcasting* in Peter Simonson (ed) *The Handbook of Communication History* (1st edition, Routledge, New York, 2013) at 223.
[262] C. H. Sterling "Radio Broadcasting" at 224.
[263] C. H. Sterling "Radio Broadcasting" at 224.
[264] Mary Bellis "The Invention of Radio Technology".
[265] Thomas H. White "United States Early Radio History" (11.03.2003) EarlyRadioHistory.us <earlyradiohistory.us/sec015.htm>.

frequencies by using a device he conceived during World War I which is still dominating radio technology today.[266]

The invention of the transistor by Bell Labs in 1947 made it possible to amplify radio signals, and transistor radios were first sold to the public in 1954.[267]

Digital audio broadcasting was developed in Munich in 1981, and the first Wi-Fi connecting computers wirelessly over the internet was developed only nine years later in 1990. It took another eight years until the Bluetooth technology was invented, allowing for short distance wireless communication a technology widely used today for connecting mobile phones with headphones and loudspeakers.[268]

In the United States, the first commercial radio station with regularly scheduled broadcasts was established in 1920, some years prior to similar setups all around the globe.[269]

In 1921, the first unlicensed transmission of a gramophone recording from a room in Wellington took place, followed by the first licensed broadcast of concerts by a professor from Otago, establishing the first radio station in New Zealand in 1922.[270]

With the words: "Attention! This is transmitting Station Berlin Voxhaus, broadcast 400. We would like to advise you that Berlin Voxhaus starts broadcasting today." broadcasting started in Germany on 29th October 1923 at exactly 8 pm.*[271]*

Initially, copyright was not a major issue for broadcasters and other involved parties as the focus was to make radio receivers available and affordable for the wider public and to control the information that was transmitted.

As radio technology gained more and more popularity, it was decided to make radio available to the wider public. Governments and the newly developing radio industry debated the financial side of radio broadcasting and countries took different approaches to settle the financial issue. Radio stations were either privately owned and supported commercially by advertisement as was the case for the United States, Canada, Mexico and Latin America, or funded by the government and sometimes supported by copyright fees on receiving devices as in the United Kingdom, some Commonwealth countries and most of the European countries.[272]

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[266] Thomas H. Lee *The Design of CMOS Radio-Frequency Integrated (*Circuits 2nd edition, Cambridge University Press, Cambridge, UK, 2004) at 21.

[267] Chris Woodford "Radio" (last updated 24.08.2018) EXPLAINTHATSTUFF! <http://www.explainthatstuff.com/radio.html>.

[268] Woodford "Radio".

[269] Gregory J. Golda (Web page creator) "History of American Radio: Melodrama, Adaption and Comedy" Pennsylvania State University <www.psu.edu/dept/inart10_110/inart10/radio.html>.

[270] Ministry of Business, Innovation & Employment Hikina Whakatutuki "Radio Spectrum Management" (27.01.2017) Business.govt.nz <www.rsm.govt.nz/about-rsm/who-is-radio-spectrum-management/new-zealand-radiocommunications-history#radiocomm-regs>.

[271] DRA "Rundfunkgeschichte – 75 Jahre Radio" dra.de <www.dra.de/rundfunkgeschichte/75jahreradio/anfaenge/voxhaus/index.html>.

[272] Spiker "The Development of Radio" at 110.

Negotiations over the pay of public performance fees started around 1923 after the Supreme Court of the United States agreed that radio stations had to pay for the right to use the music managed by ASCAP[273].[274] At first, ASCAP demanded fees ranging between USD 200 and USD 5,000 per year payable by broadcasters and makers of radio equipment. With the decline in revenues from sheet music, ASCAP negotiated licensing rates based upon a percentage of the radio station's advertising revenues for the first time in 1932.

So, radio programmes in the United States consisted of a mixture of talk, music and advertisement.

While the character of terrestrial radio in the United States was shaped by focusing on the financial side of broadcasting, the European approach emphasized culture, 'good' music, education and public affairs and offered only high-level entertainment for the social and political elite, funded mostly by the government.[275]

The rise of dictatorship in some European countries like Germany, Spain and Italy turned radio into a governmentally controlled propaganda service even making it a crime to listen to radio from other countries. Apart from propaganda, radio became the most important medium for reporting war progress and news during the years of World War II.[276] In the aftermath of World War II, the popularity of television terrestrial radio transformed more and more into 'Top 40' radio playing only the most popular music with minimum talk and news in between. The increased use of musical works played from phonograms and sound recordings played a vital part in contributing to the discussions over rights in sound recordings. The introduction of commercial radio stations in Europe started during the 1970s and 1980s, not long after, the first concerns about the costs of publicly funded radios occurred.[277]

Technical developments focused on improvement of transmission range and radio station capacities, leading eventually to the development of new forms of transmission in the early 1980s.

2 Digital and satellite radio

While the transmission range and the capacity of traditional terrestrial AM and FM radio stations were limited, new technology opened up the possibility to improve the transmission range and the signal quality using digital systems and satellites as a new transmission method.

In the early 1980s, a research collaboration between the German Institut für Rundfunktechnik (IRT) and the French Centre Commun détudes de Télédiffusion

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[273] American Society of Composers, Authors and Publishers managing the respective public performance rights.

[274] *M. Wittmark & Sons v. L. Bamberger & Co.*, 291 F. (D.N.J. 1923) at [776-777].

[275] C. H. Sterling "Radio Broadcasting" at 225.

[276] C. H. Sterling "Radio Broadcasting" at 226.

[277] C. H. Sterling "Radio Broadcasting" at 225.

et Télécommunication (CCETT) led to the development of the Digital Audio Broadcast (DAB) system which was to replace the analogue AM and FM radio system soon after.[278] With the support of the European Broadcasting Union (EBU), leading broadcasting organizations throughout Europe, and funding from the European Commission, the Eureka Project 147 was established in 1987, aiming to develop a broadcasting system able to transmit audio, text and visual content and reach portable or mobile receivers.

The DAB system[279] combined two already existing systems, the audio compression or bit-rate reduction system (MPEG) developed by IRT, and the frequency modulation system (COFDM) developed by CCETT.[280] The aim of the DAB system was to digitize broadcasting and improve overall and mobile reception, especially in fast-moving vehicles. Designed for terrestrial, satellite and mixed transmission of broadcasts, the system was adopted by the European Technical Standard Institute (ETSI) in 1995 as the single European standard. It was believed that the DAB system would herald the start of a revolutionary era in radio broadcasting and assure the survival of terrestrial radio.[281]

The difference between analogue terrestrial AM and FM radio and digital radio is the transmission method used. Digital radio used the MPEG and COFDM system to break broadcasting signals into fragments coded in numbers and strings of numbers.[282] These coded fragments are sent many times to increase the chance of them being received even when there is interruption or delay between sender and receiver. The receiver collects the transmitted fragments of radio signals, encodes them and sorts through them to reassemble the fragments to make a complete radio signal by using a forward error correction system (FEC).

The digital signal is transmitted on a higher broadband of radio frequency allowing for carrying six stereo music programmes or twenty speech programmes at the same time. Therefore, the same signal can carry music and text, making it possible to blend signals together, called multiplexing.[283] The advantages of the DAB system is that it is possible to broadcast more channels using the same frequency with less noise or disturbance and unnecessary retuning due to tuning by station name rather than frequency.[284] A big advantage for broadcasters is that digital transmitters need less power than analogue transmitters and therefore save them millions of dollars

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[278] Brian O'Neill "DAB Eureka-147: The European Platform for Digital Radio" (2009) New Media Society11(1-2) 261-278 at 169.

[279] In the USA HD Radio uses the same system as the DAB radio in Europe.

[280] O'Neill "DAB Eureka-147: The European Platform for Digital Radio" at 169.

[281] O'Neill "DAB Eureka-147: The European Platform for Digital Radio" at 170.

[282] Woodford "Radio".

[283] Woodford "Radio".

[284] Paul Denton "What is a DAB Digital Radio?" (2016) On Air pauldanton.co.uk <www.pauldenton.co.uk/DigitalRadio.htm>.

annually.[285] Analogue radios are unable to receive digital signals and special digital receivers are necessary for tuning into DAB radio. After the introduction of DAB radio in Europe in the 1990s, it developed slowly and unevenly throughout the Member States because of various existing transmission standards used such as DAB+, Digital Radio Mondiale (T-DMB), Digital Radio Modulation (DRM (radio)), the prioritisation of TV and mobile communication and the competition from internet radio.

Digital Radio was also developed in the United States where it is known as HD Radio, using the same system as DAB radio in Europe but operating in different allocated bandwidths.[286]

Another form of digital radio is satellite radio. Satellite broadcasting was first approved in 1992 by the United States Federal Communications Commission (FCC) which granted an S-band (the 2.3 GHz frequency) for satellite-based Digital Audio Radio Service (DARS).[287] Its difference to analogue and digital radios, which send their programmes directly to the receiver, is that satellite radio services use satellites circling Earth as their intermediary transmitter. The main benefit of satellite radio is that signals can be broadcast over a very long distance in high quality without any static interference.[288] In consequence of the high costs of technical equipment and special regulations, it took years for companies to launch their first satellites. Licences for DARS to broadcast in the United States over the S-band were eventually granted to CD Radio (later Sirius Satellite Radio) and American Mobile Radio (later XM Satellite Radio) by the FCC in 1997.[289] However, it was not before the early 2000s that XM Satellite Radio and Sirius Satellite Radio started commercial service in the United States and Canada.[290] Satellite radio, unlike traditional terrestrial radio, is a commercial-free subscription-based service that requires specialised equipment to receive the signal.[291] After the two existing satellite radio stations merged in 2008, there is only one company left offering satellite radio for the United States and Canada, Sirius XM. Attempts to establish a similar satellite radio in Europe have failed so far due to the focus on

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[285] Javier Garcia "Digital Radio in Europe after the FM switch off in Norway" (March 2017) Observacom <www.observacom.org/digital-radio-in-europe-after-the-fm-switch-off-in-norway/>.

[286] Lou Frenzel "What´s the Difference Between Satellite Radio and HD Radio?" (01.10.2012) ElectronicDesign, Technologies, Communication <www.electronicdesign.com/communications/what-s-difference-between-satellite-radio-and-hd-radio>.

[287] Super Seventies Rock Side "How Does Satellite Radio work?" superseventies.com <www.superseventies.com/infobank/satelliteradio/howdoes.html>.

[288] Stephanie Watson & John Fuller "Sirius vs. XM" (18.03.2005) HowStuffWorks.com. <electronics.howstuffworks.com/satellite-radio-comp.htm>.

[289] Kevin Bonsor "How Satellite Radio Works" (26.09.2001) HowStuffWorks.com <electronics.howstuffworks.com/satellite-radio1.htm>.

[290] Frenzel "What´s the Difference Between Satellite Radio and HD Radio?".

[291] Jeremy Laukkonen "What is Satellite Radio?" (04.03.2018) lifewire.com <www.lifewire.com/what-is-satellite-radio-534582>.

DAB radio, the better expansion of analogue and digital radio in all regions, and the diversity of languages. The advent of the internet and the great success of internet radios could also hinder further developments in digital and satellite radio technology.

3 Online radio broadcasting, downloading and music streaming

The popularity of personal computers and the process of slowly transferring the internet from military to civilian control, in the mid-1990s, allowing for the availability of permanent private internet access from everywhere at any time paved the way for the establishment of online radio broadcasting, downloading and streaming services.[292]

Internet access is delivered through a cable that is usually buried in the ground. To connect a private device to the internet it must be connected to a router or modem which connects to an Internet Service Provider (ISP).[293] The ISP connects the private device to the webpages requested which are usually stored on a special computer directly connected to the internet, the server. To transmit multimedia data like music from a server to a private device, the data is broken down into little coded parcels and send via the ISP and the router to the private device. The data received from the internet will be decoded and reassembled while passing through the router to the connected private device. The connection from the router to the private device can be wired or wireless. A wireless connection between the router and the private device uses radio waves as the data carrier which can be received and decoded by the devices wireless adapters.[294] The process of wireless data transmission via radio waves is very similar to the process used for digital and satellite radio transmission. The transmission process commonly used for online radio broadcasting is known as streaming and can be defined as a continuous transmission flow of data in real-time. [295]

When a user visits a website, or opens an app like Spotify and pushes the play button, the user's device sends a request to the IPS which makes a connection to the server requested that stores the data, in this case, Spotify. The Spotify server sends the requested data broken down into little parcels back to the user's device via the IPS and the router. The router decodes the data and sends it to the user's device where special software decodes it, turning it into music. Once the process of

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[292] Janet Abbate "Inventing the Internet" (1999) Cambridge, Mass: MIT Press. c1999 196 at 199; see also Maurizio Borghi, "Chasing Copyright Infringement in the Streaming Landscape" (2011) IIC 2011 316 at 317.

[293] Aaron Titus "The Internet in 5 Minutes (or Less)" (video 18.02.2009) YouTube videos <www.youtube.com/watch?v=7_LPdttKXPc>.

[294] Aakai1056 "What is WiFi and How Does it Work?" (03.02.2016) CCM ccm.net <ccm.net/faq/298-what-is-wifi-and-how-does-it-work>.

[295]Jessica Michelle Ciminero "Technology, the Internet and the Evolution of Webcasters, Amazon Revisited" (2017) 8 Intell. Prop. Brief 109 at 110.

transmitting and decoding has begun, it is a continuous process of transmitting, receiving and decoding which enables the user's device to play the music requested.[296] This process is very similar to the transmission process used by satellite and digital radio. Based on the size of the transmitted data, the player on the user's device collects a stock of data and stores it temporarily on a piece of the volatile memory, the buffer, to compensate for fluctuations in the flow of data.[297] The process of buffering can be described as the storage of little bundles of data which are subsequently replaced by other data bundles during the streaming process. Therefore, the data is only on the volatile memory of the streaming device for the time necessary to process it through the media player software located on the device. At no time during the streaming process is a copy of the whole content made that would be retrievable by the user. This means that the process of buffering forms a vital part of the whole transmission process known as streaming, and distinguishes it from other forms of data transmission and storage like downloading and caching where storing is either not part of the transmission process or is permanently on the hard disk of the device. This tiny but significant distinction is vital for the legal classification of streaming in regards to copyright infringement and, therefore, music licensing.

The streaming process can be broken down further depending on the possibility of user interference in regard to the content requested. While interactive or on-demand streaming services enable users to request a particular sound recording similar to a jukebox, non-interactive or live-streaming services provide a pre-programmed combination of songs similar to terrestrial radio.[298]

The streaming process, and the classification of the interactivity, is important when licensing musical works for their online use.

However, the technical online revolution of music started long before streaming was available with the discovery of shrinking digital audio into mp3[299] files by the German company Frauenhofer-Gesellschaft in 1989, and a Northeastern University student dropout named Shawn Fanning paving the way for online music streaming services like Spotify.[300]

Before music could be compressed into digital audio files called mp3 - being only one-tenth of the original size - without any notable loss in quality transmitting music over a modem or downloading it onto a website was very time-consuming. Despite

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[296] The streaming process is described in Tracy V. Wilson in "How Streaming Video and Audio work" (12.10.2007) HowStuffWorks.com <computer.howstuffworks.com/internet/basics/streaming-video-and-audio.htm>; see also Borghi "Chasing Copyright Infringement in the Streaming Landscape" at 326.

[297] Borghi "Chasing Copyright Infringement in the Streaming Landscape" at 327.

[298] Ciminero "Technology, the Internet and the Evolution of Webcasters, Amazon Revisited" at 111.

[299] MP stands for "Moving Pictures Experts Group" *(*group that sets standards for audio and video compression/transmission, the 3 for the layer/scheme of the standard.

[300] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 269.

the possibility of minimizing the size of musical files, it was still difficult to download and share mp3 files over the internet until, in 1999, the Napster program was invented. The Napster program allowed for the transformation of personal computers into interconnected servers for exchanging musical files over the internet. Within one week, 15,000 people downloaded the free Napster program and started exchanging music files.[301]

The Napster software used a central Napster server storing a database which contained information about available files and the hard disk storing them.[302] Users of the Napster program searched for files and downloaded them directly from the storing hard disk via the Napster program connecting them for the time of the download. From the Napster system, new Peer-to-Peer (P2P) systems emerged soon after, operating without a central server storing information about the files and their storage location. These P2P systems connected private computers directly over the internet and made the exchange of music very easy. Soon after the launch of Napster, controversies about the legality of online exchange and downloading of copyrighted works on music exchange platforms that had not acquired licences led to numerous lawsuits brought by members of the music industry.[303]

For the lack of legally licensed online music services, users turned naturally to whatever was available online without thinking twice about copyright infringements. While the music industry concentrated on battling copyright infringements of platforms like Napster and co. in court, one company realized the demands for legally downloadable music. Apple launched its fee-based online music service iTunes in 2001, allowing its users to convert music from CDs to digital mp3 files on Apple devices.[304] Two years later in 2003, Apple signed deals with all major record labels and launched a virtual music store that enabled the user to buy and download music on-demand for USD 0.99 per song. Within the first week, 1 million songs were purchased by iTunes Store users, and more than 40 billion songs have been purchased to date.[305] Following in Apple's footsteps, Amazon.com launched a digital music download store in 2007, enabling music downloads onto any hardware devices, unlike Apple not only onto Apple devices.[306]

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[301] Sarah Riedel "A Brief History of Filesharing: From Napster to Legal Music Downloads," (24.02.2006) associatedcontent.com <www.associatedcontent.com/article/20644/a_brief_history_of_filesharing_from_pg2.html?cat=15>.

[302] Marshall Brain "How Gnutella Works" (22.07.2002) HowStuffWorks <computer.howstuffworks.com/file-sharing2.htm>.

[303] Riedel "A Brief History of Filesharing: From Napster to Legal Music Downloads".

[304] Luke Dormehl "Today in Apple history: iTunes hits 1 million downloads in first week" (05.05.2017) cultofmc.com <www.cultofmac.com/479749/today-apple-history-itunes-hits-1-million-downloads-first-week/>.

[305] Luke Dormehl "Today in Apple history: iTunes hits 1 million downloads in first week".

[306] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 272.

Eventually, Apple removed the restrictions to their products in 2009, after renegotiating with the major record labels.[307]

Soon after the availability of broadband connections increased and new devices like smartphones and tablet computers made it possible to access the internet wirelessly from every corner of the world, as early as 1994, terrestrial radio stations started to broadcast their signals simultaneously over the internet.[308]

While the new technology made it easy to broadcast via the internet, other types of online music services emerged making it possible for users to access music on-demand and creating personalised playlists for free or through a subscription model similar to those offered by satellite radios. The possibility of streaming content whenever required soon changed the users' behaviour from downloading and owning media content to streaming and only paying for accessing media content when it is needed. This gave rise to the establishment of new online music streaming services like Spotify in the early 2000s. The change from buying physical copies or downloading musical works on a private computer to buying on-demand access to a music library challenged existing legislation and called for a rethinking of rights management and licensing methods, especially regarding the online exploitation of musical works.

B Development of International Legislation for Radio Broadcasting and Streaming Services

Since the technical invention of the upright piano, gramophone, telephone and radio during the 1800s and early 1900s, the music industry has been confronted repeatedly with the development of mechanical music instruments, record and playback devices making musical works publicly available in new forms and through new channels.

The first question that challenged evolving copyright legislation was whether the incorporation of musical works in mechanical music devices or the fixation onto phono records infringed the authors' copyright.

The Final Protocol of the 1886 Berne Convention No. 3 stated that:

> It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical works in which copyright subsists shall not be considered as constituting an infringement of musical copyright.[309]

[307] Luke Dormehl "Today in Apple history: iTunes hits 1 million downloads in first week".
[308] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 330.
[309] Records of the Conference convened in Berlin 14.10. to 14.11.1908, Report Presented to the conference on behalf of its committee.

It was held that the rights of authors and the rights of inventors of mechanical musical devices cannot be counterbalanced, despite how genius the invention might be. The musical work is incorporated in the disc and therefore, no different to a musical work that is incorporated in paper when printed. It appeared to be unreasonable having only manufacturers making large profits from reproducing musical works and leaving authors without receiving any kind of remuneration. Consequently, a new Article 13 was introduced to the Berne Convention granting authors of musical works the exclusive right to authorise the adaptation of their works to instruments which are able to reproduce them mechanically and the public performance of those works by means of these instruments.

The third revision of the Berne Convention took place in Rome in 1928 and introduced an exclusive broadcasting right following the triumphant progress of radio broadcasting. It was urged that the Convention should, at least, provide for an exclusive right for authors to authorise the use of their work for broadcasting in the same way as had been done for the adaptation of musical works for mechanical instruments and fixation on phonorecords.[310] The Sub-Committee on Broadcasting stated that, given the fact that broadcasting services have a varying social character in national legislation, undertakings that might hamper developments in such directions would be ill-advised.[311]

While the British and French delegation were convinced that the radio broadcasting right is best integrated into the authors' other exclusive rights, the Australian and New Zealand delegation held the belief that in order to protect the social and cultural interests linked to radio broadcasting, the matter is best considered as subject to the intervention of the public authorities.[312]

The newly adopted Article 11*bis* Berne Convention compromised the two different approaches and granted authors of literary and artistic works the exclusive right to authorise the communication of their work to the public by radio-diffusion but left it entirely to the national legislator to determine the respective conditions in each individual country.

The Sub-Committee on Broadcasting also recognised the influence of performing artists and record producers in the General Report of the Conference in Rome, indicating that the problem of the protection of performing artists' artistic creations or interpretations which have acquired a new economic value due to the radio and phonograph industry capable of physical materialisation needs to be addressed in the future. It was held that this new problem which has not been settled by national

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[310] David J. Brennan *Retransmission and U. S. Compliance with TRIPs* (Kluwer Law International, 2003) at [18-19].

[311] Records of the Conference in Rome 07.05. to 02.06.1928, II. Report of the Sub-Committee, 2. Sub-Committee on Broadcasting.

[312] Records of the Conference in Rome 07.05. to 02.06.1928, Article 11*bis* (new).

legislation so far, needs to be sufficiently mature before it can be addressed in an international convention.[313]

Although the problem was identified as early as 1928, it took over 30 years until performers and record producers were granted legal protection of their work. The delay was mainly caused by global social upheavals and financial crisis leading to World War II.

In 1948, the fourth revision of the Berne Convention took place in Brussels discussing broadcasting and communication to the public rights of authors once more. This Conference was referred to as the conference of broadcasting, discs, cinema and artificial or natural screens.[314] For the development of radio and television, the committee on broadcasting saw it as inevitable that the communication right granted to authors at the Rome Conference in Article 11*bis* needed to be adjusted to the latest forms of exploitation, especially in terms of proper broadcasting, rebroadcasting as distinct from relaying, deferred broadcasting after recording, and communication by loudspeaker and television.[315]

The newly modified Article 11*bis* specified the exclusively granted communication rights by splitting them into three:

> (1) the radio diffusion or communication of their works to the public by any other means of wireless diffusion of signs, sounds or images;
> (2) any communication to the public over wires or not, of the radio diffusion of the work when this communication is made by any body other than the original one and
> (3) the communication by loudspeaker or other similar instrument transmitting by signs, sounds or images the radio diffusion of the work.

It was a big step to include the fast-improving technology of terrestrial radio and television by broadening the communication rights aiming to grant authors the best protection possible while trying to leave room for future inventions and technical progress. The following revisions of the Berne Convention made no changes to the rights granted relating to radio broadcasting.

While the popularity of radio and television progressed and the industry grew, the voices of performers and phonogram producers asking for protection of their rights could no longer be ignored, and the Rome Convention was finalised in 1961 granting protection for rights in the sound recording.

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[313] Records of the Conference in Rome 07.05. to 02.06.1928, II. Report of the Sub-Committee, 2. Sub-Committee on Broadcasting.

[314] Records of the Conference convened in Brussels 05.06. to 26.06.1948, General Report (Marcel Plaisant).

[315] Records of the Conference convened in Brussels 05.06. to 26.06.1948.

In 1996 the WIPO copyright treaties WCT and WPPT tried to keep up with the technical developments, but fast evolving new download and online streaming services like Napster and Spotify made it hard for legislation to do so.
That the internet can be a platform for sharing music excluding the right holders' agreement, sparked controversies when Napster became popular in the late 1990s. With no international regulations on hand, the battle over royalties from the public exploitation of musical works through sharing platforms was fought on a national level.

1 P2P and filesharing of musical works

Soon after the launch of Napster in 1999, right holders including A&M Records and the then four major record labels Sony Music Entertainment, Universal Music, Warner Music and EMI, together with the Recording Industry Association of America (RIAA) filed a series of lawsuits against Napster in the United States for contributory and vicarious copyright infringement citing the non-payment of royalties and the loss of revenue due to declining physical sales of CD and other sound recording mediums.[316] The claim of revenue losses had been made by music publishers once before and would become a leading argument in almost any ensuing legal battle that involved a new form or business model related to the exploitation of musical works.[317] The main problem was that Napster had never obtained licences to distribute and download copyrighted content[318] and had no copyright compliance policy in place that users knew of until after February 2000.[319] It was estimated that 87 percent of the files exchanged via the Napster program belonged to copyright holders.[320] The plaintiffs claimed damages and profit or statutory damages of USD 100,000 per work infringed, and preliminary and permanent injunctions against further contributory and vicarious infringement.[321]
The record labels were unable to reach a deal with Napster, and a final court injunction in 2001 ordered Napster to enjoin from "engaging in, or facilitating others in, copying, downloading, uploading, transmitting, or distributing"

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[316] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 270.
[317] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 270; see also *A&M Records, Inc., et al. v. Napster, Inc*. 114 F. (2000) Supp. 2d at 896.
[318] *A&M Records, Inc. v. Napster, Inc*. at 903.
[319] *A&M Records, Inc. v. Napster, Inc*.; Users were notified of the copyright compliance policy on 07.02.2000. The policy reads as follows:

> "Napster will terminate the accounts of users who are repeat infringers of the copyrights, or other intellectual property rights, of others. In addition, Napster reserves the right to terminate the account of a user upon any single infringement of the rights of others in conjunction with use of the Napster service".

[320] Sue A. Mota, "Napster: Facilitation of Sharing, or Contributory and Vicarious Copyright Infringement?" (2001) 2 Minn. Intell. Prop. Rev. 61 at 63.
[321] Mota, "Napster: Facilitation of Sharing, or Contributory and Vicarious Copyright Infringement?" at 63.

copyrighted sound recordings and to remove all copyrighted material from its servers within three business days and prevent further infringement, which led to the shutdown of the website two days later.[322]

As the former EMI Executive Ted Cohen later said, "The record labels had an opportunity to create a digital ecosystem and infrastructure to sell music online, but they kept looking at the small picture instead of the big one. They wouldn´t let go of CDs."[323]

After Napster was closed down and no legal substitute for sharing or downloading music was within sight, new advanced peer-to-peer (P2P) systems emerged avoiding the legal pitfalls of Napster. Instead of using a central server storing a database containing information about available files and the respective hard disk they are stored on, new P2P programs interconnected individual computers over the internet.[324] The big record labels and RIAA continued to sue P2P network operators in the United States but file-sharing continued to grow, and new decentralized file-sharing networks like Grokster, Kaaza and Streamcast attracted a wide range of users. The battle between record labels and file-sharing networks continued for a couple of years until the Supreme Court of the United States in mid-2005 held that Grokster and Streamcast could be liable for contributory copyright infringement, because:

> One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmation steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.[325]

Even though the Courts of the United States never established a rule that would make companies that developed or distributed a new technology that can be used for copyright infringement liable, it made it clear, that if a business using musical works is selling advertisements, it depends on the musical content it offers because the price for advertisers is directly linked to the number of software users.[326]

Not only in the United States but in countries like Australia and Sweden, similar cases were decided in court, paving the way for the emergence of an international standard for P2P applications.

In the Kaaza filesharing case *Universal Music Australia Pty. Ltd. V. Sharman License Holdings Ltd*., (2005) FCA 1242, the Australian Federal Court held that;

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[322] Lule *Understanding Media and Culture: An Introduction to Mass Communication* at 270.

[323] Seth Mnookin, "Universal's CEO Once Called iPod Users Thieves. Now He's Giving Songs Away,' Wired" (27.11.2007) Wired <www.wired.com/entertainment/music/magazine/15-12/mf_morris?currentPage=2>.

[324] Brain "How Gnutella Works".

[325] Davide J Moser, Cheryl L Slay *Music Copyright Law* (Course Technology / Cengage Learning, Boston, MA, USA, 2012) at 280; see also *MGM Studios Inc. v. Grokster Ltd. 125 S. Cr. 2764 (2005).*

[326] Moser, Slay *Music Copyright Law* at 283.

> Kazaa is apparently sustained by advertising revenue. It is a fundamental of advertising marketing that price is sensitive to the exposure likely to be achieved by the advertisement. The more shared files available through Kazaa, the greater the attraction of the Kazaa website. The more visitors to the Kazaa website, the greater its advertising value and the higher the advertising rate able to be demanded by Sharmen. And what is more likely to attract large numbers of visitors to the website than music, especially currently popular 'bits'?[327]

In Sweden, the file-sharing website Pirate Bay founded by anti-copyright proponents called Piritbriyan (Piracy Bureau) in 2003 sparked a raid in 2006 and resulting in a court trial in 2009 before the CJEU [328] in which all four creators of the Pirate Bay website were found guilty of criminal copyright infringement by making money out of advertisements on the website.[329]
In the case of P2P websites, courts around the world seemed to have come to similar conclusions, holding businesses liable for copyright infringement if they encourage people to infringe copyright while turning those infringements into money.

2 Struggle to legally classify streaming

Due to processes in the United States concerning Napster and with no sight of an international agreement regarding online rights, the EU tried to unify the rights of reproduction and communication to the public for its territory in order to create clarification and legal certainty.
The reproduction and communication to the public rights under European law are defined in the Information Society Directive (InfoSoc) in Arts. 2 and 3.[330]

The reproduction right is defined in Art. 2 InfoSoc as:

> [T]he exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part,

including all categories of works as of Art. 2 (a)-(e). Exceptions are made under Art. 5 (1.) (a)-(b) for temporary acts of reproduction, which are transient or incidental and an integral and essential part of a technological process with the sole purpose to enable transmission between third parties in a network or lawful use of a work without any economic significance.

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[327] *Universal Music Australia Pty. Ltd. V. Sharman License Holdings Ltd*. (2005) FCA at 1242; see also Moser, Slay *Music Copyright Law* at 285.
[328] Case C-610/15 *Stichting Brein v Ziggo BV, XS4ALL Internet BV* [2017] ECLI:EU:C:2017:456.
[329] Laws "Pirate Bay vs. Sweden" (2017) Laws.com <copyright.laws.com/famous-cases/pirate-bay-vs-sweden>.
[330] Directive 2001/29/EC of the European Parliament and of the Council of 22.05.2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc).

The qualification of the streaming process is problematic, especially the question of whether it qualifies as a temporary reproduction in part that is transient or incidental and forms an essential part of the technological process of streaming.
The CJEU, in its *Infopaq*[331] decision, held that in cases of literary works an infringement occurs when the reproduced part contains an element of the original work which expresses the author's own intellectual creation because it is only through the choice, sequence and combination of words that an author expresses their creativity. Therefore the result of a technical act of transmission does not necessarily qualify as reproduction, in part, it rather depends on the category of works transmitted. Accordingly, the process of streaming music and movies can hardly be classified as reproduction in part based on the continuous process of transmission, receiving, playing and replacing of data which does not allow for making retrievable copies of the work in whole or in part at any time.
However, even if the process would qualify as reproduction in part, it could fall under the exemption of Art. 5(1) InfoSoc if the act of reproduction within the streaming process qualifies as temporary, transient or incidental, and forms an essential part of the technological process of streaming with the sole purpose of transmitting data in a network between third parties without any economic significance.
Recital 33 InfoSoc reads:

> [T]he exception includes acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

While it is likely that acts enabling browsing and caching are covered by Art. 5 (1), it remains unclear whether acts that occur during the digital processing of copyrighted works such as buffering fall under the exemption.[332]
Courts tend to classify the technical process of temporary reproduction differently. In *Australian Video Retailers Association Ltd v. Warner Home Video Pty Ltd,*[333] the court held that the temporary storage of a motion picture in the RAM that occurs during the viewing of a DVD does not constitute a reproduction of the movie due

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[331] Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening [2009] ECLI:EU:C:2009:465 at* 16 [45–47].
[332] Borghi "Chasing Copyright Infringement in the Streaming Landscape" at 333; see also Bernt Hugenholtz "Caching and copyright: the right of temporary copying" 22 EIPR 482 at [487-489].
[333] *Australian Video Retailers Association Ltd v. Warner Home Video Pty Ltd* [2001] F.C.A. 1719 (Fed Ct (Aus)).

to the definition of material form under Australian law[334] as including any form of storage *from which the work can be reproduced.*

As seen throughout the Modchip Cases[335], Courts of the United Kingdom tend to take the view that the playing of digital content consisting of computer programs and other comparable works qualifies as reproduction while they are more cautious with cases of temporary reproduction involving other categories of works.[336]

In *FA Premier Leauge v. QC Leisure,* Kitchin J. states that temporary reproduction means, that "the substantial part must be embodied in the transient copy, not a series of different transient copies which are stored one after the other"[337] during the transmission process. While focusing on the substantial part, copyrighted works can be categorized as "time-sensitive" works such as musical works, movies, sound recordings and dramatic works, and "time-independent" works such as photographs, drawings and paintings. While the buffering process occurring during the streaming transmission is not sufficient for the temporary reproduction of time-sensitive works, it is most likely to be enough for time-independent works.[338]

The CJEU decision in *Infopaq*, even though it only provides a narrow interpretation of Art. 5 (1) InfoSoc, does not contradict the view that the streaming process falls under the exception thereof.

The second right that is likely to be concerned when it comes to streaming is the right of communication to the public which is defined in Article 3 (1) InfoSoc as:

> [the] exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place at a time individually chosen by them.

According to *SGAE v. Rafael Hotels SA,*[339] an infringement occurs whenever a work is made publicly available, irrelevant of whether the work is actually transferred to any member of the public. Providing access to otherwise inaccessible works infringes the communication right, whether or not an actual transmission occurs.[340]

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[334] s 21 Copyright Act, 1968 (Australia).

[335] *Sony Computer Entertainment v. Paul Owen and Others* [2002] EWHC 45(Ch); *Kabushiki Kaisha Sony Computer Entertainment Inc v. Gaynor David Ball and Others* [2004] EWHC 1984 (Ch); *R. v. Higgs (Neil Stanley)* [2008] EWCA Crim 1324 and *R. v. Gilham (Christopher Paul)* [2009] EWCA Crim 2293.

[336] Borghi "Chasing Copyright Infringement in the Streaming Landscape" at [337-338].

[337] *Football Association Premier League v. QC Leisure* [2008] EWHC 1411 (Ch) at [227] (Kitchin J.).

[338] Borghi "Chasing Copyright Infringement in the Streaming Landscape" at 340.

[339] Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles* [2006] ECLI:EU:C:2006:764.

[340] *Twentieth Century Fox Film Corp v. Newzbin Ltd* [2010] E.C.D.R. 8 (UK).

The communication right includes the broadcasting and the making available rights which need to be clearly distinguished for online streaming services because they each require a different set of licences.

On-demand streaming allows the user to access the content provided in their own time from anywhere in the world. Therefore, on-demand streaming services make works available to the public and are required to obtain authorization from the right holders concerned.

In the case of broadcasting, right holders in performances and phonograms only have a right to equitable remuneration under Art. 8(2) of the Rental and Lending Directive[341]. Furthermore, broadcasting is subject to a special cable retransmission right provided for in Arts. 9-12 of the Satellite and Cable Directive[342] whereupon cable operators are entitled to retransmit most of the programmes aired by broadcast companies without the need of clearing the rights with each right holder due to the compulsory administration of those licences by CMOs.[343]

In *Stichting Brein v Jack Frederik Wullems (Filmspeler)*[344] the CJEU revisited its concept of communication to the public and the exception of temporary reproduction. The court held that the sale of a multimedia player with pre-loaded access to websites containing pirated content via hyperlinks was classified as a communication to the public within the meaning of Article 3(1) InfoSoc.[345] Further, the court made it clear that temporary reproduction obtained by streaming from a source with obvious unconsented content cannot be exempted under Art. 5(1) InfoSoc. As before in *Infopaq*, the court makes no attempt to define or clarify to what extent the technical streaming process, during which temporary copies are made, is within the legal scoop of the InfoSoc Directive and rather focuses on the classification of the source of the content.

It remains to be seen the extent to which this will influence the possibilities of legal action against users who deliberately stream unlicensed content and streaming services operating without acquiring proper licences. Depending on the model of operation, services making musical works publicly available must acquire various licences from the respective right holders.

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[341] Council Directive 92/100/EEC of 19.11.1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

[342] Council Directive 93/83/EEC of 27.09.1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

[343] Borghi "Chasing Copyright Infringement in the Streaming Landscape" at 3321.

[344] Case C-527/15 *Stichting Brein v Jack Frederik Wullems (Filmspeler)* [2017] ECLI:EU:C:2017:300.

[345] Karin Cederlund and Nedim Malovic "CJEU revisits concept of communication to the public and temporary copies exemption" (2017) Journal of Intellectual Property Law & Practice Vol. 12 No. 11 892.

C Summary

The development of radio technology shows that legislation hesitates to react to specific problems whenever they appear. In the beginning, new technology that enables the public exploitation of musical works is usually unregulated as the focus is on how to get the wider public involved to make the use of new technology popular. As soon as it takes off and becomes popular, the call for legal regulation follows swiftly, especially when services prove to be lucrative by using musical works.

When mechanical music instruments, record and playback devices became popular, a new exclusive adaptation right for authors was introduced in the Berne Convention.

Shortly after, the triumphant progress of radio triggered the introduction of broadcasting and communication rights which were added and readjusted over time.

The first problem that arose when radio technology took off was the overcrowding of airwaves due to the easy establishment of amateur radios. The reaction was to regulate the use of radio waves through a frequencies licensing system that enabled authorities to control the use of existing airwaves.

The second problem arose when commercial radio shifted from a predominantly information source to a pure music radio with minimum talk and extensive use of musical works financed by advertisement. While authorial rights in the composition had to be licensed for the exploitation of musical works in radio programmes, controversies over the licensing of rights in the sound recording differed under national legislation. Initially, this was not a problem as the transmission range of analogue, satellite and digital radios was usually limited to a certain national territory and each nation states could control and regulate the use of musical works differently following minimal guidelines set by the Berne Convention and later the Rome Convention. Due to a national radio frequency approval system relying on licensing radio frequencies for radio broadcasting services, monitoring the use of musical works was unproblematic for CMOs operating in the respective territory applying national legislation.

The increasing use of sound recordings soon called for recognition of recording artists and producers, finalised with the establishment of the Rome Convention.

With the advent of the internet, it was possible to make musical works available without gaining licences for the setup of the required transmission platform. The exploitation of musical works over the internet is comparable with the problem of airwave crowding by amateur radios when it first became popular but without restrictions of the transmission range.

The transmission range was no longer restricted to national territory but publicly available and accessible all over the world. When personal computers became smaller and more affordable for the wider public, and the faster transmission of data

due to the invention of mp3 and file sharing software like Napster, the increased availability of unlicensed musical works became a problem for right holders all over the world. Controlling the P2P or file sharing on the internet was almost impossible for national CMOs and other rights managing agencies, and the struggle of legally classifying and defining the streaming process as copyright infringement added to the problem.
The answer was the adoption of two additional treaties, the WPPT and WCT, granting making available rights to right holders regarding the composition and sound recording publicly exploited online.
The establishment of new rights in response to new channels of public exploitation of musical works failed to address the management of the rights through CMOs or other rights managing entities, and left it entirely to the respective nation states to establish a system that sufficiently guaranteed the protection of granted rights.

II Development of Licensing Procedures for the Public Exploitation of Musical Works

Whenever there is talk about right holders and their fair remuneration, the cliché of the 'starving artist' fighting an unequal battle against publishers, CMOs and big record companies comes to mind. Right holders can only be remunerated if their works are used by others. The most common way of being remunerated for the use of creative works would be through licensing agreements. Due to the complexity of copyright and various owners, users and means of exploitation, licensing agreements are commonly negotiated between CMOs, publishers and commercial users. And, in reality, that is where most of the problems start.
One example that illustrates the controversies around licensing copyrighted works and the power of publishers is the Happy Birthday song, a drama in eight notes. To use the song Happy Birthday in a movie for only nine seconds, filmmakers had to pay USD 5,000 in royalties to the right owner in the musical composition publisher Warner/Chapple in 1994.[346] In 2015, filmmaker Jennifer Nelson filed a class action lawsuit against Warner/Chapple after she was asked to pay USD 1,500 licence fees for using the Happy Birthday song in her documentary about the song, arguing that a song that is around for some hundred years surely should be in the public domain. Judge George H. King ruled that the Warner Music Group only acquired the rights to specific piano arrangements of the music, not the actual composition.[347] A final settlement was agreed on by Warner/Chapple in 2017 to pay USD 14,000,000 –

[346] Christine Mai-Duc "All the 'Happy Birthday' song copyright claims are invalid, federal judge rules" (22.09.2015) Los Angeles Times <www.latimes.com/local/lanow/la-me-ln-happy-birthday-song-lawsuit-decision-20150922-story.html>.
[347] Mai-Duc "All the 'Happy Birthday' song copyright claims are invalid, federal judge rules".

4,620,000 million for the legal team and the rest to compensate everyone who has paid a fee to use the song in the past.[348]

The power of big publishing companies and CMOs, especially their strong legal and financial background to fight for royalty payments gives artists a stronger voice when it comes to negotiations of licensing fees the sole artists could never achieve. Therefore, the collective licensing system is used by many artists where individual licensing of their rights is uneconomic and unrealistic. CMOs are the heart of the licensing system, granting licences, providing for the auditing and monitoring of rights, ensuring payment and negotiating terms and conditions of licensing agreements with third party users, collecting and distributing royalties on behalf of the respective right holders.[349]

Licensing can be defined as the contractual grant of an authorization to use the work protected by copyright where such use is not otherwise allowed by an applicable exception or limitation.[350]

While the idea of charging fees for performing or communicating musical works to the public was widely accepted, the method of collecting licensing fees by CMOs was not.[351]

A Early Licensing Methods

One early example of collective licensing methods was presented by the CMO PRS operating in the territory of the United Kingdom. PRS charged fixed fees calculated per head of musicians playing in the hired orchestra. This method led to a boycott of the PRS repertoire by the Amalgamated Musicians Union (AMU) arguing that charging fees like that would directly affect musician's labour conditions because it would reduce the number of musicians hired by entrepreneurs.[352] PRS had to adapt and reformulate its licensing schemes, and turned its attention to charging premises by their seating or dancing capacity instead of the number of performing musicians. The first licences were granted to councils as they were typically owners of public halls and places. The licences first covered music halls in town and expanded step by step to music in local parks, village halls and schools. Special types of licences with collective groups, trade unions and church bodies covering, for example, ephemeral performances and public parades, saved monitoring

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[348] Jana Kasperkevic "Music publisher agrees to pay $14m to end Happy Birthday song lawsuit" (Feb 2016) The Guardian <www.theguardian.com/business/2016/feb/09/happy-birthday-song-lawsuit-warner-chappell-settlement>.

[349] Enrico Bonadio "Copyright Collective Licensing and the EU initiatives in the online music field" (2006) DANTe - Diritto d'Autore e Nuove Tecnologie, Vol. 4 389 at 390.

[350] Gervais (ed), *Collective Management of Copyright and Related Rights* at xxvii.

[351] Bonadio "Copyright Collective Licensing and the EU initiatives in the online music field at 391.

[352] Jose Bellido and Fiona Macmillan "Music Copyright after Collectivisation" (2016) Intellectual Property Quarterly 2016 (3) 231-246 at 233.

specific travellers and events by delegating the task of collecting revenues to those bodies.[353] Soon, CMOs pushed further testing the boundaries between private and public places, targeting hotels and clubs.

Over time, the PRS developed a litigation-oriented practice and established a permanent legal department to push for collective actions, financial support of pursuits of injunction and damages, and forced the legal definition of performing in public within the meaning of copyright.[354] Litigation and negotiation strategies tended to be linked to licensing efforts and the exploitation of rights granted by CMOs.

This shows that the methods of collecting licensing fees go beyond administrative requirements and have an immediate effect on the distribution and development of musical labour, making it even more important to take into account the impact of copyright policies on society when discussing new copyright legislation.[355] The licensing method and resulting tariff structures used by CMOs is inextricably linked with the success of new developments on the music market.

As described previously, the usual procedure would be that a CMO or publisher obtains the ability to license copyright protected works on behalf of the right holders who fully transfer their exclusive rights to the CMO or allow for representation on an exclusive or non-exclusive basis.[356] CMOs are then able to grant licences on behalf of the right holder to the commercial user and entitle them to sell the copyrighted material to the end user. Therefore, the overall system of collective licensing seems to be the most cost-efficient and easiest method to manage copyrights in providing a single point of reference and access to the overall repertoire of CMOs for third-party users.[357]

B Types and Scopes of Licences

Many kinds and types of licences have been introduced over time and are customarily used in the music industry by CMOs, publishers and record producers. Two of the most common licences in the music industry are mechanical and performance licences.

Mechanical licences authorise the making of audio-only mechanical reproductions of a musical composition for the purpose of distributing those reproductions to the public for private use.[358]

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[353] Bellido, Macmillan "Music Copyright after Collectivisation" at 234.
[354] Bellido, Macmillan "Music Copyright after Collectivisation" at 234.
[355] Bellido, Macmillan "Music Copyright after Collectivisation" at 236.
[356] Gervais "Collective Management of Copyright: Theory and Practice in the Digital Age" in Gervais *Collective Management of Copyrights and Related Rights* at 9.
[357] Bonadio "Copyright Collective Licensing and the EU initiatives in the online music field" at 393.
[358] Kohn *Kohn on Music Licensing* at 367.

Performance licences authorise the performance of a work in public, for example, performances of recorded music in radio broadcasts and online transmissions.[359] Those licences can be acquired on different terms and conditions according to the licensing CMO and the legislation of the state of operation.

The most common way of granting mechanical and performance licences in Europe is as transactional and blanket licences.

A Transactional licence is defined as a licence that covers only a particular use of a specific work in a particular context and for a defined period of time.[360] These licences are typically issued for musical works used in an advertisement or when making a commercial recording of a specific musical work.

A blanket licence is defined as a licence allowing the user to copy and reproduce any work included in a CMOs' repertoire anywhere in public at any time.[361] Due to their cost-efficiency, those licences are typically issued for broadcasters, providing them with a single most likely annual, authorization to use the CMOs repertoires in total, reducing costs on both sides. The user makes a single fee payment, so reducing transaction cost for the CMO which otherwise would have to monitor the actual use of musical works.

An additional type of licence used in the United States is the compulsory or statutory licence. Compulsory licences grant broad rights to use protected material subject to the payment of a fixed royalty and the fulfilment of certain other conditions.[362] Under a compulsory licensing system, the right holder has no chance to opt out and is forced to license their work to the set conditions. Such a licence is commonly justified if "the costs of identifying and negotiating with copyright owners outweigh the value of the resulting licence".[363] Others state that "[the] imposition of a compulsory licence reflects a legislative judgment that certain classes or exploitations of works should be more available to third parties (particularly ´infant industries´) than others."[364]

As it was not required to license copyrighted material across borders prior to the technical development of online streaming and downloading services, CMOs were only able to issue licences for their repertoire in the territory they operated in. With radio and broadcasting going online, licences for a greater repertoire and wider territory were required to satisfy user demand and build online businesses. CMOs saw the need, and entered into reciprocal agreements with other CMOs, providing

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[359] Kohn *Kohn on Music Licensing* at 370.
[360] Bonadio "Copyright Collective Licensing and the EU initiatives in the online music field" at 393.
[361] Bonadio "Copyright Collective Licensing and the EU initiatives in the online music field" at 393.
[362] Sam Ricketson, Christopher Creswell *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson Reuters Australia Limited, Sydney, 2015) at [12.0].
[363] E Hudson "Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia" (Dissertation University of Melbourne, 2011) at 56.
[364] Jane C. Ginsburg "Creation and Commercial Value: Copyright Protection of Works of Information" (1990) 90 Columbia Law Review 1865 at 1926.

each other with the right to license each other's repertoire in their territory. Those agreements enabled CMOs to grant multi-repertoire licences to commercial users who cover a more extended repertoire.

Although a wide network of reciprocal agreements is in place, the territoriality restriction still exists due to different copyright regimes. While it was not much of a problem in the analogue world, it becomes more and more of a burden to new online businesses operating on a worldwide scale needing as much access to as much content as possible.

C Models of Online Music Services and the Differences in Licensing Procedures

The invention and development of radio technology gave record producers and music performers a large boost and paved the way for television, internet, digital and online audio-visual broadcasting developing a multi-million-dollar media industry.

While legal offers of online music services were limited to downloads of single tracks and whole albums at first, new online services soon found that the combination of access to musical works and innovative services, like the possibility of creating customized playlists, creates new value for users.[365]

When satellite radio became available, and especially since terrestrial radios began to stream their programmes simultaneously over the internet in the mid-1990s, many new business models emerged combining various models, including free advertising and subscription-based streaming services allowing their users access to their music catalogue and other special features for a limited period of time.

Pure audio streaming services can be divided into live-streaming (non-interactive) and on-demand (interactive) services.

The latter can be further classified into download only, subscription and free music services or a mix of the three options.

The most popular models of streaming services are those that offer subscription (premium) based combined with free services like Pandora, Spotify, Amazon music unlimited, Apple Music, Deezer and Tindal. While Pandora, Spotify and Deezer offer freemium models, Tindal, Apple Music and Amazon music unlimited are exclusively paid subscription services.[366] Depending on the classification of the music or broadcasting service as terrestrial and simulcasting service or non-interactive and interactive online streaming service, the licensing requirements and procedures differ significantly.

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[365] Patrick Waelbroeck *Digital Music* in Ruth Towse and Christian Handke (ed) *Handbook on the Digital Creative Economy* (Edward Elgar, Cheltenham, UK, Northampton, MA, USA, 2013) at 393.

[366] Ashleigh Macro "Best music streaming services 2018" techadvisor.co.uk (31.01.2018) techadvisor.co.uk <www.techadvisor.co.uk/review/audio/best-music-streaming-services-2018-3523953/>.

1 Licensing procedures for terrestrial radios and online simulcasting

While the licensing of terrestrial radio is a national affair due to its limited transmission range, the licensing procedure for terrestrial radio stations transmitting their programmes online and pure online radio stations with no terrestrial affiliation is more complicated due to the cross-border range of the transmission signals. The different types of radio transmission can be roughly classified as terrestrial radio with or without the ability to simulcast, and interactive and noninteractive online only radios.

Simulcasting describes the simultaneous transmission of a television or radio programmes over two or more networks or two or more stations at the same time.[367] Simulcast also includes the broadcasting of analogue and digital signals simultaneously.[368]

Simulcasting, or simultaneous broadcasting is used by national radio stations to broadcast their programmes additionally via satellite or online to reach a wider audience. Terrestrial radios are subject to national legislation in regard to the transmission frequencies and the licensing process is well established. However, there is one peculiarity in regard to the public performance rights in the sound recording used by such terrestrial radio stations. While in most countries, terrestrial radio stations need to acquire licences for the reproduction and public performance rights in both the composition and the sound recording in the United States, terrestrial radio stations are exempt from obtaining licences for the rights in the sound recording. As a result, whenever music (foreign or national artists) is played on terrestrial radio in the United States, the right holder in the sound recording does not receive any remuneration. On the other hand, due to different regulations in most of the European countries, all rights in the sound recording are recognised (foreign or national artists) and remunerated accordingly.[369]

Terrestrial radios transmitting their programmes simultaneously over the internet in a non-interactive way and as unchanged audio stream only, can acquire an additional licence from their CMO operating in their country of origin.

For example, the German CMO GEMA grants licences for simultaneous non-interactive and audio-only online broadcasting of the unchanged programme to terrestrial radios that cover the German and all territories the programme can be received in. For such a licence, it is required that the terrestrial radio operator has its economic residence or principal place of operation within Germany, and that language used in the programme is predominantly German.[370]

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[367] Norman Felsenthal „Simulcasting“ Museum.tv <www.museum.tv/eotv/simulcasting.htm>.

[368] European Commission “Simulcasting” Glossary ec.europa.eu <ec.europa.eu/digital-single-market/en/glossary#letter_s>.

[369] Waelbroeck *“Digital Music”* at 393.

[370] GEMA “Tarif Radio“ gema.de <www.gema.de/fileadmin/user_upload/Musiknutzer/Tarife/Tarife_sonstige/tarif_radio.pdf>.

Similar regulations are in place for satellite radios and cable retransmission services that fall under the Satellite Directives regulations following the country of origin principle.[371]

Online and satellite radios are not exempt from paying public performance royalties for sound recordings in the United States but do not pay reproduction or distribution royalties for the use of the sound recordings.

Terrestrial radio and simulcasting of audio-only content remain under national legislation even though the transmission range extends across borders.

2 Licensing procedures non-interactive and interactive on-demand streaming services

Most of the online on-demand streaming services on offer provide options for free and premium paid subscription services (freemium model). Those models are usually divided into two parts: the non-interactive free ad-based service, and the ad-free subscription or premium service.

Non-interactive on-demand streaming services are similar to terrestrial radio stations broadcasting their programmes online but without having the terrestrial counterpart in a specific country. Usually, such services only allow for limited interactivity in regard to the number of songs that can be skipped or chosen by the individual user.

One of the first on-demand online radio services was Pandora, offering its listeners free of charge personalized internet radio relying on on-screen and audio advertisement in between songs. After Pandora shut down its service for Australia and New Zealand in 2017, based on legal difficulties surrounding the operation, licensing negotiation and remuneration payments for the free and subscription service are now only operating in the United States.[372]

The Pandora service comes in three different models: free, subscription plus, and premium. The free service qualifies as non-interactive on-demand service, as it is limited to six song skips per hour and frequent ad-interruptions.[373]

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[371] Council Directive 93/83/EEC at [15–21].

[372] Hugh McIntyre "Pandora is Shutting Down its Operation in Australia and New Zealand Today" (31.07.2017) forbs.com <www.forbes.com/sites/hughmcintyre/2017/07/31/pandora-is-shutting-down-its-operations-in-australia-new-zealand-today/#27df15910e9e>; see also Keith Nelson Jr. and Kris Wouk "No longer mobile-only, Pandora Premium features come to the web" (15.02.2018) Digital Trends <www.digitaltrends.com/music/pandora-premium-streaming-available-to-everyone/>.

[373] Hugh McIntyre "Pandora is Shutting Down its Operation in Australia and New Zealand Today".

The Pandora service is based on its invented Music Genom Project technic which is a music recommendation system based on complex algorithms and over 450 music attributes recommending songs to the user.[374]

After setting up an account, Pandora allows the user to search for artists or songs and creates a station based on the search playing similar music stored in the music library. The only way to customize the automatically created station is to give played songs a thumbs-up or thumbs-down. The plus and premium subscription which is ad-free and offers the possibility of unlimited song skips, rewind tracks and limited/unlimited offline playback qualifies as an interactive service.[375] Some services offer semi-interactive programmes for each listener designed by algorithms that compile a customized playlist taking into account the user's preferences and/or online activities on social media.

The most popular on-demand freemium services operating on an international scale today are Spotify and Deezer.

Spotify was founded in 2006 and launched in October 2008 in Sweden and some European countries.[376] To date, Spotify is available in 65 countries, and territories including all European countries, the United States, Australia and New Zealand. The Spotify library includes over 35 million songs plus audiobooks, comedy, radio dramas, poetry and speeches. Due to licensing agreements, all three record companies and some independent labels are shareholders of Spotify, Sony Music being the second largest record label holding the biggest stake (5.7%) of the share worth UDS 1.1 billion.[377]

Spotify offers an ad-based free and a premium service (USD 9.99/month/NZD 14.99/month) including special offers for students and families.[378]

Spotify´s free version offers access to the entire library on all devices, the possibility to create customized playlists and to choose from genre-specific playlists. With the free service, the interactivity of the user is limited, and it is only possible to listen to playlists on shuffle play without the opportunity to listen to a specific song. The paid premium service is an ad-free service offering the possibility of unlimited song skips, choosing the song to listen to and downloading songs for offline listening.

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[374] Alexander Clamor "Pandora: How the Wrong Business Model Can Lead Management to Focus on the Wrong Customer" (Blog posted 02.02.2017) hbs.org <digit.hbs.org/submission/pandora-how-the-wrong-business-model-can-lead-management-to-focus-on-the-wrong-customer/#_edn1>.

[375] Jeffery L. Wilson "Pandora (Free Version)" (09.09.2017) pcmag.com <au.pcmag.com/pandora-free-version/40348/review/pandora-internet-radio>.

[376] John Seabrook "Revenue Streams Is Spotify the music industry´s friend or its foe?" (24.11.2014) The New York Times <www.newyorker.com/magazine/2014/11/24/revenue-streams>.

[377] Peter Kafka and Rani Molla "Spotify´s IPO could be a billion-dollar payday for Sony Music" (28.02.2018) recode.net <www.recode.net/2018/2/28/17064048/spotify-ipo-sony-music-billion-dollar-equity-streaming>.

[378] Spotify for Students for USD 7.49/month and family premium (six accounts) for USD 22.50 <www.spotify.com>.

Deezer was launched in 2007 in France, and is available in more than 180 countries today, partnering with thousands of independent and major record labels offering a music library of more than 53 million songs.[379] In 2016, Deezer was sold entirely to Access Industries, the parent company of the third largest record label, Warner Music Group, which already held a 26.9 percent share of Deezer.[380]

Deezer operates a similar system to Spotify and offers a free ad-supported service and a subscription-based service (Premium+ NZD 12.99/month) including special offers for families.[381] Deezer's free ad-based version offers the possibility to create and listen to customized and pre-set playlists while limiting the interactivity in the same way as Spotify regarding the choices of songs played and the ability to skip. Deezer limits its service further for mobile users allowing listening to automated personalized playlists only.

Apple Music was launched in 2015 and is available in 120 countries offering a music library of 30 million songs.[382]

Apple Music is an on-demand streaming subscription service which, unlike Spotify and Deezer, offers no free version but a free three-month trial. It offers a single (USD 9.99/month) and family (USD 14.99/month up to six users) subscription plan which grants ad-free music listening and video watching, offline listening and access to its exclusive Beats 1 Radio without limitation.[383] Apple Music also connects to iTunes where the songs listened to can be purchased and downloaded.

Amazon Music unlimited was founded in 2016 upgrading the Amazon Music offer which has been available for Amazon Prime users since 2007. While Amazon Music for Prime users only offered access to a limited music library, Amazon Music unlimited opens up the whole music library with up to 40 million songs. Amazon music unlimited is currently available in 39 countries.

It offers a 30-day free trial and two different streaming plans depending on the Amazon Prime membership, granting ad-free music listening online and offline. Non-Prime members pay USD 9.99/month, Prime members pay USD 7.99/month or USD 79/year plus their Prime membership fees. Amazon Music unlimited connects to Amazon where the songs listened to can be purchased and downloaded. Most of the above-mentioned online music services are using a similar system when it comes to royalty distribution.[384]

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[379] Deezer "Our Story" deezer.com <www.deezer.com/en/company/press>.

[380] Andrew Flanagan "Warner Music´s Parent Company Now in Control of Deezer Following French Approval" (09.08.2016) billboard.com <www.billboard.com/articles/business/7502855/deezer-access-industries-french-approval-len-blavatnik>.

[381] Deezer Family (NZD 19.49/month) up to 6 accounts <www.deezer.com/de/offers>.

[382] As of 2019.

[383] Jeffry L. Wilson "Apple Music" (05.05.2018) pcmag.com <au.pcmag.com/apple-music/35264/review/apple-music>.

[384] Amazon Customer Service <www.amazon.com/gp/help/customer/display.html?nodeId=200738950>

D Royalty Distribution Models

At the moment, most of the big audio streaming services like Spotify and Apple use a pro rata model as the basis for royalty calculations.[385]

The overall income of an audio streaming service consists of subscription fees and advertisement revenues and is shared between three main groups, 55-60 percent for right holders of rights in the sound recording (record producer, performers), 10-15 percent for right holders in the composition (composer, lyricists, arrangers, and music publishers) and 30 percent for the online streaming service.[386] This calculation is extremely simplified but shows, where the differences in royalty payments for rights in the composition and sound recording originate, and that it is not solely a problem of licensing methods but distribution models used by stakeholders of the music industry. The simplified pro rata model uses the following calculation basis:

$$\frac{Total\ numbers\ of\ streams\ per\ song}{Total\ number\ of\ overall\ streams} \times Total\ revenue = Payable\ Royalties$$

E Summary

Licensing the use of musical works to third parties was and still is the most efficient way for right holders to receive remuneration. With the development of new ways of public exploitation, the licensing models needed to be adjusted and redefined. The exploitation of musical works through new channels online has been a special challenge for the dated licensing processes and models as they allowed for worldwide transmission via a mostly unregulated platform, that is, the internet. Not only licensing models and methods needed re-adjustment, but the distribution systems led to an imbalance between classes of right holders. New possibilities of worldwide transmission of radio programmes and musical works forced the predominantly national operating CMOs and other rights managing entities to re-think their licensing systems and distribution models, leading to numerous problems in almost every country but most significantly in the United States and Europe as will be examined hereafter.

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[385] Jari Mulkku "Pro Rata and User Centric Distribution Models: A Comparative Study" (30.11.2017) Digital Media Finland, OY <www.muusikkojenliitto.fi/wp-content/uploads/2018/02/UC_report_FINAL-2018.pdf> at 4(14).

[386] Mulkku "Pro Rata and User Centric Distribution Models: A Comparative Study" at 4(14).

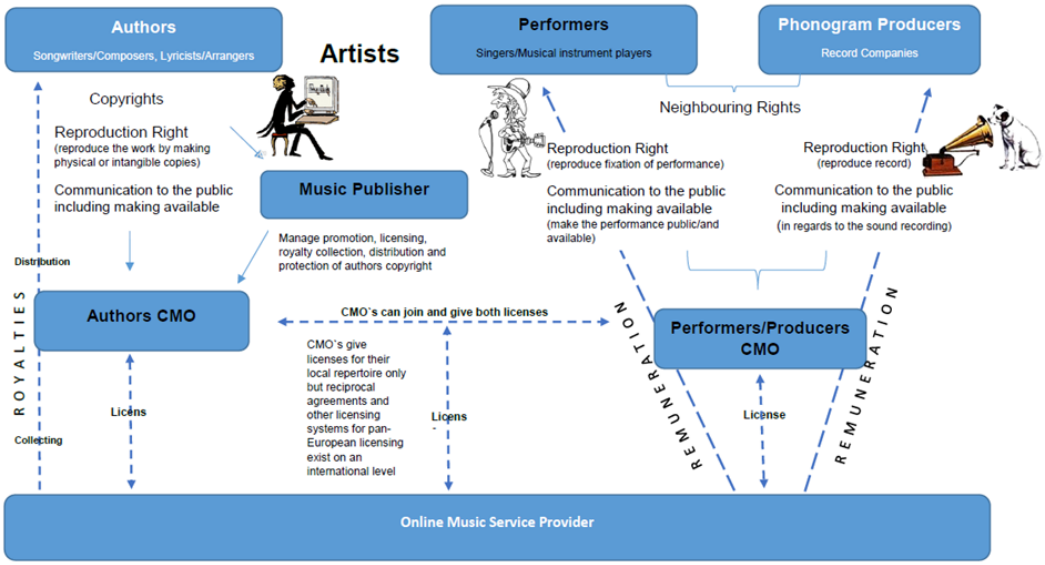

Figure 1 Overview: General music licensing

III The European Licensing System before the CRM-Directive

As analysed earlier, authors, performers, and record producers hold exclusively granted rights in the composition and the sound recording of a musical work due to national and international copyright standards. The rights in the composition are usually managed by national CMOs on behalf of the authors, while the rights in the sound recording can be managed by performers CMOs or by individual record producers and performers.

Usually, there are CMOs representing authors and publishers separately from performers, and record labels in each Member State of the EU authorised to grant licences in the respective territory of operation and usually free to negotiate licensing agreements on their behalf.

A Licensing Musical Compositions

The combined rights in the musical composition are usually managed by authors' CMOs in each of the EU Member States. The online exploitation of musical compositions through the EU territory is managed by national CMOs for their respective repertoire or by CMO's joint ventures or intermediaries managing a combined repertoire. Before the CRM-Directive was implemented into the law of the Member States, it was necessary to gain a licence for the use of musical composition from each respective national CMO separately in order to be able to use the works in all the EU territory. Sometimes reciprocal agreements between CMOs made it possible to ease the licensing process. In general, it meant that a

third-party user would have to negotiate and acquire 27 separate licences in order to be able to use respective musical composition in all EU countries.
Royalty rates used to be negotiated in the free market regulated by national anti-trust, competition and corporate legislation. Since the introduction of the CRM-Directive in all of the EU Member States, CMOs and other rights managing entities are regulated by newly introduced governance and transparency rules and regulations.
Additionally, licences for the sound recording have to be acquired and negotiated with the respective right holders.

B Licensing Sound Recordings

The combined rights in the sound recording are usually managed by the respective record producers (record labels) and directly licensed by them.
In some Member States, like Germany, combined licences for a specific use that includes both, the rights in the musical composition and the sound recording can be acquired from the respective CMO for the national territory.
A special feature of the European music market is the individual management of the Anglo-American repertoire of sound recordings, adding to the licensing controversy.
This trend began in the 1960s when the impact of American music grew internationally and encouraged American record companies to set up foreign branches to sell their music directly instead of selling it through local companies in Europe and Latin America.[387] Mergers and takeovers of record companies led to an oligopoly of five major record companies holding a market share of 70-80 percent of global sales in the 1990s. Further developments, mergers and takeovers have now produced an oligopoly of three remaining major record labels controlling nearly 80 percent of the rights in recorded music.[388] The big three have recently started to assign the management of their rights for the European market to national CMOs or joint ventures of such.
To ease the licensing complications and comply with national and international competition regulations, CMOs started to set up joint ventures, sometimes with the major record labels, to offer a wider range of licensing opportunities aiming to bridge the gap and make licensing more effective for the online market.

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[387] Dave Laing "Copyright, Politics and the International Music Industry" in Frith, Marshall *Music and Copyright* at 80.
[388] From 1988 to 1999 the six major record labels have been Warner Music Group (US), EMI (UK), Sony Music (US), BMG (Germany), Universal Music (US), PolyGram (Dutch), PolyGram merged into Universal Music in 1998; BMG became part of Sony Music in 2006; EMI was split between Warner Music, Sony Music and Universal in 2012, see Zach Carter, Jason Cherkis "Universal-EMI Merger Could Yield New Mega-Label To Threaten The Future Of Music" huffpost.com <www.huffpost.com/entry/universal-emi-merger_n_1897901>.

ARMONIA was launched by the CMOs of France, Spain, and Italy in 2007, offering licences for the online and mobile exploitation that included their combined repertoire of musical compositions and the Anglo-American rights in the sound recordings of Universal Music.

A similar concept, the Nordisk Copyright Bureau (NCB), was set up in 2009 by Baltic and Nordic CMOs[389] aiming to grant a joint Nordic/Baltic online licence (JOL) consisting of their combined rights in the composition and sound recording.[390]

The International Copyright Enterprise Service Limited (ICE), an intermediary that is jointly owned by the CMOS of the United Kingdom, Germany and Sweden, grants licences for online and mobile distribution, including the Anglo-American repertoire of sound recordings of Sony and BMG, and the combined repertoire of the musical compositions of the CMOs participating. Another intermediary, Direct European Administration Licensing (DEAL), was set up by the French CMO in order to grant pan-European licences for the digital rights for the Anglo-American repertoire of Universal Music Publishing International (UMPI).

PEDEL is an intermediary managed by the CMOs of the United Kingdom, Sweden, France, Spain, Belgium, and the Netherlands granting licences for the pan-European digital rights of the Anglo-American repertoire of Warner/Chappell.

IMPEL (Independent Music Publishers E-Licensing) manages and administers the online rights of independent music publishers organized under the MPA (Music Publisher Association) and is administered by the CMO of the United Kingdom PRS for music. More than 800 independent labels from 53 countries are organized under Merlin, offering licences to global digital music services like Spotify.

All the above-mentioned collaborations are able to grant multi-territorial licences within the territory of the EU for their respective repertoire of managed rights. The numerous entities managing different repertoires and rights, especially the rights in the sound recording, created a market with a very fragmented structure especially in regard to cross-border or international licensing. Royalty rates are usually negotiated in the free market.

C Special Safeguards for Guaranteeing Right Holders Protection – Example of Germany and the Scandinavian Countries

In support of the national licensing system, some EU Member States have established special rules over the last decades to guarantee legal certainty and

[389]Denmark (KODA), Iceland (STEF), Sweden (STIM), Finland (TEOSTO), Norway (TONO), Lithuania (LATGA-A), Latvia (AKKA-LAA) and Estonia (EAU).

[390] KEA "Licensing music works and transaction costs in Europe" (Final study Vrije Universiteit Brussel, 2012) <www.keanet.eu/docs/music%20licensing%20and%20transaction%20costs%20-%20full.pdf> at 31.

comprehensive protection of right holders within their territory. The German GEMA-assumption rule and the extended collective licensing method used by most of the Scandinavian countries could be of special interest when discussing an international licensing approach.

1 Germany´s GEMA-assumption rule

Starting in 1930, the German legislator facilitated the burden of proof for CMOs by introducing an assumption rule. The GEMA-assumption rule states that if music is publicly exploited, copied or otherwise used, it is assumed that GEMA has a sufficient legal mandate to represent the respective right holders.[391] Therefore, users must provide GEMA with a detailed list of works they use in public. Shifting the burden of proof to the user makes prosecution easier for CMOs and saves them time and costly monitoring. This does not mean that all right holders are automatically GEMA members as it only serves the purpose of facilitating the burden of proof. However, it guarantees protection of right holders whenever musical works are exploited publicly and makes it compulsory for third-party users of such work to inform GEMA of all musical works used. The third-party user is liable for royalty payments unless it can be proved that the musical works used are not part of the GEMA repertoire.

2 Scandinavia's extended collective licensing model (ECL)

Similarly to the GEMA assumption model, the Extended Collective Licensing System used in Scandinavian countries combines the voluntary assignment of rights with a legal extension of the repertoire to include all right holders, despite the actual assignment of their rights to a CMO. The system is similar to a compulsory licence but offers the right holder the chance to opt out which would be impossible under a compulsory licensing system.[392] The basic features of the ECL model include the extension effect of an agreement between a CMO and a user, the principle of equal treatment, the right to claim individual remuneration, and the possibility for right holders to opt out, and provisions on mediation and arbitration.[393] To conclude an ECL agreement, a CMO must be a representative and approved by the government

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[391] Reinhold v. Kreile, Jürgen Becker, Karl Riesenhuber *Recht und Praxis der GEMA – Handbuch und Kommentar (Law and Practice of GEMA – Handbook and Commentary)* (2nd edition De Gruyter, Germany, 2009) at [145-146].

[392] Daniel Gervais "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation" (Study Prepared for the Department of Canadian Heritage, University of Ottawa, 2003) available from <ssrn.com/abstract=1920391>.

[393] Johan Axhamn and Lucie Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage?" (Final Report (201108-IVIR) prepared for EropeanaConnect, University van Amsterdam, 2011) available from <de.scribd.com/document/66704031/201108-IVIR-Report-Cross-border-extended-collective-licensing-a-solution-to-online-dissemination-of-Europe-s-cultural-heritage> at 30.

of the respective country. The criterion of "representative" usually requires the CMO to represent "a substantial number of authors of certain types of works which are used."[394] Additionally, the CMO must operate efficiently and provide for appropriate systems to distribute collected royalties appropriately. The contents of an ECL agreement are extended to right holders who are not represented by the CMO without having a membership presumption effect. The ECL agreement is flexible and offers the possibility to include different uses, restrictions of such uses for certain works, or other regulations concerning the repertoire. This guarantees legal certainty for users and statutory immunity against civil remedies and criminal penalties.[395] Right holders that are not represented by the respective CMO concluding the ECL agreement have the right to claim individual remuneration if they can prove the extent of use of their works, putting them in a better position than the actual members of the CMO. Right holders can opt out of an ECL agreement and prohibit the use of their work completely or for the purpose of individual negotiation.[396] As the example of the Nordic countries shows, a functioning ECL system requires an established rights management system that provides for good governance and transparency regulations for CMOs and concepts of equal treatment of right holders.

[394] Axhamn, Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage" at 30.
[395] Axhamn, Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage" at 34.
[396] Axhamn, Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage" at 37.

Table 4 Overview: CMO joint ventures in Europe

Name	Members/Owners	Licensing
ICE	PRS for Music GEMA, STIM	International Copyright Enterprise Services Limited, single, consolidated MTL for Europe including their own repertoire, SOLAR and ARESA
SOLAR	GEMA PRS for Music	Pan-European digital rights for Anglo-American Repertoire of Sony/ATV and EMI (partly after EMI was split up)
ARESA	GEMA	Anglo-American Rights European Service Agency, licenses Mechanical Rights of the Anglo-American repertoire of BMG for online and mobile distribution within the EU
PEDL	PRS for Music, STIM, SACEM SGAE, SABAM Buma/Stemra	Pan-European Digital Licensing licenses digital rights for Anglo-American Repertoire of Warner/Chappell
ARMONIA	SACEM, SGAE, SACEM, Luxemburg, SPA, SABAM, Artisjus, SUISA, AKM, SIAE	Licenses their members' joint repertoire and the Mechanical Rights of the Anglo-American and Latin American Repertoire of UMPI, the Anglo-American Repertoire of Wixen Music Publishing and the repertoire of SOCAN (Canada) for the online use in 33 territories (EU & EFTA);

D Summary

The European licensing system before the CRM-Directive was twofold and the collective rights management system especially differed from country to country. The licensing of authorial works was usually through a nationally operating CMO but the possibility for third parties to license a wide repertoire for the entire territory of the EU was only possible if reciprocal representation agreements between CMOs or joint ventures of CMOs licensing a special repertoire existed. This created a fragmented music market that was divided by classes of right holders, differences in rights managing methods, and numerous rights managing entities. For third-party users, it was difficult and time-consuming to find all right holders, the respective rights managing entities, and ensure legal certainty for their business. The introduction of the CRM-Directive aimed to solve these problems will be analysed in detail in the next chapter of this research.

IV Licensing System of the United States of America before the MMA 2018

The licensing system of the United States is slightly different to that of the European system but creates problems of its own.

Instead of classifying the collective rights management by right holders into authorial rights managed predominantly by CMOs and neighbouring rights managed by CMOs or record producers/performers directly, the United States classifies the collective rights management by rights. Another difference is the royalty rate-setting process which is left entirely to the market in Europe but is twofold in the United States, either regulated by special bodies or negotiated in the free market.

There are three major organisations managing the public performance rights in the musical composition on behalf of copyright owners: The American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc (BMI) and the Society of European Stage Authors and Composers (SESAC). The public performance rights in the sound recording are managed by SoundExchange for simulcast and satellite radios, and through the respective labels for all other public exploitation.[397] The rights management through different managing entities is important for the royalty rate-setting process which will be described in more detail hereafter.

[397] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* (February 2015) at 28.

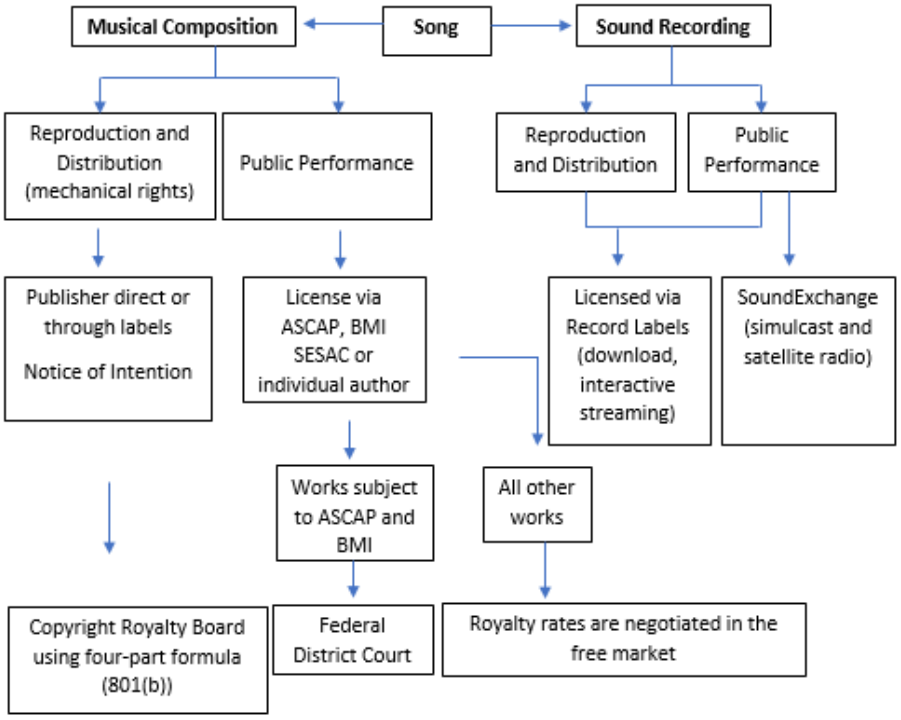

Figure 2 Licensing System for Interactive Services in the United States before MMA 2018

A Licensing Musical Compositions and Sound Recordings

To make or distribute reproductions of a musical composition, the user must send a notice of intent to the right holders in order to obtain a licence to do so within 30 days after making, and before distributing.[398] The user has to ensure the provision of statements of account and pay the statutorily prescribed royalties on a monthly basis. If the names and the addresses of the right holders cannot be identified, the user may file the notice of intent with the Copyright Office and pay a filing fee but does not need to deposit royalties.

The administrative body responsible for setting statutory rates and terms is the Copyright Royalty Board, which is composed of three administrative judges appointed by the Librarian of Congress.[399] The rate-setting process takes place every five years and sets the ceiling for what a right holder may charge but leaves room for right holders and users to negotiate voluntary licences that depart from the statutory rates setting the maximum amount a right holder can seek.

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[398] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* at 28.

[399] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* at 27.

To perform the musical composition in public, the user must obtain licences for the public performance rights. Usually, Performance Right Organisations like ASCAP, BMI and SESAC provide for licences, typically in the form of blanket licences that include all the repertoire for a flat fee or percentage of the gross revenue. Nevertheless, users can also acquire licences directly from the respective publishers in the form of a direct or source licences.

As the public performance rights are not subject to compulsory licensing, the licensing entities are subject to government antitrust regulations through consent decrees.[400] Although the consent decrees for ASCAP and BMI are not the same, they share many similar features, most relevantly that they can only acquire the public performance rights on a non-exclusive basis, they are obliged to grant licences to any user that applies, on non-discriminatory terms and must accept any right holder in a musical composition that applies to be a member, providing they meet certain minimum standards.[401] Additionally, ASCAP and BMI must offer alternatives to blanket licences and are barred from licensing other than public performance rights in the musical composition. ASCAP and BMI negotiate royalty rates with the respective user. If no royalty rate agreement can be reached, a determination of a reasonable licence fee can be sought by both parties from one of the two federal district judges in the Southern District of New York. In response to their members' demand, ASCAP and BMI amended their rules and allowed major publishers to withdraw their public performance rights for digital use (i.e. streaming services) from their management. This partial withdrawal of rights was successfully challenged by Pandora soon after, and the court ruled that music publishers could not withdraw selected rights, rather, a publisher's song catalogue must be either "all in" or "all out" of the Performance Rights Organisations management.[402]

A user seeking a public performance licence must submit a request to the respective Performance Rights Organisation. The submission of the request gives the applicant the right to use the repertoire of the Performance Right Organisation immediately without payment of any fees or compensation as long as negotiations or rate setting procedures are pending.

B Licensing Sound Recordings

Reproducing or distributing sound recordings requires a licence that can be obtained through direct negotiations with the respective right holder (usually the record producer/record label). An exception is in place for limited cases of digital non-

[400] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* at 34.
[401] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* at 36.
[402] *In re Pandora*,2013 WL 5211927 at 5-7; *BMI v. Pandora, 2013 WL 669788* at 3-4.

interactive streaming services and satellite radio that qualify for a compulsory licence.

The public performance right in the sound recording is limited to digital audio transmission and excludes traditional terrestrial radio.

A distinction is made between non-interactive and satellite radio, and interactive services. While non-interactive and satellite services are subject to statutory licences managed by a single non-profit agent, SoundExchange interactive services like Spotify negotiate royalty rates with the respective record producers directly in the free market.

SoundExchange collects royalties and distributes them to right holders as specified in the Copyright Act, 50 percent for the record producer (usually record labels), 45 percent for featured performing artists and 2 ½ percent each for agents representing nonfeatured artists and agents representing nonfeatured vocalists respectively.[403]

The applicable statutory rates are set by the Copyright Royalty Board in five-year intervals. SoundExchange has the authority to negotiate and agree to alternative royalty schemes in lieu of the rates set by the Copyright Royalty Board that are based on a percentage of the gross revenues or specified per-performance rates.

C Summary

While all the worldwide existing licensing systems are based on the same basic rights created by international agreements like the Berne Convention protecting the same right holders the management of rights comes in many variations and different regulatory content. While the rights management in most of the European countries is organised by right holders focusing on licences that bundle especially authorial rights, the United States has organised the management not only by right holders but by classification of specific rights. Additionally, the rights management system of the United States relies on a mix of statutory, compulsory and free negotiated royalty rates while in most of the European countries, the royalty rates are negotiated between the parties in a reasonable and non-discriminative manner. The two collective rights organisations that exist in the United States are regulated by competition law and consent decrees while European CMOs are required to follow national governance and transparency regulations in addition to competition rules. The problems with the system of the United States are presented by the differences in royalty rates giving right holders in the sound recording more leeway and power when negotiating royalty rates while right holders in the musical composition are restricted. The filing of intention notices required for licensing reproduction and distribution rights, especially, lacked legal clarity and made it difficult for third-

[403] United States Copyright Office *Copyright and the Music Marketplace – A Report of the Register of Copyright* at 45.

party users to find all the respective right holders, opening the way for infringement claims as will be discussed with the newly introduced Music Modernization Act 2018.

Table 5 Overview: Rights Clearance in the United States and EU

Country	Part of Musical Work	Rights Holder	Rights	Managing Entity
United States	Composition	Songwriter, Lyricists, Composer, Publisher	Reproduction & distribution	Licensing Collective
			Public Performance	ASCAP, BMI, SESAC or Publishers direct
	Sound Recording	Record label and featured performing artists	Reproduction & Distribution	Record label direct (for interactive services only)
			Public Performance	Record label direct (for interactive services) SoundExchange (for non-interactive and satellite radio)
EU	Composition	Songwriter, Lyricists, Composer, Publisher	Reproduction, Distribution & Public Performance Rights	Publisher or agents (Anglo-American Repertoire)
				National CMOs for their respective territory or CMOs/Intermediaries offering MTL
				Individual Rights Holder
	Sound Recording	Record Producer, Performing Artists	Reproduction, Distribution & Public Performance Rights	Record Labels and Performing Artists direct
				National Performers' CMOs

V Conclusion

The problems of repertoire fragmentation and differences in royalty rate settings for right holders are not new and have developed alongside the new legislation and technical developments making the public exploitation of musical works possible through different channels. The struggle of legislation to regulate the public exploitation and provide a licensing system that satisfies all parties involved and provides for fair remuneration of right holders led to a national orientated licensing system that is difficult to adopt into the online world. The shying away from regulating the exploitation of internationally granted rights or providing for common ground contributed to the licensing and royalty controversy faced by the third-party online users of musical works.

This allowed for the development of a fragmented and predominantly national licensing system that struggles to function in the online world which requires adjustments by not only rights managers but all rights managing entities.
A new licensing system can only be successful and satisfying for all parties involved if stakeholders work together trying to reduce the differences in order to limit the fragmentation of repertoires and counteract the imbalance of right holders' remuneration. As the internet is not as easily controllable as the airwaves, a solution would have to examine not only adjusting legislation but use existing technical possibilities to its advantage.
If the fragmentation of repertoires is not counteracted, the music market will become a patchwork, especially in regard to rights in the sound recording. This could lead to the establishment of numerous online music services offering only a limited repertoire, forcing the consumer to subscribe to not only one but several online music services in order to listen to a wide range of music. That this scenario is not farfetched can be recognised when looking at the likes of Netflix, Hulu, HBO and other movie streaming services starting to produce their own shows and movies in order to reduce licensing costs.[404]
To solve the problems outlined and not to run head first into new ones the EU and the United States introduced new legislation, the CRM-Directive and the MMA 2018 which will be analysed and examined in more detail hereafter.

[404] Matt Egan "Netflix's not-so-secret weapon to win the streaming wars" (25.04.2019) CNN Digital < edition.cnn.com/2019/04/25/investing/netflix-debt-streaming-wars/index.html>.

Chapter Four
Untangling the Gordian Knot - The Impact of New Legislation on Online Licensing

"That's not easy to find in a corporate world, somebody who cares about music."
Michael Penn, Musician

When the first CMOs were established in Europe in 1851, their primary purpose was to monitor the public use of authorial works and collect the respective royalties in their national territory. The advent of technical devices and new forms of exploitation across borders brought national differences in rights management and, especially licensing procedures, to light that opposed the European 2020 Strategy.
The harmonisation of copyright in Europe was part of the European 2020 Strategy laid down by the EC in the Concept of a European Single Market and the Digital Agenda released in 2010.[405] The primary goal of the Digital Agenda is to develop a European digital single market. The Single Market Concept and the Digital Agenda for Europe illustrate the heart of the European Project to turn the EU into one territory without national borders.

> The European Single Market refers to the EU as one territory without any international borders or other regulatory obstacles to the free movement of goods and services.[406]

For creating a single market, especially in regard to the fast advancing digital transformation, the European Commission adopted eleven Directives[407] between 1991 and 2016 with the primary objective to harmonise intellectual property rights

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[405] European Commission "Digital Single Market – Policy – Europe 2020 strategy" European Commission <ec.europa.eu/digital-single-market/digital-agenda-Europe>.
[406] European Commission "European Single Market" European Commission <ec.europa.eu/growth/single-market_en>.
[407] **Directive 91/250/CEE** of 14.05.1991 on legal protection of computer programs, **Directive 92/100/CEE** of 19.11.1992 on the rental and lending right and other rights related to copyright in the field of the intellectual property; **Directive 93/83/CEE** of 27.09.1993 on the harmonisation of certain provisions regarding copyright and neighbouring rights applicable to the broadcasting of programs via satellite and cable retransmission; **Directive 93/98/CEE** of 29.10.1993 on the harmonisation of the duration for the protection of copyright and certain neighbouring rights; **Directive 96/9/CE** of 11.05.1996 on the legal protection of databases; **Directive 2001/29/CE** of 22.05.2001 on the harmonisation of certain issues of copyright and neighbouring rights in the information society; **Directive 2001/84/CE** of 27.09.2001 on resale right for the benefit of the author of original works of art; **Directive 2004/48/CE** of 29.04.2004 on insuring the observance of intellectual property rights, **Directive 2006/116/EC** on the term of protection of copyright and certain related rights (amended by **Directive 2011/77/EU**); **Directive 2012/28/EU** of 25.10.2012 on certain permitted uses of orphan works; **Directive 2014/26/EU** of 26.02.2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

and the aim to pave the way for a European copyright law suitable for the digital single market.

The most recently adopted CRM-Directive is the first one to focus on regulating the rights management and licensing procedures of CMOs especially in regard to cross-border licensing.

The newly established legal framework aims to harmonise rules on transparency and good governance for the collective management of copyright and related rights and to create a legal framework which promotes development in the field of music-making and multi-territory/multi-repertoire licensing.[408]

Due to the rapid growth of legal online music services operating within the EU, the establishment of a solution that allows multi-territory licensing of copyright and related rights was inevitable to ensure the goal of the single market doctrine.

While earlier research has covered a wide field, the examination of the CRM-Directive in regard to its potential for an international licensing model remains unexplored. Therefore, the following section examines the impact of the CRM-Directive on CMOs, the licensing processes, and the changes in national legislation as part of the implementation process of the CMR-Directive into the law of the Member States, to show its potential. The following analyses of the CRM-Directive will focus on the development of regulations on good governance and transparency as main solutions for a system of multi-territorial licensing in synchronicity with existing European copyright and competition regulations.

I Legislative Development of the CRM-Directive

While copyright was harmonised step by step, the management of copyright and related rights was never a central issue that was addressed in international or national treaties and agreements, leaving regulations entirely to the respective national legislation. With the advent of the online market and new ways of exploiting music, the significant differences in legislation and practice concerning the rights management and licensing systems have become more and more obvious, and in conflict with the idea of a borderless online environment.

Since 1991, the EU has developed the legal copyright framework to align and harmonise copyright legislation throughout the Union but only referenced to the

[408] Guibault, van Gompel "Collective Management in the European Union" at 139.

management of rights by CMOs rather than addressing the conditions of rights management in the *acquis communautaire*[409] Directives.[410]

The issue of cross-border rights' clearance came to the attention of the EC in the early 2000s, when CMOs started to conclude reciprocal representation agreements (RRAs) allowing for territorial restricted multi-repertoire licences within the European market. In the ECs' opinion, most of the RRAs concluded contained territorial or tariff restrictions conflicting with competition regulations and had to be reversed or adjusted. In the following years, the EC and the European Parliament drafted numerous documents regarding the issues surrounding pan-European licensing which ultimately lead to the introduction of the CRM-Directive in 2014.

The development process of the CRM-Directive shows the shift of focus from general harmonisation and compliance with competition regulations to a more regulatory approach of introducing standards of good governance and transparency for rights managing entities as the best solution for cross-border management.

A First Attempts at Cross-Border Licensing: Reciprocal Representation Agreements (RRAs)

Traditionally, CMOs entered into RRAs to assure rights clearance for the non-domestic repertoire in their respective national territory. RRAs enabled participating CMOs to grant multi-repertoire licences for their respective territory of operation. The CJEU outlined the advantages of such reciprocal agreements between CMOs as cost efficient in regard to user contracts and local monitoring arrangements of CMOs in *Tournier*[411] and *Lucazeau*[412] in 1989 by stating, that:

> [reciprocal agreements] enable copyright-management societies to rely, for the protection of their repertoires in another State, on the organisation established by the copyright-management society operating there, without being obliged to add to

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[409] European Commission Glossary states that: "The *acquis communautaire* is the cumulative body of European Union legislation consisting of primary (treaties and protocols) and secondary legislation (regulations, directives and decisions) and the case law of the European Court of Justice. The *acquis* therefore comprises the objectives of the European Union, its policies and the rules governing these policies. The *acquis* is fundamental and dynamic, constantly developing as the European Union evolves. All Member States are bound to comply with the *acquis communautaire* because EU law has primacy over national law. Candidate countries have to accept the *acquis* and integrate it into their own legal system before they can join the European Union." European Commission "acquis-communautaire" European Commission Glossary < https://ec.europa.eu/agriculture/glossary/acquis-communautaire_en_en>).

[410] European Commission *Communication from the Commission to the Council the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market* (16.04.2004) COM(2004)261 final at 6.

[411] Case 395/87 *Ministère public v Jean-Louis Tournier* [1989] ECLI:EU:C:1989:319 (*Tournier)*.

[412] Joint Cases 110/88, 241/88 and 242/88 *Lucazeau v. SACEM* [1989] ECLI:EU:C:1989:326 (*Lucazeau*).

that organisation their own network of contracts with users and their own local monitoring agreements.[413]

It was stressed that such representation agreements must comply with non-discrimination rules of Article 18 TFEU[414] and competition rules in Article 101 TFEU. Therefore, CMOs are required to apply the same tariffs, management fees, and conditions for collection and distribution of rights revenues to right holders of other CMOs.[415]

Reciprocal representation agreements comply with competition rules if no concerted action is demonstrated by the CMOs concerned.[416] While reciprocal representation agreements between CMOs were justified in the analogue world by the requirement of physical monitoring of the usage of copyrighted works, the development of technology made it possible to monitor the use from a distance. Due to the new possibilities, four RRAs concluded in the early 2000s became subject to the EC critical scrutiny questioning their compliance with competition regulations.

1 IFPI Simulcasting Agreements

New developments in technology made it possible for broadcasting services to simultaneously broadcast their programmes globally online over the internet. While the technology was evolving fast, opening up new possibilities to exploit copyrighted material online on a global level proved to be difficult. Due to the national scope of copyright, CMOs were bound to their repertoire and territory, unable to issue licences beyond their national borders. Pre-existing reciprocal representation agreements between CMOs allowed for only the grant of mono- or multi-repertoire licences restricted to the national territory. Therefore, a group of CMOs[417] signed the IFPI Simulcasting Agreement on an experimental basis and

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[413] *Tournier* at 19; *Lucazeau* at 13.

[414] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.

[415] The non-discrimination rule follows from Article 18 TFEU and Commission Decision *71/224/EEC relating to a proceeding under Article 86 of the EEC Treaty (IV/26760 – GEMA), O.J. L 134/* (*GEMA*).

[416] *Tournier* at 20; *Lucazeau* at 14.

[417] Record producers' collecting societies: Wahrnehmung von Leistungsschutzrechten GesmbH (LSG, Austria); Société de l'Industrie Musicale Muziek Industrie Maatschappij (SIMIM, Belgium); Gramex (Denmark); Gramex (Finland); Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL, Germany); Grammo (Greece); Samband Flitjenda og Hljomplötuframleidanda (SFH/IFPI, Iceland); Società Consortile Fonografici Per Azioni (SCF Scpa, Italy); Phonographic Performance Ireland (PPI, Ireland); Stichting ter Exploitatie van Naburige Rechten (SENA, The Netherlands); GRAMO (Norway); Associaçao Fonografica Portuguesa (AFP, Portugal); IFPI Svenska Gruppen, from Sweden; IFPI Schweiz, from Switzerland; Phonographic Performance Limited (PPL, UK); Intergram, (Czech Republic); Eesti Fonogrammitootjate Ühing (EFU, Estonia); Zwiazek Producentów Audio Video (ZPAV, Poland); Phonographic Performance Ltd, South East Asia (Hong Kong); Phonographic Perfor-mance Limited (PPL, India); Public Performance Malaysia

applied to the EC for approval of compliance with EU law in 2000. The scope of the agreement was to facilitate the creation of a new category of licences, namely a multi-territorial and multi-repertoire licence (MTL/MRL) for the simultaneous online transmission of radio and TV programmes including sound recordings and broadcasts. Participating CMOs permitted each other to grant MTL/MRL licences for the online use of musical works to online users.

As previously done in two similar constructions of reciprocal agreements[418] between CMOs, the EC issued a statement of objection to the IFPI agreement questioning the compliance of the agreement with Article 101 TFEU[419] but granted an individual exemption that left the agreement in place until 2004 when the agreement would automatically expire.[420]

Particularly with regard to the CJEU decisions in *Tournier* and *Lucazeau*, the EC stated that modern monitoring technology allows for CMOs to monitor the use of their repertoire from a distance and across borders, which makes the traditional

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Sdn Bhd (PPM, Malaysia); Recording Industry Performance Singapore Pte Ltd (RIPS, Singapore); The Association of Recording Copyright Owners (ARCO, Taiwan); Phonorights Ltd (Thailand); Cámara Argentina de Productores de Fonopgramas y Videograma (CAPIF, Argentina); Sociedad Mexicana de Productores de Fonogramas, Videogramas y Multimedia S.G.C. (Somexfon SGC, Mexico); Unión Peruana de Productores Fonográficos (Unimpro, Peru); Cámara Uruguaya del Disco (CUD, Uruguay); Recording Industry Association New Zealand (RIANZ, New Zealand).

[418] Commission notification of cooperation agreements Case COMP/C2/38.126 *BUMA, GEMA, PRS, SACEM – (Santiago Agreements)* [2001] O.J. C. 145/2; Commission notification of cooperation agreements Case COMP/C-2/38.377 *BIEM (Barcelona Agreements)* [2002] O.J. C. 132/18.

[419] Article 101 TFEU (ex Art. 81 TEC) reads as follows:

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make 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.
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> - any agreement or category of agreements between undertakings,
> - any decision or category of decisions by associations of undertakings,
> - any concerted practice or category of concerted practices,
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[420] Guibault, van Gompel "Collective Management in the European Union" at 160.

economic justification of territorial limitation used for the analogue world no longer applicable.[421]

The EC criticized the payment modalities between contracting CMOs and their users, and demanded an increase of transparency in regard to those charges by separating the royalty tariffs and the administration costs.[422] Without a proper split of the costs, user charges would be to a large extent pre-determined and lead to reducing competition between CMOs in terms of pricing.[423]

However, the EC tested whether the agreement could be exempted under Article 101(3) TFEU until the expiration of the agreement in 2004. The agreement would qualify as an exception if the circumstances of the cooperation are in response to increasing competitive pressure by a changing market driven by globalisation and rapidly progressing technology and general market dynamics.[424] The EC found three reasons for the qualification of the agreement as an exemption. First, the agreement introduced a new licensing service in the form of multi-territory/multi-repertoire licensing for online simulcasting, enabling such services to obtain one single licence from one CMO for multiple territories and repertoires. Secondly, such a licensing service would provide significant benefits for broadcasters by reducing transaction costs for acquiring licences, and thirdly, would benefit consumers by introducing easier and wider access to more attractive offers of international broadcasts.[425]

The ECs' only concern was the remuneration element of the new licensing service which remained pre-determined and unchangeable by the licence issuing CMO. Nevertheless, the EC considered those tariff structures as a necessary guarantee, without which CMOs would not be willing to create and distribute such a licensing service. The EC came to the conclusion that the tariff restrictions used in the IFPI Simulcasting agreement are indispensable within the meaning of Article 101(3) TFEU and granted an exemption until 2004.

The results of the EC examination of the IFPI agreement show that a simplified licensing service provides significant benefits for consumers and broadcasters and only fails to convince by a lack of transparency and tariff restrictions.

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[421] Commission Decision C(2008) 3435 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/C2/38.698 — *CISAC*) [2008] O.J. C 323; Commission Decision 2003/300/EC *IFPI Simulcasting* [2003] O.J. 2003 L 107/58 at 58-84 [61] (*IFPI Simulcasting)*.

[422] *IFPI Simulcasting* at 103.

[423] *IFPI Simulcasting* at [58-84], [62-78].

[424] Guibault, van Gompel "Collective Management in the European Union" at 160.

[425] *IFPI Simulcasting* at [84-95].

2 Santiago and BIEM Agreements

The Santiago Agreement describes substantially identical reciprocal representation agreements between European authors' CMOs which corresponded to a standard agreement used worldwide. The Santiago Agreement concerned the right to license public performance rights in musical works for their online use. The parties of the Santiago Agreement authorised each other to grant non-exclusive multi-repertoire licences for the public performance of musical works online on a worldwide basis. The EC was notified about those agreements in 2001, and issued a statement of objection in 2004 after receiving third-party statements and gathering other information. The EC criticised section II of the agreement containing a territorial limitation according to which the CMO that is authorised to grant MRL is the CMO of the country where the licensee originates. This means that each national CMO can grant a MRL for the use of musical works online exclusively for its territory.[426] In addition to the territorial limitation, the Santiago agreement contained a most favoured nation clause which restricts licensing to the national territory of CMOs, leading to a standardisation of licensing terms and preventing the market from evolving in different directions. The agreement was not renewed after its termination.

The standard bilateral agreement of performers' CMOs (BIEM Agreement) was based on existing reciprocal representation agreements between performers' CMOs making amendments to cover exploitation of musical works through webcasting, downloading and online streaming containing the same territorial restrictions and most favoured nation clause as the Santiago Agreement.[427]

3 CISAC Model Contract Agreement and CISAC Case

In 1936, CISAC drafted a non-binding model contract which has been amended numerous times over the years and was used by the majority of the European CMOs.[428] On the basis of the model contract, CMOs have entered into reciprocal representation agreements allowing each CMO to issue licences for public performance rights for traditional offline applications and exploitation of music via the internet, satellite, and cable broadcasting. The model of reciprocal representation agreements adopted permits each participating CMO to license the combined repertoire of the participating CMOs in their respective territory of

[426] European Commission *Notice published pursuant to Article 27(4) of Council Regulation 1/2003, Santiago Agreement* (17.08.2005) COMP/C2/38126, OJ 2005 C 200/11 at No. 6.

[427] Estelle Derclaye (ed) *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2009) at 383.

[428] Case T-442/08 DEP (Joined Cases T-414/08 DEP, T-415/08 DEP, T-416/08 DEP, T-417/08 DEP, T-418/08 DEP, T-419/08 DEP, T-420/08 DEP, T-442/08 DEP) *CISAC v. European Commission* [2013] ECLI:EU:T:2013:188.

operation.[429] The agreement restricted CMOs from engaging in multi-territorial / multi-repertoire licensing within the EEA and lead to refusals to grant community-wide licences to commercial users, like television and music broadcasters.[430]

In 2000 and 2003, the EC received two complaints lodged by RTL Group SA and Music Choice Europe against members of CISAC concerning the refusal of granting multi-territorial licences for public performance rights for broadcasting musical works within the EEA.

In 2006, the EC issued a statement of objection against the CISAC model contract and the reciprocal representation agreements deriving from it.[431]

After adjustments to the CISAC model contract and resulting reciprocal representation agreements between CMOs were made, the EC put the amended agreement to the test in 2008 and identified three clauses with the potential to be restrictive and therefore contrary to Article 101 TFEU. The CISAC model contract, and especially the three clauses identified, combined limited services to their domestic territory which was interfering with competition.

The exclusivity clause in Article 1 (I) CISAC model contract restricts the authorization to license collectively managed works to the territory in which the respective CMO operates.

The non-intervention clause in Article 6 (II) CISAC model contract restricts CMOs from interfering with the territory another contracting CMO is operating in, and forbids it to issue licences for those territories.

The membership-restriction clause in Article 11 (II) CISAC model contract prohibits CMOs from accepting any member of another contracting CMO without the consent of the respective CMO. The membership restriction clearly limits the authors' choice of CMO representative.

The EC concluded that the interaction of the exclusivity clause and the non-intervention clause results into a territorial delineation of CMOs in their own national territory and interferes with Article 101 TFEU.[432]

The Commission concluded that such a territorial delineation was not necessary to ensure reciprocal representation between CISAC members within the EEA and declared the CISAC model contract as a concerted practice limiting competition and therefore being contrary to Article 101 TFEU.[433]

The EEA CISAC members adjusted their reciprocal representation agreements to address the concerns raised regarding the exclusivity and membership clause but

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[429] Alain Andries and Bruno Julien Malvy "The CISAC decision – creating competition between collecting societies for music rights" (2008) Publication European Commission Competition Policy Newsletter Number 3 – 2008 53 at 54.

[430] Joao Pedro Quintais "The Empire Strikes Back: CISAC Beats Commission in General Court" (2013) 8 J. Intell. Prop. L. & Prac 680 at 681.

[431] Guibault, van Gompel "Collective Management in the European Union" at 161.

[432] Case COMP/C2/38.698 (*CISAC*) at [18-40].

[433] Case COMP/C2/38.698 (*CISAC*) at [222-223] and [229-255].

successfully appealed the concerted practice regarding territorial delineation following from combining the exclusivity and non-intervention clauses to the CJEU in 2008.[434] CISAC was joined by the European Broadcasting Union (EBU) in claiming that the CJEU should annul Article 3 of the CISAC 2008 decision which stated that "the territorial delineations [were coordinated] in a way which limits a licence to the domestic territory of each collecting society."[435]

The CJEU ruled in favour of CISAC and annulled the Commission´s decision insofar as the prohibition of national territorial limitations was concerned, permitting such limitations providing they do not result in concerted practice between CMOs.[436] The Court concluded that a collective rights management structure based on a one-CMO mono-territory/multi-repertoire licensing model is not per se anti-competitive, and can be justified even in the light of new technological developments.

The decision was made one year before the CRM-Directive was finalized going down a different path than that the EC had emphasized.

4 Summary

The three RRAs and the CISAC model contract were the first initiatives to ease the online licensing controversy in the absence of international and national legislation. While they have the same goal, they differ in their structure and approach.

The IFPI Agreement concerning simulcasting licences allows CMOs to grant multi-repertoire licences for the entire EU market, leaving it to the licensee to choose one of the CMOs operating in the EU. This would allow licensees to acquire one licence from one CMO that is valid for the entire EU territory and includes the repertoire of all participating CMOs. As outlined by the EC, such a system must be accompanied by a remuneration system that complies with competition regulations and transparency standards. The need for a functioning and transparent remuneration system is one of the basic requirements for a functioning cross-border licensing system and appears in different configurations throughout the development process of the CRM-Directive.

The similarly structured Santiago and BIEM Agreements concerning licences for the exploitation of musical works online allowed CMOs to license each other's repertoire only in their respective territory of operation, restricting users to acquiring licences from the national CMO in their country of origin. In its statement, the EC outlined that such a licensing system would partition the market and underline the monopoly position of national CMOs which would ultimately

[434] Quintais "The Empire Strikes Back: CISAC Beats Commission in General Court" at 682; see also Case T-442/08, *CISAC v. European Commission*.
[435] Case T-442/08 *CISAC v. European Commission* at No. 45.
[436] Guibault, van Gompel "Collective Management in the European Union" at 164.

oppose existing competition regulations. Territorial limitations and the most favoured nation clause were two of the first concepts to be revised and adjusted to meet competition regulations and guarantee cross-border licensing.

The model contract drafted by CISAC concerned licences for the exploitation of musical works online, similar to the Santiago and BIEM Agreements. The model contract allowed CMOs to license their combined repertoire for their national territory only restricting them from interfering with each other's territory and members. The EC was concerned that the chosen concept of multi-repertoire licensing with territorial and membership restrictions could be contrary to competition regulations and hinder the development of a harmonized licensing system. After CISAC members adjusted their contracts and opposed the EC's decision, the CJEU ruled that a licensing structure based on a mono-territory/multi-repertoire licensing model restricting CMOs to their territory is not per se anti-competitive and can be justified.

As can be seen from the regulations in the IFPI, Santiago and BIEM Agreements, CMOs focused on RRAs bundling their repertoire to ensure a functioning licensing system for the exploitation of musical works in a fast-growing online environment. With little guidance from international legislation and differences in national regulations, it seemed to be the only way to balance the market and guarantee legal certainty for online content providers. Due to language barriers and national differences in rights management regulations, territorially restricted licences were the only options to guarantee comprehensive licensing within the EU.

The quasi-monopoly position of CMOs in most of the EU Member States was widely accepted due to the difficulties of monitoring the actual use of musical works across-borders. With the advent of technology, monitoring the online use of musical works was no longer an issue and expanding existing RRAs into the online world and creating further monopolies could no longer be justified against the backdrop of competition regulations. This was the start of rethinking copyright structures, especially in regard to regulations for copyright exploitation and intermediaries managing such rights. Given its diversity, the EU was the first to acknowledge that copyright protection and management must go hand in hand to ensure a balanced market. The policy documents leading to the CRM-Directive clearly show a rethinking after the final CISAC decision and a shift of focus to regulations concerning rights managing entities and the development of a governance and transparency solution finalised in the CRM-Directive.

B Policy Documents Leading to the CRM-Directive

As early as 1995, the EC started consultation on the question of rights management. The main purpose was to determine whether the existing methods of collective rights management hinder the function and development of the European market, especially in the light of new information technology and the online use of musical works.

Since the publication of the Green Paper[437] in 2005, the creation of a European level playing field for CMOs has been an item on the EC agenda. The main goal outlined by the Green Paper was the establishment of a harmonized legal framework for the management of copyright and neighbouring rights in Europe. It took roughly twenty years and numerous policy documents to accomplish the goal set and adopt the CRM-Directive which establishes rules on transparency and good governance for rights managing entities accompanied by a European licensing passport creating a legal framework promoting development in the field of music exploitation and licensing.[438] In the process, it became clear that granting rights is not enough to ensure fair treatment and remuneration. It was recognized that those rights needed to be accompanied by regulations for rights management and managing entities as they are the main licensors of musical works. With the main focus on breaking up the monopoly position of CMOs and opening the licensing market up to competition, a shift from territorially restricted licences to repertoire limited licences took place, not necessarily solving the licensing controversy.

1 Community Framework Resolution and Communication Paper - 2004

At the beginning of 2004, the European Parliament adopted a Community Framework Resolution[439] calling for the establishment of a framework for CMOs operating in the EU in the field of copyright and neighbouring rights. The Resolution pointed out that CMOs are:

> [the] most significant option for the efficient protection of the copyright of artists and must operate according to the principles of transparency, democracy and participation of creators *[…] to ensure* equitable remuneration for creators and users´ easy access to intellectual property works *which* cannot be replaced by DRM systems.[440]

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[437] European Commission *Green Paper on Copyright and Related Rights in the Information Society* (19.07.2005) COM (95) 382 final.
[438] Guibault, van Gompel "Collective Management in the European Union" at 139.
[439] European Parliament *Resolution on a Community framework for collective management societies in the field of copyright and neighboring rights (15.01.2004) (2002/2274(INI)), P5_TA(2004)0036.*
[440] European Parliament *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring* at para. 30.

The framework aimed to establish minimum standards for organizational structures of CMOs, transparency, accountability, legal remedies, and the adoption of provisions requiring CMOs to provide publicly available information about tariffs, distribution keys, annual accounts, listings of appropriate management costs, and information on RRAs. The European Parliament advocated common organizational standards for CMOs and the freedom of choice for authors which rights to entrust to a CMO, mirroring the concerns expressed by the EC in earlier RRAs.[441] The Parliament expressed further concerns over RRAs and called for the separation of rights administration where "unequal rights exist" opposing a one-stop-shop administration in certain cases.[442]

In response to the Parliament´s Resolution and based on its own consultation process, the EC released a Communication Paper in April 2004,[443] stating that cross-border trade in copyright-related goods has become the norm within the EU market. Copyright related goods include rights implicated in any online transmission. While many parts of substantive copyright had been harmonised over the years, the EC noted that it is time to address issues of rights management through CMOs regulated differently by the national law of the Member States.[444]

The EC indicated that "a lack of common rules regarding the governance of collecting societies may potentially be detrimental to both users and right holders"[445] and serve as an obstacle to an internal market in rights management. During the consultation process, the Commission noticed that there is a call for community-wide licensing, especially from commercial users entering the fast developing online market. The term community-wide licensing was defined by the Commission as an "umbrella term to describe the grant of a licence by a single collecting society in a single transaction for exploitation throughout the Community."

One of the primary goals of the ECs Communication Paper of 2004 was to examine the best option to develop the cross-border licensing system and identify whether the market would regulate itself or whether legislation would be needed to do so. The EC found that the main obstacle for the development of online services lies in the territorial limitation of copyright licensing and can only be overcome by creating some sort of Community-wide licence granted by a single CMO in a single territory for exploitation throughout the EU.[446] A legislative measure requiring right holders to grant multi-territorial licences could amount to a compulsory licence,

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[441] Bernd Justin Jütte *Reconstructing European Copyright Law for the Digital Single Market Between Old Paradigms and Digital Challenges* (Nomos, Baden-Baden, Germany, 2017) at 429.
[442] European Parliament *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring* at para. 39.
[443] COM(2004)261 final at 4.
[444] COM(2004)261final at 5.
[445] COM(2004)261 final at 7.
[446] COM(2004)261 final at 8.

conflicting with international obligations under the Berne and Rome Conventions.[447] Therefore, the EC examined the management of rights in the internal market, individual rights management, and the collective management of rights to find a fitting solution. In a first step, the EC assessed the management of rights, focusing on cross-border activities and the associated licensing structures to identify existing issues. In order to overcome existing obstacles, six possible solutions for a comprehensive cross-border licensing system were analysed.

(a) Existing issues of rights management

The issues detected concerned national differences in the establishment of CMOs, the relationship between CMOs their members and commercial users and the external control of CMOs which need to be addressed in order to introduce a functioning and sufficient cross-border licensing system in the EU.[448]

While disparities in rules for the establishment of CMOs and their status are not necessarily linked to their efficiency, they come with special economic, cultural, and social obligations that differ within the Member States. Common ground is required especially in regard to the person who establishes a CMO, its status, the necessary proof of efficiency, operability, accounting obligations, and the existence of a sufficient number of right holders represented. Therefore, in order to promote good governance of CMOs, their establishment within the EU should be subject to similar conditions.

In order to promote or safeguard access to protected works, the establishment of community-wide principles regarding tariff setting, licensing conditions, and dispute resolution are necessary to foster the relationship between CMOs and commercial users and should be developed to provide for multi-territory licences. CMOs usually already have an exclusive mandate to administer certain rights in their field of activity which allows them to function as a one-stop-shop for licensing, but more transparency is necessary to comply with competition regulations.

Due to the situation that usually only one CMO for each group of right holders exists in a Member State, the principles of good governance, non-discrimination, transparency and accountability are of great importance in the relationship between CMOs and their members. Therefore, common principles should be applied to the acquisition of rights, the membership conditions, and the positioning of the right holders within the CMOs. CMOs should grant their members a reasonable degree of flexibility, and offer the possibility to split their rights and manage some of them individually.[449]

[447] COM(2004)261 final at 8.
[448] COM(2004)261 final at 9.
[449] COM(2004)261 final at 9.

The existing differences in controlling CMOs through public authorities or specific bodies are significant throughout the EU and constitute obstacles to the interests of right holders and users. Therefore, it is necessary to establish an adequate external control mechanism and make specific regulating bodies available in all Member States to create common ground on the competencies, composition, and non-binding nature of those bodies' decisions.

(b) Community exhaustion solution

The first possible solution, discussed as Option 1, was based on the partial removal of the principle of territoriality and resembles the IFPI licensing model to a certain extent. It would give CMOs the power to grant multi-territory licences for the exploitation of musical works online, valid for the entire territory of the EU.[450]
This would mean that once an act of communication to the public or making available of musical works has been authorized in one Member State, it could be used legally anywhere in the EU without further rights clearance with other national CMOs. The community exhaustion approach would remove the criticized territorial restrictions of licences for cross-border activities within the EEA and allow the use of musical works in all Member States with only one licence. As discussed previously, such a licensing model could comply with EU competition regulations providing it includes a fair remuneration concept and does not result in concerted practice between CMOs. This approach makes licensing easier for users as they only have to acquire one licence for the entire EU territory but restricts the authorial rights and leaves the right holders unable to control the use of their works once these have been made publicly available.

(c) Country of origin solution

The second possible solution, discussed as Option 2, was based on the country of origin principle as established in the Satellite-Directive. According to Article 1(2)(b) Satellite Directive the relevant act of communication to the public "occurs solely in the Member State where […] the program-carrying signals are introduced." Therefore, a user would have to acquire licences only in the Member State where the signal originates and not in every State the signal can be received. This model would only determine the applicable law and restrict users once more to the CMO operating in the respective territory.[451] While such a model works for satellite transmission which is restricted to a specific range and therefore limited to a specific area, online transmission is limited to neither a specific range nor a specific area. Adopting such a model for online exploitation of musical works

[450] COM(2004)261 final at 9.
[451] COM(2004)261 final at 8.

would be most likely to lead to a system of compulsory licensing with no chance to monitor or control the actual use of the licensed work.

(d) Non-exclusive rights solution

The third possible solution, discussed as Option 3, was based on the removal of the exclusivity status of the communication and making available rights.[452] This option would strip the communication rights of their status of exclusivity and change them into sole remuneration rights subject to mandatory collective management. Right holders would no longer have control over their rights or their rights management. The option would be contrary to the Berne and Rome Conventions, the InfoSoc Directive, the WPPT and the WCT which establish and harmonize these rights, granting them a status of exclusivity. Adopting such a model would not only strengthen the monopoly position of national CMOs but most likely would lead to a compulsory licensing system bypassing right holders entirely.

(e) Freedom of choice and transparency solution

The fourth solution discussed as Option 4, would combine freedom of choice with increased transparency obligations for CMOs, allowing for multi-territorial licences for the EEA similar to the IFPI Simulcast model. The IFPI model combined with transparency obligations would comply with competition law regulations provided it did not lead to concerted practice between CMOs and included a transparent remuneration system. This option would give online content providers the freedom of choice of CMO and would not restrict them to their country of operation. Users would no longer be required to clear rights with every national CMO of the EEA to acquire EU-wide licences, making it much easier to gain legal certainty. This option would be beneficial for users but would not improve the situation for right holders or align the operational processes of CMOs, leaving their control to national regulations.

(f) CMO mandate and RRAs solution

The fifth solution, discussed as Option 5 would mandate CMOs and allow them to offer multi-territorial licences for the territory of the EEA under certain conditions. Such a model would require a harmonized, efficient and accountable collective rights management system within the EU that incorporates existing RRAs.[453] This would require a legal framework that harmonises collective rights management

[452] COM(2004)261 final at 9.
[453] COM(2004)261 final at 9.

within the EU and detach rights management from its national scope and regulations to guarantee compliance with competition regulations.

(g) Good governance and RRAs solution

The sixth solution, discussed as Option 6, suggested focusing on the modalities of collective management by CMOs only and fostering existing RRAs and centralized licensing by eliminating disparities in the law of the Member States and introducing governance rules for CMOs in the EU.[454] This would lead to a one-stop-shop system in which CMOs are able to license the world repertoire of the respective group of right holders for their territory of operation. To avoid conflicts with competition law, as experienced in previous similar arrangements, such a system needs to be accompanied by the harmonization of the conditions of collective management in the Member States and the introduction of governance rules for the functioning of CMOs at EU level.

Table 6 Overview: Changes proposed by the Communication Paper of 2004

Policy Document	Proposed Regulations to improve Governance and Transparency of CMOs	Proposed Regulations for Multi-Territorial Licensing
Community Framework and Communication Paper 2004	**Option 1** – Community exhaustion **Option 2** – Country of Origin **Option 3** – Non-exclusive Rights **Option 4** – Freedom of choice for commercial user and transparency **Option 5** – RRAs combined with mandating of CMOs **Option 6** – Modality harmonisation and good governance rules one-stop-shop **Favoured Options 5 and 6** best to create a level playing field on certain aspects of collective management esp. efficiency, transparency, governance inevitable and only achievable through legislative instrument	Identified that operational framework for the functioning of collective rights management is crucial for guaranteeing cross border activities

(h) Conclusion drawn by the Communication Paper 2004

The Communication Paper of 2004 came to the conclusion that certain issues in regard to the collective management of rights require a legislative approach as they are crucial to the establishment of a functioning cross-border licensing system.[455]

[454] COM(2004)261 final at 9.
[455] COM(2004)261 final at 19.

To guarantee a sufficient cross-border licensing system, a level playing field on certain aspects of collective management, including rules on efficiency, transparency and good governance, is inevitable and can only be achieved through a legislative instrument.
The solution with the most potential would, therefore, be mandating of CMOs and the introduction of harmonised transparency and governance regulations for CMOs as proposed under Options 5 and 6.
The most promising options resemble the existing RRAs to a certain degree but include regulations to comply with existing competition regulations.
Taking the findings and suggestions of the EC into account, cross-border licensing issues are not being resolved when leaving their regulation entirely to the market. The need for legislative instruments on certain aspects of collective rights management and the introduction of harmonised rules on good governance and transparency are necessary to harmonise common practices and ensure sufficient cross-border licensing. The options given to develop a cross-border licensing system show that a functioning cross-border licensing system goes hand in hand with a functioning collective rights management system in general. Therefore, the focus cannot be solely on the development of a cross-border licensing system but on the combination of more common ground and general conditions for collective management in the EU.
In order to achieve the objectives outlined, the EC proposed a legislative instrument on certain aspects of collective management and good governance of CMOs one year later which included some of the favoured principles and options.

2 Study, Impact Assessment and Commission Recommendation - 2005

One year after its Communication Paper, the EC issued a non-binding[456] Recommendation[457] on the collective cross-border management of copyright and related rights for legitimate online music services in 2005. The Recommendation was accompanied by a Study[458] on cross-border collective rights management and an Impact Assessment[459] reforming cross-border collective management for legitimate online music services.

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[456] As of Article 288 *TFEU* Recommendations have no binding force and do not create direct rights and obligations but can be taken into account when interpreting national rules, see Koenraad Lenaerts & Piet Van Nuffel, *European Union Law* (London: Sweet & Maxwell Ltd, London, UK, 2011) at [22-100].
[457] European Commission *Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services* (18.05.2005) 2005/737/EC.
[458] European Commission *Study (2005)*.
[459] European Commission *Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services* (11.10.2005) SEC(2005)1254.

(a) Study and Impact Assessment of 2005

The scope of the Study was the cross-border management of copyright in general but its emphasis was on cross-border collective rights management in the music industry as the impact of the digital transformation has been most felt in the music sector which operates like no other with complex licensing arrangements.[460]

The Study performed an in-depth analysis of the problems of the digital market related to cross-border collective management of rights in musical works.

The problem was defined as a "lack of innovative and dynamic structures for cross-border collective management of legitimate online services."[461] The Study found that the existing system of cross-border licensing and the associated remuneration distribution is dysfunctional and hampers the development of an innovative market for online music services.[462] Opposing the earlier favoured solutions of fostering existing RRAs, the Study stated that existing regulations in RRAs relating to territorial restrictions, discriminatory royalty distributions, and membership allocation cannot provide for universal, acceptable, multi-territorial arrangements for the online rights of all right holders concerned.[463]

The Study noted that the digital transmission methods used for making copyrighted work available online and across borders have created a demand for a new service that is able to provide for MTL without the restrictions in current RRAs. So far, the market had failed to produce sufficient structures for cross-border collective management services that provide for MTL without territorial and membership restriction providing for satisfactory cross-border royalty distribution systems.[464]

The Study presents the favoured policy objections and suggests solutions in order to reach the set goals with the overall aim to create a cross-border licensing structure for online music services within the EEA.

(i) Favoured policy objectives

The general objectives identified in the Study referred to the existing copyright policies in the EU which "must create a vibrant market for the online exploitation of copyright across the Community […] in which the revenue stream is transferred back to the creators in the most efficient and direct way."[465] The focus must be on opening the potential of the EU market and strengthening the confidence of right holders. The accessibility and clearance of protected works across the EEA need to be improved significantly, and right holders need more opportunities to participate in decisions regarding the revenue stream when their works are used online and

[460] European Commission *Study (2005)* at 7.
[461] European Commission *Study (2005)* at 6.
[462] European Commission *Study (2005)* at 9.
[463] European Commission *Study (2005)* at [10-12].
[464] European Commission *Study (2005)* [23-27].
[465] European Commission *Study (2005)* at [31-32].

across borders.[466] The objectives for a functioning cross-border rights management that need to be addressed when drafting new regulations are:

1. the introduction of a licensing policy that is in line with the demand of online service providers;
2. the enhancement of transparency regulations for CMOs;
3. the possibility for right holders to choose a CMO;
4. the improvement of copyright clearance across the EEA;
5. the guaranty of non-discriminatory CMO membership regulations;
6. the increased availability of multi-territorial licences for online content providers; and
7. the enhancement of transparency and accountability of CMOs.

The emphasised objectives mirrored, to a certain extent, the freedom of choice CMO mandate and good governance solutions discussed in prior policy documents, but ruled out the integration of existing RRAs. In order to reach the goals of the policy objectives and create a sufficient cross-border collective rights management system for all EU Member States, three solutions were proposed.

(ii) Status Quo solution

The first *Status Quo* solution would make no changes and leave further development to the market. This would leave the development of multi-territorial licensing to the market, most probably leading to a system that makes MTL for the online exploitation available, maintaining the customer allocation clause limiting the user to the CMO in the territory of its "economic residence." As already discussed by the Communication Paper of 2004, maintaining the status quo would bring no solution to existing licensing problems and slow down the process of developing a multi-territorial licensing system for the online exploitation of musical works, further hindering the establishment of new business models.

(iii) Elimination of territorial restrictions

The second option would eliminate territorial restrictions and discriminatory provisions in existing RRAs to improve their functioning and compliance with competition regulations. It reflects the IFPI model and combines elements of the proposed freedom of choice solution (Option 4 of the Communication Paper of 2004) in combination with the CMO mandate and RRAs solution (Option 5 of the Communication Paper of 2004). To ensure cross-border management of rights, this option would introduce a single entry point for content providers to acquire one licence covering the world's repertoire for the entire EU from a European CMO of

[466] European Commission *Study (2005)* at 32.

their choice. This would lead to a situation of MTL / MRL licensing where content providers are no longer restricted to their home territory and the respective operating CMO.[467] However, even though this option would lift some of the territorial restrictions, it would not improve services offered by CMOs. This option would lead to a situation where CMOs would offer licences for the same repertoire and territory. This option would benefit commercial users as it would reduce the licences required to only one for the entire territory of the EU and introduce competition on the commercial user level.

(iv) Right holders' choice solution

The third option would introduce choice for right holders and open CMOs up to competition. This option would give right holders the possibility for assigning the management of the EU-wide exploitation of their online rights to a CMO of their choice and therefore lift the existing territorial membership restrictions. [468] Instead of relying on RRAs offering licences for the world repertoire, CMOs would grant licences for the works of their direct members only. Those licences would come without territorial restrictions and would be valid for the entire EU. In order to offer an attractive repertoire, CMOs would be forced to compete for right holders. To attract right holders, CMOs would need to improve their services, especially in regard to the collection and distribution of royalties, and monitoring of use and efficiency of operation. This option would give CMOs the opportunity to build genre specific repertoires and develop niche markets. A system of direct membership would provide for more legal certainty for commercial users in respect of the repertoire included in, and territory covered by, the licence. CMOs would be able to provide for a more transparent royalty collection and distribution system which would develop without regulatory interference, stimulated by the competition for right holders between CMOs. However, granting right holders the freedom to move between CMOs would potentially lead to a fragmentation of repertoire, making it difficult for commercial users to keep track and find the right CMO. The Study notes that Option 3 will lead to repertoire fragmentation but also strengthen the bargaining power of CMOs offering online licences and competition on right holders' level.

(v) Conclusion drawn by the Study 2005

The Study took an earlier consultation[469] with stakeholders into account which showed that Community action in respect to cross-border management with a focus

[467] European Commission *Study (2005)* at 34.
[468] European Commission *Study (2005)* at 35.
[469] COM(2004)261 final at 8.

on royalty distribution and the licensing process of copyrighted works would be most welcome.

Stakeholders argue that a system where RRAs do not provide for obligations to distribute royalties collected on behalf of non-domestic right holders back to their respective managing CMO is seen as the major obstacle for the functioning of the market. Therefore, for further development of an EU-wide cross-border licensing system, it is *condicio sine qua non*[470] that RRAs function in a non-discriminatory way so that right holders from anywhere in the EU receive royalties that are in line with the actual use of their works.[471]

Common ground exists in that an EU-wide cross-border licensing model which respects the value of copyright should be developed but disagreement, whether competition between CMOs and free choice for commercial users is favourable, remained.

After analysing the impact of each option on different aspects of the market and taking the consultation with stakeholders into account, the Study comes to the conclusion that granting right holders the opportunity to freely choose the CMO managing their online rights, right holders' choice solution (Option 3 of the Study 2005), would guarantee the best outcome for an EU-wide licensing system for the online exploitation of musical works. In addition to the freedom of choice granted to right holders, it is important that CMO membership is not limited to specific categories of right holders and open to all right holders or their representatives. Right holders must be free to withdraw their rights in total or partially from the management of a CMO within a reasonable notice period, and entrust them to a CMO that is better suited.

To safeguard the competitive nature of a cross-border management system for the online exploitation of rights based on the proposed right holders' choice solution (Option 3 of the Study 2005), the Study, accompanied by a clarifying Memo,[472] outlines the core principles EU actions should be based upon.

Principles regarding the relationship of right holders and CMOs should include the freedom for right holders to choose a rights managing CMO, and the possibility to become a direct member of the chosen CMO combined with the option to withdraw rights in total or partially from a CMO's management. CMOs would have to accept all categories of right holders, including right holders representatives, and guarantee equitable service and royalty distribution. Principles regarding the removal of territorial restrictions and limitations would include that CMOs are able to grant EU-wide licences and right holders are no longer limited to their national CMO.

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[470] Indispensable condition.
[471] European Commission *Study (2005)* at 52.
[472] European Commission *Memo/05/241* (2005).

The Study and Impact Assessment of 2005 turn away from the idea of fostering or improving RRAs between CMOs, and instead propose regulations for CMOs concerning their relationship with their members and lifting territorial restrictions by granting right holders the choice of their rights managing entity and the possibility to split their rights and have them managed separately. The outcome emphasised would have CMOs competing for members by offering better and more effective services as the only distinctive feature on offer. Therefore, regulations regarding governance and transparency are not required at this stage and their regulation is left to the competitive market. Although earlier policy documents stressed that a sufficient cross-border licensing solution can only be reached if national regulations of CMOs are harmonised at EU level, the Study and Impact Assessment of 2005 is convinced that the introduction of competition can solve all problems. The introduction of competition between CMOs by the introduction of a right holders' choice solution was adopted in the EC Recommendation of the same year.

Table 7 Overview: Changes proposed by Study and Impact Assessment of 2005

Policy Document	Proposed Regulations to improve Governance and Transparency of CMOs	Proposed Regulations for Multi-Territorial Licensing
Study, Impact Assessment 2005	**Option 1** – Status Quo **Option 2** – Improving existing RRAs between CMOs **Option 3** – Right holders choice in rights managing CMO **<u>Favoured Option 3</u>** As it would open CMOs to competition which would ultimately lead to CMOs being more efficient, transparent and operate in good governance	**Option 3 -** would lift territorial membership restrictions and enable CMOs to license their repertoire for the entire EU market, ultimately leading to a system of MTL No special regulation on MTL

(b) Recommendation of 2005

Based on the Study and its accompanying documents, the EC decided to issue a non-binding Recommendation to the Member States as a solution to the cross-border management problems analysed, leaving it to the Member States to address the issue. The Recommendation of 2005 was based solely on the right holders' choice solution (Option 3) introduced by the preceding Study of 2005. Earlier findings connecting the differences in operation and functioning of CMOs to the existing problems of cross-border rights management were not taken into consideration. The Recommendation of 2005 invited Member States to take the necessary steps to "facilitate the growth of legitimate online services in the

Community by promoting a regulatory environment which is best suited to the management, at community level, of copyright and related rights for the provision of legitimate online music services."[473]

It was recommended that the Member States introduce the freedom of choice for right holders, giving them the opportunity to freely choose their rights managing entity and enabling right holders to decide the territorial scope of the mandate granted and the possibility to manage their online rights separately or through a different rights managing entity under certain conditions.[474]

If right holders withdraw parts of their rights from the management of a CMO, that CMO is required to take measures to withdraw the rights concerned from existing RRAs.[475]

Additionally to the freedom of choice granted to right holders, certain regulations concerning CMOs were recommended to ensure sufficiency.

Accordingly, CMOs are obliged to inform right holders and commercial users of the repertoire represented including existing RRAs, the territorial scope of their mandates, the applicable tariffs and any changes in their repertoire caused by withdrawals of rights by right holders.[476] Furthermore, CMOs are required to grant licences to commercial users based on objective, non-discriminative criteria while commercial users should be required to inform CMOs of the features of the service they acquire a licence for.[477]

Terms and conditions for royalty distribution and deductions were recommended according to which royalty distribution should be in an equitable manner to all members represented and deductions other than those for provided services must be outlined explicitly.[478] The non-discrimination principle discussed in earlier RRAs and policy documents, and a participation in internal decision-making was also recommended.[479] Additionally, CMOs should be more transparent and obliged to report regularly to all members represented on licences granted, applicable tariffs and royalties collected and distributed.[480]

The additional regulations accompanying the introduction of the freedom of choice for right holders marked the start to the regulatory process of CMOs, leading to the introduction of more explicit governance and transparency regulations in later policy documents.

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[473] *Commission Recommendation* (2005/737/EC) at No. 2.
[474] *Commission Recommendation* (2005/737/EC) at No. 3, 5 (a)-(c).
[475] *Commission Recommendation* (2005/737/EC) at No. 5 (d).
[476] *Commission Recommendation* (2005/737/EC) at No. 6 and 7.
[477] *Commission Recommendation* (2005/737/EC) at No. 8 and 9.
[478] *Commission Recommendation* (2005/737/EC) at No. 10-12.
[479] *Commission Recommendation* (2005/737/EC) at No. 13.
[480] *Commission Recommendation* (2005/737/EC) No. 14.

After its release, the Recommendation of 2005 was fiercely criticized, especially for its lack of legitimacy and negative effects on local repertoires and cultural diversity. [481]

The choice of a Recommendation as a legal instrument to ease the existing problems associated with cross-border rights management and licensing has no power to create the much needed legal certainty for right holder and commercial users within the Internal EU Market. On the contrary, it has the potential to pose a threat for local repertoires and cultural diversity.[482]

The Communication paper of 2004 and the Study and Impact Assessment of 2005 identified two corresponding problems hindering the development of the market, the lack of efficient structures for the cross-border management of rights at EU level, and the existing territorial and membership restrictions in RRAs concluded between CMOs. Even though the correlation of the two problems was recognised, the chosen solution in the form of a Recommendation acknowledged only the latter problem, hoping to solve those remaining by increased competition ultimately leading to more efficient management structures.

Legal commentators questioned whether the liberalization of the market was the best solution to the problems of cross-border licensing, fearing that it could lead to the emergence of monopolies or regional oligopolies for the management of online music rights, with negative effects on cultural diversity.

The EC, on the contrary, was hoping that its chosen concept would lead to the establishment of attractive genre-specific repertoires managed by one CMO with the ability to grant repertoire-specific licences for the entire EEA. [483] It was hoped that this would lead to CMOs competing for right holders complementing their genre-specific repertoire, shifting the licensing system from territorial specialization to repertoire-specialization.[484]

Although the Recommendation mentions that:

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[481] 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* (25.09.2008) P6_TA(2008)0462; see also Guibault, van Gompel "Collective Management in the European Union" at 165; see also M.M. Frabboni, "Online Music Licensing: The Calm after the Storm" (2006) 17 Ent. L. Rev. 65-69 at 81; M. Ricolfi, "Individual and Collective Management of Copyright in a Digital Environment" in P. Torremans (ed.) *Copyright Law: A Handbook of Contemporary Research (*Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, US, 2007) at 297.

[482] Guibault, van Gompel "Collective Management in the European Union" at 165.

[483] *Commission Recommendation* (2005/737/EC) at 44; Cf. von Einem „Grenzüberschreitende Lizenzierung von Musikwerken in Europa – Auswirkungen der Empfehlung der EU-Kommisssion zur Rechtewahrnehmung auf das System der Gegenseitigkeitsverträge" MMR (2006) at 648.

[484] Manuela Maria Schmidt "Die kollektive Wahrnehmung der Online-Musikrechte im Europäischen Binnenmarkt" MMR (2005) at 787 and von Einem "Grenzüberschreitende Lizenzierung von Musikwerten in Europa - Auswirkungen der Empfehlung der EU-Kommission zur Rechtewahrnehmung auf das System der Gegenseitigkeitsverträge" at 649.

> [it] would be 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 right holders,[485]

it does not invite Member States to provide for MTL in its operative part. The Recommendation of 2005 made a clear statement against RRAs in order to grant right holders the freedom to choose their managing CMO freely and the opportunity to split their rights between entities. This scenario would make the maintenance of RRAs for online rights costly and time-consuming due to the continuous fluctuation and changes in mandates.[486]

Granting right holders the ability to entrust the management of their online rights to a CMO of their choice has the potential to lead to the fragmentation of the world repertoire, making it impossible to acquire one licence for the whole repertoire from one CMO and has the potential to bring disadvantages to both right holders and online content providers.

Online content providers would face the difficulty of finding the CMO managing the repertoire needed which could be a time consuming and costly task as there is no publicly available information on the repertoire managed by CMOs. It would mean that online music service providers would need to acquire multiple repertoire-specific licences from numerous European CMOs while keeping track of artists' movements between them. This could lead to a situation in which an online music service provider would obtain licences only from CMOs managing the most popular repertoire rather than shop around for niche or local repertoire.

If CMOs would start to focus on building genre specific repertoires, right holders of less popular works, or works that do not fit into specific genres, could face difficulties assigning their rights to a CMO. Potentially, this could lead to CMOs refusing to represent certain right holders online rights due to the absence of regulations regarding an obligation for CMOs to contract with right holders.

As outlined by the Max Planck Institute[487] in its statement to the Recommendation, the best-case scenario would see competition between a small number of CMOs, namely those with the most attractive and efficient service for right holders. In the worst case, the most popular and commercially attractive repertoires, including the Anglo-American repertoires, would be managed by the biggest CMOs, leaving only

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[485] *Commission Recommendation* (2005/737/EC) at 8.

[486] Jütte *Reconstructing European copyright law for the digital single market between old paradigms and digital challenges* at 437, see also P. Torremans (ed.) *Copyright Law: A Handbook of Contemporary Research* at [255, 269].

[487] Max-Planck Institute for Intellectual Property, Competition and Tax Law *Stellungnahme des Max-Planck-Instituts für Geistiges Eigentum, Wettbewerbs und Steuerrecht zuhänden des Bundesministeriums der Justiz betreffend die Empfehlung der Europäischen Kommission über die Lizenzierung von Musik für das Internet vom 18. Oktober 2005* (2005) 2005/737/EG at paras [7-8].

smaller and less popular repertoires to smaller CMOs. Compared to the existing system based on RRAs between CMOs limiting the territorial reach of licences, the new system based on right holders' freedom of choice seems to create more problems than it solves.

The practice showed that since the Recommendation was issued the number of entities offering EU-wide licences had increased and the most popular repertoires have been concentrated in a few newly established entities bundling their efforts to provide for a one-stop-shop for the licensing of online rights in musical works.[488] Online users were able to acquire MTLs for the entire EEA but, depending on the repertoire they wished to use, had to clear licences with even more entities than before. In the absence of a harmonized licensing model, CMOs became engaged in litigation against each other, questioning the mandate for EU-wide licensing.[489] Despite the good intention of the EC to harmonize cross-border collective management of copyrights for the online market, the Recommendation of 2005 rattled the EU's collective management system and created more obstacles for online content providers. By focusing entirely on one element of the well-known existing problems related to cross-border licensing, and hoping that the market would sort itself out eventually was short-sighted, and lead to the creation of more unnecessary confusion. Laying down terms and conditions around the freedom of choice for right holders was only trying to eliminate the effects of a collective rights management system dominated by national legislation and avoiding facing the bigger picture of the complexity of the exploitation of rights.

The legislative history of copyright has shown that adopting legislation to new forms of technical developments, especially those involving the exploitation of rights through new channels, is linked to a certain kind of indecisiveness as to the necessity and scope of legal actions.

Early on, the European Parliament urged the EC to launch a proposal for a Directive with the scope to regulate the collective rights management in the online music sector at community level by taking into account the special digital features and existing cultural diversity. It would take nearly another ten years until a Directive on the matter was finally adopted and implemented in the legislation of the Member States.

As predicted by most of the critiques, the situation did not improve after the release of the Recommendation of 2005, on the contrary, it caused fragmentation of repertoires that were not foreseen. Not the ordinary right holder but big publishers made use of the right withdrawal opportunity and started to manage their rights separately or through new specialised entities. This led to fragmentation of

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[488] European Commission *Monitoring of the 2005 Music Online Recommendation* (07.02.2008) 03/128702_5 9 3 at [5-7].

[489] Guibault, van Gompel "Collective Management in the European Union" at 167.

repertoire, splitting it not only between CMOs but separately managed Anglo-American repertoires. Instead of making the licensing system for the online market more comprehensive, the Recommendation of 2005 worsened the situation.

Table 8 Overview: Changes recommended by Recommendation of 2005

Policy Document	Recommended Regulations to improve Governance and Transparency of CMOs	Recommended Regulations for Multi-Territorial Licensing
Recommendation 2005	Introduced right holders choice in rights managing CMO combined with regulations on royalty distribution and deduction on EU level	CMOs are able to grant licences for their own repertoire for the EU territory No special regulation on MTL

3 Impact Assessments 2012[490] *and Proposal of 2012*

In the years following the EC's Recommendation of 2005, the creation of a Single European Market for intellectual property rights became more and more the focus of attention. The Europe 2020 Strategy,[491] the ECs Digital Agenda for Europe,[492], the EC's Communication on A Single Market for Intellectual Property Rights[493] (IPR Communication), and the EC's Communication on A Coherent Framework for Building trust in the Digital Single Market for e-commerce and online services[494] were considered when conducting an Impact Assessment[495] on collective management of copyright and related rights and multi-territorial licensing

[490] European Commission *Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* (2012) COM(2012)372 final SWD(2012) 205 final.
[491] European Commission *EUROPE 2020 – A strategy for smart, sustainable and inclusive growth* – (2011) COM(2011) 2020.
[492] European Commission *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe*, COM(2010) 245 final/2 (adopted 19.05.2010).
[493] European Commission *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe* (24.05.2011) COM(2011) 287 final.
[494] European Commission *Commission Communication to the European Parliament, The Council, The Economic and Social Committee and the Committee of the Regions, A coherent framework for building A coherent framework for building trust in the Digital Single Market for e-commerce and online services* (11.11.2012) COM(2011) 942 final.
[495] European Commission *Commission Staff Working Document, Impact Assessment, Accompanying the document, Proposal for a Directive of European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* (11.07.2012) SWD(2012) 204 final.

of rights in musical works for online use in the internal market accompanying the final Proposal of the CRM-Directive in 2012 (Impact Assessment of 2012).

The Impact Assessment of 2012 analysed the inefficiencies associated with CMOs in general and the specific complexities of the collective licensing of authors' rights in musical works for their online use with the aim to improve the governance and transparency of CMOs and the offering of MTL for the online exploitation of musical works.[496] The Impact Assessment stated that the problems related to MTL originate from the inability of CMO members to access information and exercise real control over CMOs' decision-making processes. Another aspect of the problem was the national differences in CMO regulations, invoicing and data processing.[497] It was noted, that the Recommendations favoured solution of right holders' choice in a rights managing entity, can only be effective if there is no legal barrier as to the establishment, operation and control over the management strategies of CMOs.[498]

Since the Recommendation of 2005, the development of MTL for online music rights evolved, as expected, in different directions, depending on right holders and market sectors relying on different variations of rights management. CMOs adapted very slowly to the new concept of multi-territory repertoire licensing introduced by the Recommendation of 2005. The problems which arose were usually related to governance and transparency regulations which differed in each of the Member States and, despite anticipations, were not harmonised by the competition introduced.

Instead, several right holders, especially music publishers, withdrew the management of their online rights from CMOs and started to license them directly. This eventually triggered the repertoire fragmentation the Max-Planck Institute had foreseen earlier in their critiques of the Recommendation of 2005. The general differences in rights management between the Anglo-American system and the European system contributed to the repertoire fragmentation on the right holders' level. While the Anglo-American system has authors of musical works assigning their mechanical rights to music publishers and their performing rights to CMOs, the rest of Europe has authors assign both rights to CMOs that publishers are usually members of. At the time of the Impact Assessment, online music providers needed to obtain licences for the online exploitation of musical works from a number of different licensors and licensing entities. While some CMOs granted multi-repertoire licences for their own repertoire, others were still granting multi-repertoire licences for their own territory. In addition, music publishers or their agents were granting a multi-territorial licence for their Anglo-American repertoire separately. In addition, online service providers had to acquire licences from

[496] *Impact Assessment* SWD(2012) 204 final at 8.
[497] *Impact Assessment* SWD(2012) 204 final at 15.
[498] *Impact Assessment* SWD(2012) 204 final at 15.

performers and producers who typically licensed their rights directly or were organised in special performers' CMOs, sometimes associated with authors' CMOs.

As identified previously in the Communication Paper of 2004 and the Study of 2005, the Impact Assessment of 2012 recognized the existence of two interlinked layers of problems concerning collective rights management, the functioning of CMOs in general, and the supply of multi-territorial licences for the online exploitation of musical works. The efficiency of granting right holders the right to choose a rights managing CMO is dependent on sufficient common governance and transparency rules for all rights managing entities.

The Impact Assessment of 2012 identified four general problems in relation to multi-territorial licensing.

(a) Existing problems

The first problem concerned the national differences in governance and general transparency standards which are applied by CMOs in each Member State. This was not a new problem as it was already identified in the Communication of 2004 and the Study of 2005. Evaluation of the impact of the Recommendation of 2005 and Member State experiences showed that national rules and self-regulation are not sufficient to guarantee that important principles are properly and consistently applied at an EU-wide level.[499] The majority of creators, music publishers, commercial users and consumers participating in the evaluation process called for improved common standards of governance and transparency rules applicable to CMOs. However, CMOs argued that self-regulation would be efficient enough to ensure high standards of governance and transparency. The Impact Assessment of 2012 stressed that right holders should be guaranteed a position where they can control the management of their interests, and influence and improve the CMOs actions on their behalf. In practice, this can become inherently difficult for foreign right holders, especially if there is no transparency regarding cross-border flows and deductions.

The second problem identified by the Impact Assessment concerned the financial management and general royalty distribution to CMO members. The financial management, and especially the distribution of royalties has been criticised many times before and was addressed in the Study of 2005. Usually, CMOs collect money on behalf of right holders but the distribution of that money back to right holders can be time-consuming and can take up to three years until finalised and distributed.[500] This means that a substantial amount of money stays with the CMO

[499] *Impact Assessment* SWD(2012) 204 final at Annex L [106-142].
[500] *Impact Assessment* SWD(2012) 204 final at 19.

as pending distribution, generating interest revenues. At the time of the Impact Assessment, there were no satisfactory distribution rules dealing with how, and for what, existing pending distribution funds should be used. The Impact Assessment of 2012 came to the conclusion that non-discriminatory distribution rules, and common and transparent accounting standards would be necessary to ensure sufficient flow and royalty distribution to right holders. It further concluded that only with common governance and transparency regulations, and an adequate royalty collection and distribution system, could the anticipated competition between CMOs and the functioning of the system of freedom of choice be achieved and develop its full potential.

The third problem concerned the economic viability of automated data processing systems related to MTL. Usually, licences are transactional which means that the user must report the works he used to the CMO. The CMO will then invoice on a per-user/per-work - or share of work – basis.[501] To grant licences for online services on a multi-territorial basis it is necessary to process a considerable amount of data concerning the reported use of music. To be economically viable, this would require adequate automated processes and databases that hold data on rights ownership to all music in all territories covered by the MTL granted.

At the time of the Impact Assessment of 2012, many CMOs were unable to accurately identify rights' ownership in musical works and work-shares or provide for fully electronic data exchange with online music services.[502] Monitoring the rights managed and the fluctuation due to right holders' withdrawals without automated data processing mechanism would be most likely to result in inaccurate or double invoicing, delays in invoicing, and consequently delays in royalty payments to right holders.

The fourth problem identified by the Impact Assessment of 2012 concerned the national scope of the legal framework applicable to CMOs in the Member States. This was never directly mentioned in the preceding policy documents but was always noted in the margin. At the time of the Impact Assessment of 2012, two licensing systems existed in parallel leading to legal uncertainty and double licensing, and hindering the development of a functioning multi-territorial licensing system. Under the existing EU *acquis,* notably the InfoSoc Directive, CMOs are categorised as service providers benefiting from the free movement of services principle. Uncertainty remains, especially when applying those principles to CMOs when granting MTL to users established in other Member States. The possibility of splitting the management of online rights from the rest of the rights which remain on a national level gave rise to the emergence of new rights managing entities, usually CMO joint ventures, which specialised in online rights. At this point, it is

[501] *Impact Assessment* SWD(2012) 204 final at 25.
[502] *Impact Assessment* SWD(2012) 204 final at 25.

unclear whether those entities qualify as CMOs or service providers, creating more uncertainty in how and to what extent the existing legal framework can be applied. Emerging from this situation was a system of parallel licensing on a national and EU-wide basis.

To gain a certain stage of legal certainty, commercial users started to obtain licences from CMOs representing major repertoires, but, at the same time mono-territory multi-repertoire licences from national CMOs which were still based on existing RRAs. This situation led to a rising number of licences being required and additional costs, and was the complete opposite to what the Recommendation of 2005 was anticipating. Consequently, the existing licensing scenario provided for unnecessary obstacles, especially for new online service providers having to clear a variety of licences differing in the scope of territory and repertoire, making the licensing process time-consuming and costly.[503] As a result, new online services tended to launch in one or a few Member States or offer major repertoires only. This could have negative effects on niche and local repertoire and lead to the loss of cultural diversity. Leaving the opportunities offered by the online market unexploited has narrowed the trust in CMOs' ability to efficiently manage rights entrusted to them.

The Impact Assessment of 2012 stated that in the absence of regulations on an EU level, "rights licensing for online services would remain complex and the rollout of online services across the Member States would remain patchy."[504] The conclusion drawn was that an EU intervention would be the best way to ensure that the right enforcement is sufficient, and the collection and distribution of royalties is organised consistently across the EU.

(b) Objectives of EU intervention

The objectives of the EU interferences are divided into two areas, namely the offline and online market for copyright protected goods and services, and the online market for music services. The overall scope was to maximise right holders earnings, foster cultural diversity, ensure efficient online services across the EU and grant access to a wide range of services and repertoires. This reflects the findings of the preceding Communication Paper of 2004 and the Study of 2005. The need for improvements in the supply of collective rights management services by all CMOs operating in the EU market was raised. In order to achieve the general objective, sufficient transparency and control mechanisms for the activities of CMOs would be necessary to ensure right holders' access to information and exercise of their membership rights, and fair transparent royalty distribution.

[503] *Impact Assessment* SWD(2012) 204 final at 26.
[504] *Impact Assessment* SWD(2012) 204 final at 28.

The general objective for the online market for musical works is the restructuring of the EU Single Market for online music services. In order to achieve the set goal, the multi-territorial licensing of authors' online rights and the structuring of repertoire must be improved through enhancing legal certainty for all parties involved and fostering the use of a licensing infrastructure that complies with the needs of the online market.
In order to achieve the goals set and solve the problems outlined, the Impact Assessment splits the policy options in regulations for transparency and control of CMOs and multi-territorial licensing for the online exploitation of musical works. In a first step, it analysed and compared the impact of four policy options for transparency and control of CMOs, followed by the analyses of five policy options regarding the multi-territorial licensing for the online exploitation of musical works.[505]

(c) Proposed options on governance and transparency for CMOs

Four options were proposed to address the existing problems and provide for a satisfactory solution in regard to regulations on governance and transparency.

(j) Status Quo solution

The first Status Quo solution (Option A1) would maintain the existing situation and leave it to the self-regulation by the market and industry to address the problems defined. The same approach was ruled out earlier in the Study of 2005 due to its inefficiency. Even though the market had developed since then, leaving it to the Member States and national regulations to introduce rules of governance and transparency for CMOs would not improve the situation and would be likely to lead to variations in approach and standards, moving even further away from a harmonised standard. The development of common ground for governance and transparency rules and regulations would depend on the willingness of CMOs to comply with them. This would not be effective enough to provide a sufficient basis. This would not bring any improvements to the problem of different operating conditions for CMOs in the Member States, but rather, would hinder the development of common grounds. The situation for right holders, especially regarding their limited influence on the decision-making process of CMOs on cross-border management and royalty flows would remain difficult. The existing unsatisfactory licensing situation would remain and bring no improvements for either right holders or online content providers.

[505] *Impact Assessment* SWD(2012) 204 final at [33-52] and Annex N.

(ii) Enforcement solution

The second enforcement solution (Option A2) would provide for better enforcement of existing secondary EU legislation rules and ensure that those principles were applied sufficiently in the Member States. To a certain extent, this option reflected earlier considerations made in the Communication Paper of 2004 which suggested CMOs be mandated and their modalities harmonised. This option would be based upon harmonising existing provisions of EU law (the freedom to provide services, and competition rules concerning concerted practice and the abuse of a dominant position) and the case law of the EUCJ and the Commission (non-discrimination and right holders' choice) to ensure consistency in the application of those principles within the EU. To ensure consistency in the application of existing principles in the Member States, the EC and relevant national authorities would have to cooperate, especially in regard to exchanging information about new cases and decisions, and cooperating in the investigation of related problems. The solution is based on legislation that lacks regulations for governance and transparency for CMOs and would, therefore, not solve any of the problems regarding the differences in the ways CMOs operate and the conditions they apply and leave it once more to the Member States and the market to find a fitting solution.

(iii) Codification of existing principles solution

The third codification of existing principles solution (Option A3) would go one step further and codify existing principles that have emerged from case law of the CJEU and the EC, including those laid down in the Recommendation of 2005 and incorporate them into binding legislation. This would clarify the principles applicable and would be binding for all Member States. This would not only create a stable basis for the enforcement of the principles but establish conditions by legislation. This would lead to a non-discriminatory treatment and fair and balanced representation of right holders by CMOs, and ensure right holders were included in the decision-making process of CMOs, and their freedom of choice of a managing CMO. This would lead to a certain degree of harmonisation but not guarantee sufficient control over CMOs' functioning, especially their governance and transparency and the efficient exercise of right holders rights'. Although this solution would create a stable basis for the enforcement of the established principles, it would bring no improvement to recently identified problems regarding financial transparency and the control of CMOs through their members.

(iv) Governance and transparency framework for CMOs

The fourth governance and transparency framework for CMOs' solution (Option A4) would go beyond the codification of existing principles and not only codify

them but set additional principle-based rules to include recently identified problems associated with the financial management of CMOs and their members' control in the decision-making process. This solution would establish common rules and minimum standards for governance and transparency for all CMOs operating in the territory of the EU. For better understanding and enforceability, such regulations would be set out in one legal instrument. In addition, to harmonising common transparency and governance, it would require Member States to provide for sufficient sanctions for breaches of those rules. This solution would fill in the gaps left by the codification of the existing principles solution (option A3) and guarantee right holders are included in the decision-making process of CMOs, and a certain control of the management of their rights. It would lead to a better system of royalty distribution to right holders in general and strengthen the position of right holders that are not members of the respective royalty collecting CMO. The solution would respond to most of the problems outlined and ensure better participation and control of CMOs by their members, better management of the income through collection of royalties and more transparency in regard to royalty collection and distribution to members. To achieve the goal set, two approaches would be possible. First, a combination of regulation and industry self-regulation or second, a legislative framework for governance and transparency regulations establishing a detailed legislative framework all CMOs operating in the EU territory have to comply with. Option A4 was further divided into two possible sub-options presenting different approaches.

While the first approach would depend on the EU code of conduct and the willingness of CMOs to adhere to it, the second approach would go further and codify binding rules regulating governance and transparency in CMOs.

(v) Recommendation

The Impact Assessment of 2012 compares the four solutions discussed above on governance and transparency by analysing their impact on different aspects of the market and stakeholders and their sufficiency and effectiveness to achieve the goals set. It concludes that the best solution would be a harmonised framework regulation governance and transparency of CMOs which would have the most positive impact on the market. It would guarantee right holders access to information and allow them to make informed choices in the decision-making process and compare the levels of service CMOs offer. This would ultimately put competitive pressure on CMOs and solve most of the problems described.

(d) Proposed options on multi-territorial licensing

As discussed in the Impact Assessment of 2012, collective management and multi-territorial licensing are intertwined and regulating one without the other would not produce the changes anticipated. Therefore, in addition to the options on governance and transparency for CMOs, the Impact Assessment of 2012 proposed and analysed five solutions for multi-territorial licensing for online use of musical works by considering the uniqueness of the online market.

(i) Status Quo solution

The first status quo solution (Option B1) would be to maintain the status quo which would leave it to the self-regulation by the market to work out a proper concept for multi-territorial licensing on a national level without an overall harmonisation for Europe.

(ii) European licensing passport solution

The second European Licensing Passport solution (Option B2) introduced the concept of a European licensing passport to build an effective and responsive MTL infrastructure.[506]

CMOs offering multi-territorial licences within the EU would have to comply with basic conditions defined by legislation at the EU level. Amongst others, the four core conditions for CMOs to grant MTL would include sufficient data handling, invoicing, transparency standards, and dispute resolution mechanisms. The handling of data would require CMOs to maintain an up-to-date database that provides for precise identification of repertoire and is able to process electronic registration of works, mandates and changes of such due to right holders switching from one entity to another. CMOs would also have to provide for sufficient invoicing structures that guarantee timely and accurate invoicing, and also providing for resolutions for conflicting ownership claims. The transparency standards towards right holders and commercial users would include improved accessibility of ownership and licensing information, and consequently, royalty payments and reporting.

The passport system would open up the possibility for CMOs complying with the basic standards to offer multi-territorial licences, and to aggregate rights and repertoires on the basis of mandates from right holders and other CMOs. The system of multi-territorial licensing would be based on mandates from right holders and other CMOs but those agreements would remain subject to competition law and regulations.

[506] *Impact Assessment* SWD(2012) 204 final at 43.

CMOs which do not comply with required basic conditions are entitled to entrust their repertoire to a passport entity of their choice which would be obliged to take on the repertoire on reasonable conditions and to license it on a non-discriminatory basis.

This would grant all right holders the possibility to entrust their online rights in their music works to a passport entity of their choice so that the whole European repertoire can be licensed on a multi-territorial basis in the long run. This option would lay down common MTL rules for all entities offering licences and operating on the European market and create competition between CMOs in regard to providing for the most efficient licensing practice.

Services ancillary to TV and radio programmes provided by broadcasters (simulcasting) would be exempted from the multi-territorial system, while still being able to acquire special MTL from national CMOs.

The passport option would only apply to online rights and would not affect offline rights which would still be managed by national CMOs due to their better knowledge of the market.

The passport option reflects various previously discussed options and brings them together to a certain extent. Certain aspects of the licensing structures and policy resolutions found in the IFPI agreement and the CISAC model contracts, the Communication Paper of 2004 and the Study of 2005 have been included. The passport option takes the earlier critiques of the Recommendation of 2005 into account and tries to overcome them by calling for a binding legal instrument to regulate multi-territorial licensing, and balancing the negative effects on local repertoires and cultural diversity by providing a tag-on solution for smaller CMOs. In short, the passport system codifies RRAs between CMOs for online rights in music and combines them with governance and transparency regulations relying on voluntary licensing and voluntary aggregation of repertoire on a contractual basis. This could lead to greater legal certainty in the licensing system and a reduction of licences required, and ensures common rules for all licensing entities across the EU. The success of this option would be dependent on the development and number of passport entities.

(iii) Parallel direct licensing solution

The third parallel direct licensing solution (Option B3) would allow for parallel direct licensing giving right holders the opportunity to grant CMOs a non-exclusive mandate to manage their rights and the ability to grant parallel direct licences to commercial users.[507] This option takes up the problems related to the exclusivity of rights and its managing mandates as suggested before in the Communication Paper

[507] *Impact Assessment* SWD(2012) 204 final at 44.

of 2004, but shifts the focus from stripping online exploitation rights of their exclusive status to the exclusively granted management mandates of CMOs. Granting non-exclusive mandates to CMOs, while concluding direct licensing agreements with publishers and/or commercial users, would open up the market to more uncertainty on different levels, weakening the position of right holders when negotiating direct licensing agreements. The direct licences granted would be multi-territorial but limited to the right holders' works. There is no specific obligation for entities granting multi-territorial licences and therefore this would not solve the related problems. This would have the potential to create more confusion and fragmentation of repertoire and create even more legal uncertainty.

Overall, this option would provide for competition between CMOs, but it would not establish common rules for MTL or counteract repertoire fragmentation, leaving it to the market to solve common problems.

(iv) Combination of extended collective licensing and country of origin principle

The fourth combination of extended collective licensing and country of origin principle solution (Option B4) introduced a system of extended collective licensing in combination with the country of origin principle. This would establish a blanket licensing system based on the presumption that each CMO has the ability to provide for such a licence covering the online use of the entire European repertoire. Instead of having to clear licences in all 27 Member States, the user only needs to clear licences in the country of origin of the transmission. While a similar system is working for the transmission of musical works via satellite as laid down in the Satellite Directive, it is difficult to apply for online transmission due to the special infrastructure of the internet. The application of the country of origin principle has been discussed earlier in the Communication Paper of 2004 and was ruled out due to the user restrictions conflicting with competition regulations. Therefore, such a system could not provide for efficient MTL regulations.

(v) Centralised portal solution

The fifth centralised portal solution (Option B5) would establish a centralised licensing pool allowing for CMOs to combine their repertoire and grant MTL/MRL.[508] The commercial user would be able to acquire MTL/MRL directly from the licensing portal. The portal would allocate the request to a participating CMO with which the commercial user can conclude a licensing agreement.

[508] *Impact Assessment* SWD(2012) 204 final at 46.

Participating CMOs would have to comply with minimum standards of service, data processing and general IT services.[509]
The rights granted to the portal by CMOs would be on a non-exclusive basis and allow CMOs to grant licences for their territory and repertoire without using the portal. This option would create a pan-European organisation with a *de facto* monopoly power and could conflict with EU competition rules. The Impact Assessment of 2012 rules this solution out immediately without any further assessment of it.

(vi) Recommendation

The Impact Assessment of 2012 comes to the conclusion that the European Passport solution would be best suited to provide for MTL, reduce transaction costs and ensure more legal certainty. [510] It would introduce common rules which would provide for a basis for trust and confidence between CMOs, and foster voluntary cooperation to provide for MTL. All other options lack minimum standards or common rules to guarantee the establishment of a fair MTL system.

(e) Outcome and best suited option

As stated earlier in the Impact Assessment of 2012, to solve the general problems, a combination of policy options for the control and transparency of CMOs, and on multi-territorial licensing for the online use are crucial. Therefore, the Impact Assessment of 2012 comes to the conclusion that a combination of a legal framework of governance and transparency regulations, in combination with the European passport solution would be the most efficient solution to the existing licensing controversy. The best option to implement such a solution into a legal framework would be a single Directive including regulations that ensure a certain minimum degree of harmonisation but leave enough room for more specific national regulations.

[509] *Impact Assessment* SWD(2012) 204 final at 47.
[510] *Impact Assessment SWD(2012) 204 final* at 53.

Table 9 Overview: Changes proposed by the Impact Assessment of 2012

Policy Document	Proposed Regulations to Improve Governance and Transparency of CMOs	Proposed Regulations for Multi-Territorial Licensing
Impact Assessment 2012	**Option A1** – Status Quo **Option A2** – Improving enforcement of existing legislation **Option A3** – Codification of existing principles **Option A4** – Introducing governance and transparency framework **Favoured Option A4** As it would harmonise standards applied by CMOs, their financial management and royalty distribution	**Option B1** – Status Quo **Option B2** – EU Licensing Passport **Option B3** – Parallel direct licensing **Option B4** – Extended Collective Licensing **Option B5** – Centralised Licensing Pool **Favoured Option B2** As it is based on competition and introduces special regulations for CMOs offering MTL in their repertoire

4 Directive Proposal of 2012

Based on the findings of the Impact Assessment of 2012 and the answers to the public consultation of stakeholders launched in 2009,[511] the EC drafted a final Proposal for a Directive on Collective Management and Multi-territorial Licensing in 2012.[512] The Proposal aimed to "improve the standards of governance and transparency of CMOs" and "facilitate multi-territorial licensing."[513]

The Proposed Directive applied to "the management of copyrights and related rights by collecting societies, irrespective of the sector in which the societies are active" and "multi-territorial licensing of online rights in musical works by authors' collecting societies" and is divided into four titles. The first title resembles the findings of the Impact Assessment of 2012 and deals with regulations on governance and transparency of CMOs while the third title reflects the European passport solution. The fourth and fifth titles contained the enforcement measures, reporting and final provisions.

The main aim of the proposed Directive was to coordinate national rules concerning the access to CMO activities, modalities for their governance and supervisory framework, and combining these with basic conditions for CMOs granting multi-territorial licences for authors' online rights.[514]

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[511] European Commission *Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT* (22.10.2009).

[512] European Commission *Proposal for a Directive of the European Parliament and the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (11.07.2012) COM(2012) 372 final.

[513] *Proposal* COM(2012) 372 at 3.

[514] *Proposal* COM(2012) at 372 [7, 21-28].

5 Critique and unsolved issues of the Proposal for a Directive of 2012

Soon after its publication, the Proposal of 2012 was widely criticised in academic literature[515] for its approach creating a severe obstacle for the establishment of an efficient MTL system and not at all improving the licensing situation or encouraging multi-territorial licensing.[516]

The criticism was that the proposed Directive combined the establishment of governance and transparency rules with regulations of multi-territorial licensing, not giving CMOs enough time to adapt and develop sufficient data processing standards while disputes over multi-territorial licensing could hinder the adoption of sufficient governance and transparency rules altogether.[517]

To comply with the new regulations concerning governance and transparency, CMOs would be required to amend their statutes, membership terms, and distribution rules which could prove to be costly and time-consuming.[518]

Another controversial point was that the draft Directive took no account of the issue of technological cooperation in the form of a centralised database for rights clearance which would have positive effects on the establishment of smaller online services.[519] The new information obligation might require CMOs to create or upgrade their IT systems more than usual to make them future proof, flexible, and able to interoperate. The passport system would allow CMOs to aggregate their services and rely on a small number of Databases. Certain tools and standards to avoid conflicts and guarantee streamlined data processing and sharing of content already exist. For example, most of the CMOs are using the freely available DDX format for processing usage reports, and the CCID (Claim Confirmation & Invoicing Details) format is a common standard to avoid invoicing conflicts. The CISAC Common Works Registration format is available for CISAC members to register works.

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[515] Tobias Holzmüller "Der Entwurf der Richtlinie über kollektive Wahrnehmung von Urheberrechten und verwandten Schutzrechten - Anmerkungen zu den Regelungen über die grenzüberschreitende Lizensierung von Musikrechten" (2013) ZUM 168-174; Mario Rehse, "Europäischer Rechtsrahmen für Verwertungsgesellschaften" (2013) ZUM 191-193; Sylvie Nerisson, "Europäischer Rechtsrahmen für Verwertungsgesellschaften: Die hochfliegenden Plane der Europäischen Kommission in ihrem Richtlinienvorschlag" (2013) ZUM 185-191; Victor Janik and Constanze Tiwisina, "Neuer europäischer Rechtsrahmen für Verwertungsgesellschaften - Einstieg in den Ausstieg aus dem System des 'collective rights management'?" (2013) ZUM 177-180; Joao Pedro Quintais, "Proposal for a Directive on collective rights management and (some) multi-territorial licensing" (2013) E.I.P.R. 65-73.

[516] Josef Drexl, Sylvie Nerisson, Felix Trumpke, & Reto M. Hilty, "Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal market COM (2012)372" (2013) Max Planck Institute HC (2013) 322-351 and IIC 2013 322-351.

[517] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" at para. 25.

[518] *Impact Assessment SWD(2012) 204 final* at 176.

[519] Rehse "Europäischer Rechtsrahmen für Verwertungsgesellschaften" (2013) ZUM at 192.

There are two internationally used identifiers for musical works and right holders used by most CMOs. The ISWC (international standard work code) and the IPI (Interested Party Information) code are widely used by CISAC CMOs. The ISWC allows local or regional agencies or CMOs to attribute a unique identifier in the form of a number to each musical work created by one of their members. The ISWC metadata includes information on the original title of the work and all authors of the work but does not include information about the shares of composers or copyright owners, and the date and place of their first publication.[520] Some of the additional information is provided by IPI including the name of the right holder, nationality, and rights they hold or have entrusted to other entities.[521] Using the two standards, CISAC created "CIS-Net" in 1998 allowing CMOs to view each other´s databases and interoperate to a certain extent.[522]

However, implementing and/or using the existing formats and databases depends on individual CMOs and their IT system and abilities, which leads to uncertainty about the sufficiency of data on works, ownership.

Therefore, the Max Planck Institute (MPI) would have liked further analyses of the centralised database solution by the Impact Assessment due to competition law considerations which were not sufficiently examined.[523] The MPI argues in favour of the central portal licensing option, analysing the system in respect of competition regulations and questioning the EC arguments. To ensure that the current system based on the accumulation of territorial licences is not substituted but only complemented, CMOs would grant MTL to the portal only on a non-exclusive basis. While licensing through a centralised portal is more efficient as a decentralised licensing system, it also corresponds with the economic features that characterise collective rights management as a natural monopoly.[524] The existence of a monopoly regarding collective rights management has never been contested by the EC, only the activities of CMOs have been scrutinised under Articles 101 and 102 of the TFEU. The anti-competitive price-fixing character of the centralised portal is not much different from the passport system advocated by the EC. Both systems would offer users limited licensing points where they could acquire multi-territorial/multi-repertoire licences for a wide range of repertoires or a specific genre. Due to the special character of right holders' repertoires complementing, rather than substituting, each other, the collective management cannot escape its monopoly position in the licensing market.[525] Therefore, the MPI comes to the conclusion that a centralised portal would be advantageous for users providing a

[520] *Impact Assessment SWD(2012) 204 final* at 100.
[521] *Impact Assessment SWD(2012) 204 final* at 100.
[522] *Impact Assessment SWD(2012) 204 final* at 100.
[523] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" at para 32.
[524] Drexl, Nerisson, Trumpke, Hilty "Comments of the Max Planck Institute" at para 33.
[525] Drexl, Nerisson, Trumpke, Hilty "Comments of the Max Planck Institute" at para 33.

one-stop-shop for online licensing. Such a system would have to be assessed in the light of the EUCJ and ECs decisions, but could be complementary to the passport solution chosen.

The decision to not discuss the solution further is understandable at this point, considering that the EC had tried to introduce a Global Repertoire Database starting with the launch of a series of Roundtable meetings brokering dialogue between industry stakeholders on legal and administrative barriers to the online distribution of music in 2008. The Roundtable meetings concluded that a common framework for consolidating and maintaining accurate data regarding musical works, their ownership and authority to license, is needed and the introduction of the International Copyright Enterprise (ICE) as the technological solution provider and Deloitte as a project manager to set up a Global Repertoire Database (GRD) followed.[526] The aim of the GRD was to provide a single comprehensive and authoritative representation of the global ownership and control of musical works.[527] The information paper issued by WIPO in October 2011 sets out the overall GRD programme objectives as to:

> develop a business and technical solution (based on ICE) to underpin a single, consolidated database that the music industry can trust to provide authoritative, multi-territorial information about the ownership and mandates to license musical works for all kinds of uses, provide greater transparency of musical works, rights and mandate data to relevant industry communities and help ensure that intellectual property rights are upheld, and that royalties are directed to the rightful recipient.[528]

At the start, the GRD comprised a diverse set of participants from organisations including Universal and EMI Music Publishing,[529] Apple, Nokia, Amazon, and Google, and CMOs like PRS for Music, STIM, SACEM, CISAC, ICMP.[530] The project failed due to high setup and operational costs, anticipated to be approximately EUR 23-32 million, which would be divided amongst the

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[526]Mark Isherwood "Global Repertoire Database – WIPO Roundtable on Music Databases: Current Landscape and Developments" (12.10.2011) wipo.int <wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/isherwood_grd.pdf>.

[527] Music Ally "Global Repertoire Database Group Launches Scoping and Stakeholder Study" Music Alley (28.09.2011) <http://musically.com/2011/09/28/global-repertoire-database-grouplaunches-scoping-and-stakeholder-study>; for a more detailed view on the GRD and the structure of the music market see Lauren Spahn "EMI v. MP3 Tunes: Business Model Proposals for the Music Industry in the Context of Emerging Technology" (2013) 2 Berkeley J.Ent. & Sports L. 153.

[528] Isherwood "Global Repertoire Database – WIPO Roundtable on Music Databases: Current Landscape and Developments".

[529] EMI Publishing was split between Sony, BMG and others in 2012.

[530] Klementina Milosic "The Failure of the Global Repertoire Database" (31.08.2015) hypebot.com <https://www.hypebot.com/hypebot/2015/08/the-failure-of-the-global-repertoire-database-effort-draft.html>.

participating societies according to their size, and additional yearly operational costs of EUR 6.4-11.6 million.[531] In 2014, it became clear that the GRD project was doomed to failure when CMOs started to pull out and stop funding due to discrepancies over control of the data and administration of the catalogue, differences in data standards, and the licensing and royalty distribution systems.[532] The discussions over such a GRD were still in full swing by the time of the Recommendation of 2012 and interfering with introducing a centralised portal solution seemed to be unnecessary and concentrating on a solution that would complement such a database was more feasible at this point.

Another criticism was the scope of the proposed Directive as being misleading to the effect that related rights are mentioned in the title but the regulations concerning multi-territorial licensing would only apply to authors' copyrights which would ultimately support differences in rights management rather than establish a satisfactory multi-territorial licensing system.[533] While the title of the proposed Directive might be misleading, Article 2 of the proposed Directive makes it clear that regulations concerning multi-territorial licensing only apply to authors' CMOs, while the rest are applicable to all CMOs established in the EU. The regulations concerning multi-territorial licensing under Title III of the proposed Directive were criticized as being too narrow and only including authors' online rights in musical works enabling rather than compelling multi-territorial licensing. It was argued that the proposed Directive would worsen the repertoire fragmentation, and compared to the former RRA system, overcomplicate the licensing situation for commercial users. Instead of creating a one-stop-shop for multi-territorial licences, the market would now be open for multiple CMOs, joint ventures or private entities to offer repertoire-specific multi-territorial licences for authors' online rights only. This situation would not only lead to more fragmentation of repertoire but add fragmentation of copyright and neighbouring rights management through various kinds of licensing entities.

Although the Impact Assessment ruled out a one-stop-shop solution for the same reason as the centralised licensing portal (Option B5 of the Impact Assessment) as both would create monopolies interfering with EU competition rules, the chosen governance and transparency regulations, combined with the passport option, is not too far off these structures. Structuring the governance and transparency regulations applicable to all CMOs was a first step to creating a level playing field for collective rights management on an EU level upon which a system of multi-territorial licensing could be based.

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[531] Milosic "The Failure of the Global Repertoire Database".
[532] Milosic "The Failure of the Global Repertoire Database".
[533] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute " at para 26.

Another point that sparked criticism and discussions was the broad definition of collecting societies. The broad definition of CMOs by the Impact Assessment as "organisations traditionally set up by right holders at national level and whose sole or main purpose is to manage copyright or related rights on their behalf"[534] was refined in the proposed Directive in Article 3(a) to:

> 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.[535]

The refined definition used for the proposed Directive would exclude organisations that manage rights on a commercial basis without granting membership rights and put CMOs at a competitive disadvantage against such entities.[536] This would allow circumvention in cases of corporate sub-structures in the form of CMO joint ventures due to the lack of clarity as to whether such entities are within the scope.[537] Furthermore, the definition fails to account for the special cultural and social character of CMOs and reduces them to mere licensing service providers.[538] For the functioning of the licensing market, it is important that rights managing entities apply the same governance and transparency standards to provide for fair competition as anticipated.

All in all, the general principles of transparency laid down in the proposed Directive were appreciated as they would have a positive impact on right holders and create a level playing field for CMOs.[539] Right holders were given the opportunity to make an informed choice regarding the CMO managing their rights, removing territorial restrictions on general CMO membership. However, due to the linguistic differences within Europe, it would be most likely that smaller right holders stayed with their national CMO, unless bigger CMOs offered multi-lingual services. Until then, smaller, national repertoires would stay with national CMOs, while bigger CMOs would administer international repertoires.[540] To ensure that smaller right holders and repertoires are represented at EU level, the passport system grants CMOs the opportunity to tag on CMOs that already offer multi-territorial licensing

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[534] *Impact Assessment SWD(2012) 204 final* at 195.
[535] *Proposal* COM(2012) 372 final at 22.
[536] *Proposal* COM(2012) 372 final at 13; see also Tilo Gerlach, "Europäischer Rechtsrahmen für Verwertungsgesellschaften" (2013) ZUM 174 at 175.
[537] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute " at para. 29.
[538] Susy Frankel and Daniel Gervais (eds)*The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge Intellectual Property and Information Law, Cambridge University Press, Cambridge, 2014) at [247-248].
[539] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" at para 31.
[540] Jütte *Reconstructing European copyright law for the digital single market between old paradigms and digital challenges* at 457.

and right holders to manage their rights individually or assign the management of their online rights to a CMO providing for multi-territorial licences.[541]

C Summary

While the overall aim of the EC was always the creation of a single market for Europe, it proved to be difficult to incorporate new technologies and find common ground for new forms of exploitation of copyrighted works. Early in the process the EC saw the main problems and concluded in the Communication Paper of 2004 that the only solution to creating a single market for copyright and related rights would be to develop an operational framework for the functioning of collective rights management. Such a framework appeared to be crucial when guaranteeing cross-border management of rights. The development of cross-border rights management could only be achieved if it were based on common management regulations concerning the efficiency, transparency and governance of rights managing entities. While the European legislator hesitated to regulate too much too soon, the market grew more complex and fragmented, and rights managing entities like CMOs and publishers tried to adapt as best as they could. While the Recommendation did nothing but add a new layer of fragmentation, the proposed Directive did a full circle and drew upon the Communication Paper of 2004 starting to lay down common grounds for governance and transparency of CMOs, combining them with regulations on multi-territorial licensing limited to authors' online rights.

The proposed Directive of 2012 did not meet expectations and was summed up by the MPI as a failure because it does not consider "the full legal framework and factual circumstances that have structured the current system of collective management" and represented a problematic sectoral approach to the "regulation of cross-border licensing which would require further harmonisation of substantive copyright law" to be sufficient.[542]

As noted previously, the regulation of cross-border or international licensing of musical works for the online exploitation cannot by itself solve the existing problem of repertoire and rights management fragmentation but would need to include legal and technical measures in order to provide a common ground for rights enforcement and management.

It would have been more appropriate to include all rights managing entities as the proposed Directive creates an opportunity for right holders to freely choose a managing entity to manage their online rights and for commercial rights managing entities to slip through the cracks not having to comply with governance and

[541] Holzmüller "Der Entwurf der Richtlinie über kollektive Wahrnehmung von Urheberrechten und verwandten Schutzrechten - Anmerkungen zu den Regelungen über die grenzüberschreitende Lizensierung von Musikrechten" at 173.

[542] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" at para 2.

transparency regulations crucial to multi-territorial licensing. The anticipated competition for right holders would not only be between CMOs but also between CMOs and commercial entities following different regulations and offering different services, leading to distorted competition in an already fragmented market. In the economic sense of the single market concept for Europe, the biggest hindrance to multi-territorial licensing was seen in the territorial restrictions for licensing services, right holders and commercial users. Therefore, the main focus was on breaking up territorial restrictions and enhancing competition between CMOs to incorporate copyright in the single market concept. The reality, however, showed that dealing with intellectual property is more complex, and focusing on only one aspect of a rather complex area can create more problems than it solves. The EC did a full circle from the Communication Paper of 2004 to the proposed Directive of 2012, realising that the issue of multi-territorial licensing can only be solved if the complex and highly fragmented system of copyright and neighbouring rights is seen as a combined system of granting and enforcing rights related to creative works. Despite the critiques on the proposed Directive of 2012, the CRM-Directive was finalised in 2014 with only minor changes and implemented into the law of the Member States in 2016. This will be examined in more detail hereafter.

Table 10 Overview: Improvements on Governance and Transparency Regulations and MTL

Policy Document	Improvements on Governance and Transparency Regulations for CMOs	Improvements on Multi-Territorial Licensing
Proposal 2012	Introduced regulations on good governance and transparency for CMOs operating in the EU market implementing **Option A4** of the Impact Assessment of 2012	Introduced special additional regulations for CMOs offering MTL implementing **Option B2** of the Impact Assessment of 2012
Impact Assessment 2012	**Favoured Option A4** Introduced governance and transparency framework	**Favoured Option B2** EU Licensing Passport
Recommendation 2005	Introduced right holders' choice in rights managing CMO, combined with regulations on royalty distribution and deduction on EU level implementing **Option 3** of the Impact Assessment	No explicit regulation on MTL
Study, Impact Assessment 2005	**Favoured Option 3** Right holders' choice in rights managing CMO	No explicit regulation on MTL
Community Framework & Communication Paper 2004	**Favoured Options 5 and 6** **Option 5** – RRAs combined with mandating of CMOs **Option 6** – Modality harmonisation and good governance rules one-stop-shop	Identified that operational framework for the functioning of collective rights management is crucial for guaranteeing cross border activities No explicit regulation on MTL
Status Quo Prior to CRM-Directive	Regulation of CMOs on national level only	CMOs were able to grant licences limited to their territory of operation for the world repertoire organised through RRAs

II CRM-Directive

Twenty years after the EC first mentioned its intention to harmonise the functioning of collective management organisation, and two years after the first draft of a Directive was proposed, the CRM-Directive entered into force in April 2014 and was due to be transferred into the law of the Member States by April 2016. The Member States were asked to report back to the EC on the situation and development of MTL in their territory two years after the final implementation date in 2018.[543] The CRM-Directive took up the regulations of the earlier Proposal and made some significant changes to the Recommendation of 2005. The provisions introduced by the CMR-Directive are not only related to multi-territorial licensing of online rights in musical works but have introduced rules on transparency and good governance for the collective management of copyrights and promoted the

[543] Article 38(3) CRM-Directive asks for a report by 10th October 2017.

development of MTL and MRL by CMOs, following the recommendation of the Proposal and Impact Assignment of 2012.[544] The aim of the CRM-Directive was to create a competitive environment by setting minimum standards for transparency and supervision of CMOs by their members based on the distinction between the analogue and online licensing markets for musical works.[545] The CRM-Directive focused on introducing more competition between CMOs rather than harmonising or extending the traditional system of reciprocal representation agreements between CMOs.[546] The new framework was needed to ease the licensing procedures for online services and guarantee EU-wide access while creating a level playing field for CMOs to ensure comparable rules on transparency and good governance.[547]
Therefore, Titles I, II, IV and V of the CRM-Directive introduce governance regulations, information duties and transparency obligations applicable to all CMOs, while Title III contains regulations for MTL of authorial online rights in musical works for authors' CMOs only.[548] The following section analyses the scope and regulations of the two main aspects of the CRM-Directive, rules on good governance, and MTL of musical works for the online use to show the final stage of the development of multi-territorial licensing and accompanying regulations.

A Subject Matter, Scope and Definitions

The CRM-Directive laid down regulations for the management of copyrights and related rights by CMOs to ensure the proper functioning and provide for multi-territorial licensing of authors' rights in musical works for the online use.[549]
The scope of the CRM-Directive was laid down in Article 2, dividing the applicability of the different regulations into four categories of collective management organisations: all CMOs; authors' CMOs; CMOs' joint ventures; and other collective management entities with CMO involvement and independent management entities. Those delicate distinctions were made in order to provide for common regulations applicable to all rights managing entities established in the EU. Apart from Title III and Articles 34(2) and 38, the CRM-Directive applies without exceptions to CMOs managing authors' rights including the online use of respective works. The regulations applicable for all independent management entities are reduced to Articles 16(1), 18, 20 (a-c) and (e-g), 21(1), 36 and 42 regulating licensing negotiations, information obligations, compliance monitoring and the protection of personal data.

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[544] Guibault, van Gompel "Collective Management in the European Union" at 139.
[545] Recital (8) and (9) CRM-Directive.
[546] Elena Copper, Ronan Deazley "What is the Point of Copyright History?" (2006) CREATe 2016-04 <zenodo.org/record/47710/files/CREATe-Working-Paper-2016-04.pdf>.at 11.
[547] Guibault, van Gompel "Collective Management in the European Union" at 140.
[548] Article 2(2) CRM-Directive.
[549] Article 1 CRM-Directive.

The CRM-Directive is the first in the field of copyright and related rights that sets out a long list of definitions centring on the main scope of creating common ground for the enforcement and management of copyrights and related rights' CMOs and independent management entities. A similar list of definitions was already included in the Proposal of 2012 but slightly changed for the final CRM-Directive responding especially to critiques of the definition of CMOs being too broad and excluding commercial rights managing entities.
For the final CRM-Directive, not only was the wording changed from 'collecting society' to 'collective management organisations,' but the entire definition was set out in more detail to acknowledge the special features of CMOs and set them apart from independent management entities. Article 3(a) CRM-Directive reads:

> 'Collective management organisation' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:
> (i) it is owned or controlled by its members;
> (ii) it is organised on a not-for-profit basis.

The definition ensures that the scope of the CRM-Directive covered all CMOs established in the EU regardless of the national differences in their legal form. This is further clarified in Recital 14 of the CRM-Directive stating that CMOs are not required to adopt a specific legal form to be within the scope of the CRM-Directive. To stretch the regulations of the CRM-Directive to as many rights managing entities as possible, and especially to include commercial managing entities, the definition of 'independent management entities' was included in Article 3(b) of the Directive not only to satisfy the needs of the newly evolving online market generating new opportunities for the collective management of rights but in response to earlier critiques. Article 3(b) reads:

> 'Independent management entity' means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:
> (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
> (ii) organised on a for-profit basis.[550]

[550] Article 3(b) CRM-Directive.

In Recitals 15 and 16 of the CRM-Directive, it is explained that independent management entities differ from CMOs because they are not based on a membership concept and neither owned nor controlled by their rights holding members. The CRM-Directive gives no clear example as to what independent managing entities are but excludes under Recital 16 audiovisual producers, record producers, broadcasters and book, music or newspaper publishers as they can only license their own or those rights that have been transferred to them on the basis of individual negotiations. The same applies to authors' and performers' rights managers and agents acting as intermediaries as they are only representatives and do not manage rights in the sense of setting tariffs, granting licences or collecting money from users. By including independent management entities in the scope of the CRM-Directive, the European legislature reacted to the critiques of the Max Planck Institute on the Proposal of 2012 to ensure harmonized transparency and accountability standards for all rights managing entities.[551] However, only a fraction of the CRM-Directives regulations apply to independent management entities established in the EU and large right holders like publishers and record producers are not included and still only regulated by competition and corporate legislation.[552]

While the definition of 'right holder' and 'user' remains the same in the Proposal of 2012 and the final CRM-Directive, the definition of 'online music service' did not appear on the definition list of the final CRM-Directive.

B Rules on Good Governance and Transparency

The importance of regulations on governance and transparency for CMOs as the basis for a functioning multi-territorial licensing system was recognised in the policy documents early on, but the execution was hesitant and unable to keep up with the times.

The Recommendation of 2005 codified principles on good governance, namely equal treatment of right holders, non-discrimination when granting licences to users, equitable distribution of royalties and information duties for CMOs to their members and licensees regarding the repertoire represented, existing reciprocal representation agreements, the territorial scope of those repertoires and the applicable tariffs and changes of such.[553]

Despite the regulations of the Recommendation of 2005, the situation in the Member States remained unchanged and significant differences regarding national governance of CMOs, especially concerning their transparency and accountability

[551] Guibault, van Gompel "Collective Management in the European Union" at [143-144]; see also Trumpke, Drexl, Hilty, Nérission, "Comments of the Max Planck Institute" (2013) IIC 322-351.
[552] Articles 16(1), 18, 20, 21(1) (a)-(c) and (e)-(g), 36 and 42 CRM-Directive.
[553] Guibault, van Gompel "Collective Management in the European Union" at [147-148].

towards members and licensees, were still existent seven years later as noted in the Impact Assessment of 2012.
The CRM-Directive addressed these problems and followed the recommendations of the Proposal of 2012 to a certain extent.
Titles II and IV of the CRM-Directive aim to harmonise the requirements applicable to, and the operation of, CMOs to ensure a common standard of governance, financial management, transparency and reporting. Special importance was placed on the relationship between CMOs and their members following not only recommendations made in the Proposal of 2012 but common EU case law derived from decisions of the EUCJ and the EC concerning the CMOs compliance with practice and competition rules.
General principles concerning the relationship between CMOs and their members regulate that CMOs shall always act:

> in the best interest of the right holders whose rights they represent and […] not impose […] any obligations which are not objectively necessary for the protection of their rights and interests.[554]

Guidelines on what the best interests of right holders represented are, are given in Recital 22 of the CRM-Directive and include the participation of right holders in the decision-making process of CMOs. The principles relating to the relationship of CMOs and their members are a direct result of European case law, reflecting the EC decision in the *GEMA I* case[555] and earlier legislative developments in that area.
In the *GEMA I* case, the EC viewed the common practice that members must assign unduly broad categories of rights to CMOs as a potential abuse of a dominant position under Article 102 TFEU marking the starting point of the development towards a non-discriminatory freedom of choice concept for right holders first introduced in the Recommendation of 2005.
The basis for a non-discriminatory freedom of choice concept was laid down ensuring that CMOs include such a concept in their statute or membership terms.[556]
The key principles of non-discrimination on the basis of nationality which follows from Article 18 TFEU and common case law were first mentioned in the Recommendation of 2005.
Some cases decided by the EC and the EUCJ which influenced the development of the non-discrimination principle should be mentioned.
In the *GEMA I* case, the practice of GEMA to pay supplementary fees from revenue collected from all members, only to ordinary members of at least three years was

[554] Article 4 CRM-Directive.
[555] Commission Decision 71/224/EEC *relating to proceedings under Article 86 of the Treaty (IV/26 760-GEMA)* [1971] O.J. L. 134, 20.6.1971.
[556] Article 5(2) CRM-Directive.

deemed an abuse of a dominant position in the eyes of the EC. It was stressed by the EC and later confirmed by the EUCJ, in the *CISAC* decision that CMOs are not to discriminate among members.

In *GVL v. Commission*[557] and *Basset v. SACEM,*[558] the EC ruled that refusing membership to foreign nationals and including discriminatory terms concerning their membership rights in their statutes are practices and are automatically viewed as an infringement of Article 102 TFEU as they are contrary to the principle of equal treatment set out in Article 18 TFEU. The EC's view was confirmed in the *Phil Collins*[559] case where the EUCJ held that domestic provisions containing reciprocity clauses are not sufficient to deny membership to non-national right holders. The CRM-Directive combined the non-discrimination provisions with the freedom of choice for right holders in their rights managing entity following the developments in common EU case law and legislative documents related to the collective management of rights.

Another key principle was the opportunity for rights splitting. The provision, which derives from case law, is the right to confer only certain categories of rights or certain works to the management of CMOs and was discussed in the CRM-Directive preceding legislative documents. In its *Daft Punk*[560] decision, the EC ruled that CMO statutes which require right holders to assign all rights without distinction to one CMO are an abuse of the CMOs dominant position and therefore contrary to Article 102 TFEU.[561] The Recommendation of 2005 included the right holders' freedom of choice, in combination with the opportunity to split online and offline rights and, under certain circumstances, assign them to different CMOs.

Recital 19 of the CRM-Directive clarifies the scope of the freedom of choice concept, reading as follows:

> Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights.

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[557] *Case 7/82 GVL v. Commission [1983] European Court Reports 1983 -00483 ECLI:EU:C:1983:52.*

[558] *Case 402/85, Basset v, SACEM (1987) I E.C.R. 1747* at para. 11.

[559] Case C-92/92 *Phil Collins v Imtrat Handelsgesellschaft mbH* [1993] European Court Reports 1993 I-05145 ECLI:EU:C:1993:847.

[560] Commission Decision COMP/C2/37.219 *Banghalter/Homem Christo (Daft Punk) v. SACEM* [2002] unpublished available from:
ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37219>.

[561] Guibault, van Gompel "Collective Management in the European Union" at [149-150].

However, it is also stressed that:

> It is important that the rights and categories of rights be determined in a manner that maintains a balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively, taking into account in particular the category of rights managed by the organisation and the creative sector in which it operates.

In addition to these regulations, right holders are guaranteed the opportunity to grant licences for the non-commercial use of their works and to terminate the authorization of their rights management under certain circumstances.[562]
The regulations follow the Proposal of 2012 and the recommended governance and transparency framework solution (Option 4A) of the Impact Assessment of 2012 creating the basis for the anticipated passport system for multi-territorial licensing. The freedom to grant rights to or withdraw rights from CMOs strengthens the position of right holders and could lead to more competition between CMOs as anticipated by the EC. However, at the same time, it has the potential to weaken CMOs' efficiency and opens the gates to additional rights fragmentation.
During the legislative process that led to the final CRM-Directive, the EC realized that solid rules on the collection, administration and distribution of revenues are necessary to guarantee an efficient collective management system.
The CRM-Directive codifies clear rules on the financial management of rights revenues, the management of rights on behalf of other CMOs to ensure non-discriminatory behaviour, and transparent payments and deductions.[563]
It also regulates the relationship between users and CMOs by focusing on the principle of good faith when negotiating licensing agreements and applying tariffs on the basis of objective criteria and follows the recommendation of the MPI by introducing obligations for CMOs to contract with commercial users.[564]
The CRM-Directive codifies obligations for CMOs, and for users when it comes to providing information related to licensing.[565]
The provisions make CMOs and users partners in the pre-licensing information process that are required for accurate and efficient licensing and balances efforts and costs equally between them.
The CRM-Directive also introduced the possibility for CMOs to issue joint licences to prevent double payment and invoicing, fulfil information obligations of CMOs

[562] Article 5(3),(4) CRM-Directive.
[563] Articles 11-15 CRM-Directive.
[564] Article 15, 16 CRM-Directive.
[565] Article 17 CRM-Directive.

to the public, clarify complaint procedures, and create a dispute resolution mechanism.[566]

To ensure compliance with the rules laid down in the CRM-Directive, Member States were required to provide for the establishment and monitoring of competent authorities which were then required to report back on matters of relevance to the application of the CRM-Directive to the EC.[567]

A copyright first was the requirement of a report on the application of the CRM-Directive assessing the impact on the development of cross-border services, cultural diversity and the relationship between CMOs and users along with the establishment of an expert group composed of representatives of the competent authorities of the Member States chaired by a representative of the EC.[568] This ensures that people highly involved in the area will be participating in the review process in the future.

Despite criticism, the CRM-Directive follows the Proposal of 2012 without taking most of the critiques into account, combining governance and transparency regulations with those special to multi-territorial licensing.

C Rules on Cross-Border, Multi-Territorial Licensing for the Online Use of Musical Works

The clearance of cross-border rights for the exploitation of musical works was commonly carried out through a system of RRAs between CMOs allowing each other to grant MRL for their respective territory of operation. The CRM-Directive recognised earlier regulations made in the Recommendation of 2005 and recommendations of the Impact Assessment and Proposal of 2012. The idea of combining rules on governance and transparency for CMOs with a passport construction as a basis for multi-territorial licensing was introduced in the Impact Assessment of 2012 and incorporated into the Proposal of the same year.

While the rules on governance and transparency would apply to a wide range of rights managing entities in general, the offering of multi-territorial licences would require additional features. The passport system would require CMOs wanting to license the online rights of musical works to provide for an adequate licensing infrastructure including sufficient data handling and invoicing capabilities, compliance with certain transparency standards towards right holders and users, and allow for a dispute resolution mechanism. To ensure that all right holders have the opportunity to license their online rights through a CMO, the system provided for additional subject matter that allows CMOs that do not comply with the legal

[566] Articles 18-22 and 33-35 CRM-Directive.
[567] Articles 36 and 38 CRM-Directive.
[568] Articles 40 and 41 CRM-Directive.

requirements of online licensing to entrust their repertoire to a CMO passport entity of their choice that already provides for online licensing. In addition, right holders are entitled to withdraw the management of their online rights from a CMO that does not provide for their licensing and assign those rights to a CMO that does.

Title III of the CRM-Directive introduced a legal framework promoting the development of MTL and MRL for the exploitation of musical works online aiming to support the creation of a single European digital market for online music services based on the passport concept.[569] The CRM-Directive followed the Proposal of 2012, according to which the scope of Title III of the CRM-Directive only applied to authors' rights in musical works due to the belief that in other areas MTL had not given rise to any difficulties at this stage.[570] Additionally, Title III of the CRM-Directive introduced minimum standards for a sufficient cross-border licensing system that meets the requirements of the digital market and guaranteed repertoire aggregation, including niche and less-known musical works.[571]

It was left to the Member States to oversee and ensure that national CMOs granting licences for the online exploitation of musical works comply with the minimum standards required to grant such licences.[572] The CRM-Directive introduced additional functional, technical, operational and good governance standards CMOs must comply with when granting MTL for online rights in musical works set out in Articles 24-28 CRM-Directive.

The provisions are a direct response to the concerns of the European Economic and Social Committee, in their response to the Proposal of 2012, [573] questioning the technical capability of CMOs to take on MTL without difficulties. Member States are required to ensure that CMOs granting MTL have sufficient capacity to process administrative data electronically, efficiently and in a transparent manner, especially for the purpose of identifying repertoire, monitoring its use, invoicing, and collecting and distributing revenues.[574] Additionally, CMOs must be able to provide accurate and comprehensive information on musical works, respective right holders, and the rights each CMO is authorized to represent in a given territory and

[569] Recitals 38 and 40 CRM-Directive.

[570] European Commission *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (15.02.2013) COM(2012) 372 final – 2012/0180 (COD) O.J. C 44/104 at 3.

[571] European Commission *Proposal for a Directive of the European Parliament and of the Council on collective management of copyrights and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* (11.07.2012) COM(2012) 372 final 2012/0180(COD) SWD(2012) 204 final SWD(2012) 205 final at 8.

[572] Article 23 CRM-Directive.

[573] *Opinion* COM(2012) at para. 3.14.

[574] Recital 41 and Article 24(1) CRM-Directive.

process such detailed data quickly and accurately using unique identifiers and up-to-date databases.[575]

In order to be able to grant MTL, CMOs are required, on request, to provide to their members, other CMOs, and online service providers electronic information on the repertoire, represented rights and the territories covered.[576]

CMO members and other CMOs offering MTL are additionally required to make arrangements enabling right holders, users and other CMOs to request correction of relevant data and submit additional information concerning their musical works or rights therein.[577]

CMOs are required to ensure the monitoring of the use of licensed works by offering online services the possibility to report their individual use electronically.[578]

The invoice must be in an electronic form identifying the works and rights which are licensed on the basis of Article 24(2) CRM-Directive and the information provided by the online service. The invoicing has to take place without delay, and online services must be provided with the opportunity to challenge the accuracy of the invoice.

CMOs are required to provide for the accurate and timely payment of revenues to right holders, offering additional information on the period and territories of use, the amounts collected, deductions made, and amounts distributed in respect to each online provider and for each online right in all musical works represented.

The introduction of the passport concept aimed to combine repertoires for MTL by making all repertoires accessible to the market and reduce the number of transactions an online service provider needs to make when offering its service.[579] It was hoped that the passport concept would reduce transaction costs and as a result, facilitate the development of new online services.

CMOs are obliged to act in a non-discriminating way and on the grounds of a representation agreement which has to be on a non-exclusive basis granting CMOs the freedom to join different licensing hubs and gives users the opportunity to obtain licences from several respective hubs. A non-exclusive mandate also ensures that the CMO that cannot provide for MTL and mandates another CMO to do so is still able to grant licences in its own or reciprocally managed repertoire in its territory.[580]

As noted by the EC in the Impact Assessment of 2012,[581] a passport system would

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[575] Article 24(2)a-d and Recitals [41,42].
[576] Article 25 CRM-Directive.
[577] Article 26 read in conjunction with Recital 42 CRM-Directive.
[578] Article 27 in conjunction with Recital 43 CRM-Directive.
[579] Recital 44 CRM-Directive.
[580] Recital 46 CRM-Directive.
[581] European Commission *Commission Staff Working Document Impact Assessment, Accompanying the document, Proposal for a Directive of European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* (11.07.2012) SWD(2012) 204 final at 165.

grant more protection to smaller and medium-sized CMOs, ensuring that their repertoire is within the MTL issued by the mandated CMO.
Additionally, the CMO which grants MTL for online rights in musical works is obliged to accept a CMO's mandate to represent its repertoire for MTL if (1) the request is limited to categories of online rights the requested CMO represents itself; (2) the requested CMO aggregates repertoire and not only grants MTL exclusively for its own repertoire; and (3) the requested CMO is not aggregating rights in the same works for the purpose of granting joint licences for the rights of reproduction and communication to the public.[582]

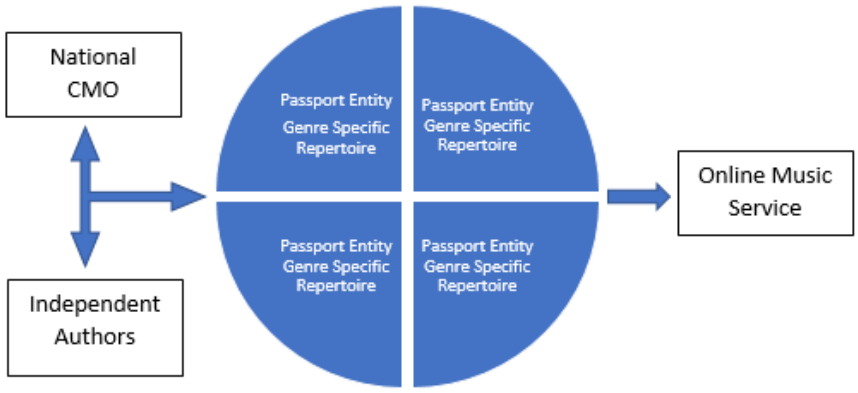

Figure 3 EU Licensing Passport

The mandated CMO is further required to respond to a request without delay and manage the repertoire represented on the same conditions as its own by providing any information related to MTL and costs incurred.
The access to MTL for right holders is safeguarded as a key element for the objectives and effectiveness of MTL rules which would otherwise be jeopardised.[583] Therefore, right holders are presented with the opportunity to withdraw the mandate of managing their rights for the online use from CMOs if their current managing CMO does not offer such services themselves or through a representation agreement with another CMO.
The CRM-Directive provides for a derogation for radio and television programmes broadcasting simultaneously online with or after their initial off-line broadcast, and online material which is produced by the broadcaster and is ancillary to the initial off-line broadcast. The derogation was introduced by the Impact Assessment of 2012 stating "that without such an exemption, broadcasters would have to acquire

[582] Article 30 and Recital 46 CRM-Directive.
[583] Recital 47 CRM-Directive.

licences from several 'passport entities' which would make the provision of these services more cumbersome."[584] Therefore, it is preferable that CMOs continue to license online rights in musical works to broadcasters directly and not through passport entities.[585]

The CRM-Directive does not clarify why such an exemption is necessary, merely assuming in Recital 48 CRM-Directive that a derogation for broadcasters is required.

The derogation provides flexibility in regard to reciprocal representation agreements in order to facilitate, improve, and simplify the procedure of granting licences to users and granting MTL in areas other than referred to in Title III.[586] The exception for online simulcasting was made due to the national character of the main source, the analogue radio broadcaster restricted to the national territory. National analogue radio providers still acquire broadcasting licences which are typically multi-repertoire licences restricted to the national territory due to the limited reach of radio frequencies. Including simulcasting in Title III of the CRM-Directive would require national radio broadcasters to acquire multi-territorial licences from numerous sources for the same repertoire they have already licensed for their national territory with their national CMO.

D Critiques of the CRM-Directive

Soon after its release, the CRM-Directive was criticised for its focus on a passport system and that its inadequate conceptualisation of copyright had led to not solving the acknowledged problems but worsening the situation for right holders and commercial users.

The main point of critiques was the EC's focus on the passport system as the basis to creating competitive pressure on CMOs to develop more efficient licensing practices.[587] Legal commentators argued, that a system which focuses solely on competition is unable to heal the fragmented market that had developed since the Recommendation of 2005.[588] Despite the criticism of the Recommendation of 2005, Title III was modelled after the recommended principles and could not overcome related concerns expressed earlier. As the Max-Planck Institute stated in its Comments on the Proposal of the CRM-Directive:

> […] the emergence of competing societies with unstable repertoires – due to the freedom given to rightholders to entrust and withdraw the rights, categories of

[584] *Impact Assessment* SWD(2012) 204 final at para. 24.4.2..
[585] *Impact Assessment* SWD(2012) 204 final at para. 24.4.5..
[586] Recital 11 CRM-Directive.
[587] *Proposal* COM(2012) at 6.
[588] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" para. 62.

> rights or types of works of their choice – constitutes a severe obstacle to the emergence of a sustainable system of multi-territorial licensing within the EU.[589]

The EC's intention for the introduction of common rules on governance and transparency, combined with special requirements for granting multi-territorial licences for the online use of musical works, was to create a competitive environment based on the distinction between the analogue and online licensing markets. Harmonising the operation of CMOs was the first step to creating a level playing field in which competition between CMOs would grow naturally, ultimately leading to more balance, better services and easier access to multi-territorial licensing. While this would be a promising concept in other fields, the creative industry comes with special and very complex features, making the process of selling and buying creative works complicated and time-consuming.

While usually, the owner of a product is the seller of the product or commissions a third party to sell the product on his behalf, a musical work consists of individually owned bundles of products, each individually managed separately or collectively. In a competitive market, the price of a product is defined by the demand for it, while the price for musical works depends on how it is used and its exploitation. Transferring well-established concepts to a very different field without taking the special features into account can only be adequate to a certain extent or create more problems. It was noted early in the Report on a Community Framework of 2003, that a misguided insistence on competition could lead to further fragmentation at different levels, complex and vast rights clearance systems, and a race to the bottom regarding licensing tariffs.[590]

The passport concept introduced was intended to open author's CMOs to competition and suspend territorial restrictions for licences to provide easier access to MTL for the online exploitation of musical works. The passport system introduced breaks with the existing licensing system relying on RRAs between CMOs to grant territorially limited multi-repertoire licences, and introduces a repertoire-limited multi-territorial licensing system.

As mentioned before, a licensing system that is based on a repertoire-limited multi-territorial approach is limiting online music services in their approach to offer their users access to a wide variety of musical works. This might lead to numerous online music services offering access to only a specific repertoire, forcing users to subscribe to more than one service which might or might not be available on an international scale. For online music streaming services, that could mean that they

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[589] Drexl, Nerisson, Trumpke, Hilty, "Comments of the Max Planck Institute" para. 63.

[590] European Parliament Committee on Legal Affairs and the Internal Market *Report on a Community framework for collecting societies for authors rights* (11.12.2013) (200/2274(INI)) Rapporteur: Raina A. Mercedes Echerer A5-0478/2003 (final) at 16.

would have to negotiate with more rights managers, especially those managing rights in the sound recording.

While an online music service provider had to clear licences in each country, its service was accessible independently of the repertoire used, under the new passport system online service providers have to decide on the repertoire and clear licences with the right managing entity. The passport system would only be an advantage to online music providers if there were a limited number of CMOs managing a wide range of repertoires; this could counteract the anticipated competition and lead to a system similar to that already existent under RRAs. Even if there is only a limited number of CMOs offering multi-territorial licences, frequent changes in the repertoire are possible due to the freedom of right holders to withdraw their rights and assign them to another CMO. This would lead to a situation where online service providers have no continuous legal certainty and would need to monitor CMOs' repertoire, which is costly and time-consuming.

The CRM-Directive was further criticized for its inadequate conceptualization of copyright, its dynamics and the interests involved which had the potential to worsen the situation for the majority of authors and commercial users, and only benefit a small group of large right holders.[591] The root of the licensing problem is the fragmentation of rights and repertoire on different levels, making it difficult for commercial users to acquire licences. By allowing right holders to split the management of their offline and online rights between CMOs, the problem was intensified and the differences between copyright and neighbouring right holders made more obvious. Removing the territorial restrictions from the licensing system made it possible for large right holders, like publishers and record labels, to withdraw their online rights from CMOs and manage them on their own.[592] This scenario leaves users and CMOs struggling with the task of identifying who holds what right to what works for what territory.

This has created a market in which traditional CMOs now compete not only with each other but with newly established CMO joint ventures, publishers and record producers managing a conglomerate of different repertoires and rights for different right holders answering to different operational regulations.[593]

Instead of creating a system in which CMOs provide for MTL/MRL, it is now unclear who grants the required licences and what is covered by them.

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[591] Morton Hviid, Simon Schroff, John Street, "Regulating CMOs by competition: an incomplete answer to the licensing problem?" (2016) CREATe Working Paper 2016/03 at 13.

[592] Emanuel Arezzo "Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU" (2015) IIC (2015) 46 534-564 at 545.

[593] Hviid, Schroff, Street "Regulating CMOs by competition: an incomplete answer to the licensing problem?" at 18.

The possibility to withdraw rights from the management of CMOs seems to benefit only successful artists, and large publishers and labels which have the resources to administer their own rights.[594] Most right holders have neither the resources to administer and manage their own rights nor the know-how to overcome the language barrier.[595]

In addition, the CRM-Directive does not take into account the special position CMOs have in the Member States and the part they play in fostering creativity.

While commercial copyright holders like publishers, record labels and successful artists are interested in generating high revenues and therefore preferring efficiency over social and collective services, less successful right holders rely on a wider distribution of their works enabling them to generate a fan base and revenue.[596]

While CMOs use a part of the collected revenues to provide, for example, social insurance and pensions and cross-subsidise genres to ensure revenues for less successful right holders, other rights managing entities license works and distribute revenues directly, not offering similar social services to their members. The CRM-Directive has created a market in which CMOs compete for online rights on several levels, with each other, with publishers and big corporations, and ultimately are forced to set up new licensing hubs to be able to grant MTL.[597]

The EC believed that increased competition in the field of copyright, and ultimately between CMOs, would lead to more efficient administration practices resulting in lower overheads and fairer revenues for right holders. With the new concept introduced by the CRM-Directive, right holders would be able to compare CMOs with regard to their service and the efficiency of their administrative process. In the absence of an accepted measure for CMOs' activities, Article 22 CRM-Directive requires CMOs to provide an annual transparency report allowing for comparison of CMOs efficiency related to the costs of rights management and administration.

Relying on competition would lead to a situation where larger right holders with the most valuable repertoire would join CMOs with low administration costs, leaving those with a strong social component with a smaller, less attractive, repertoire of a lower market value. This not only weakens the position of CMOs but threatens the social and cultural features their existence is justified on.

The passport system can only intercept the negative influences brought by competition to a certain extent when providing for smaller CMOs with a less

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[594] Ficsor "Collective Management of Copyright and Related Rights" (2002) WIPO at 97; see also C. Handke, and R. Towse "Economics of copyright collecting societies" (2007) International Review of Intellectual Property and Competition Law 8 38 937-57 at 947.

[595] Hviid, Schroff, Street "Regulating CMOs by competition: an incomplete answer to the licensing problem?" at 19.

[596]. Hviid, Schroff, Street "Regulating CMOs by competition: an incomplete answer to the licensing problem?" at [19-20].

[597] Hviid, Schroff, Street "Regulating CMOs by competition: an incomplete answer to the licensing problem?" at 18.

attractive repertoire to tag-on to a CMO that already grants multi-territorial licences for the online exploitation of musical works.
Difficulties could arise when it comes to the additional social and promotional services offered by CMOs to their members, usually linked with the special social system of the Member State the CMO operates in. Splitting rights between CMOs could lead to different treatment of exclusive members and those that have assigned only parts or categories of their rights in regard to the additionally offered services and revenue distribution.

E Summary

The CRM-Directive was the first attempt to regulate the operation of CMOs as the main rights managing entities to create common ground and ensure the exploitation of copyright and related rights in all EU Member States.
Regulating the operation of CMOs' activities on a European level became necessary to guarantee EU-wide licensing and ensure compliance with European competition law. The CRM-Directive contains extensive rules on good governance for CMOs and independent management entities but narrows the scope for regulations regarding MTL to authors' rights managing CMOs. While the regulations on good governance will inevitably even out disparities and lead to more compliance in regard to the functioning and operating of CMOs in the EU Member States, the main problems remain unsolved. Instead of simplifying the licensing system and providing for easy access to MTL for the online exploitation of musical works, the system is more fragmented than ever. The shift from a licensing system based on RRAs providing for territorially limited multi-repertoire licences to a passport system providing for repertoire limited multi-territorial licences has not been an improvement as it has the potential to fragment the management of rights in the sound recording, adding even more to the licensing controversy. It is even more costly and time-consuming now to acquire sufficient licences that guarantee legal certainty for online music service providers. The CRM-Directive is a start and provides for some solutions but to make online licensing more effective it needs to include regulations applying equally to all parties involved, combined with technical measures taking the unique character of the internet into account. The long term effects the CRM-Directive may have on the market in each of the Member States cannot be estimated yet, but the reports on the situation and development of MTL show examples of the possible impacts.

III The CRM-Directives Effects on the Member States

Article 38 CRM-Directive provides for cooperation for the development of MTL and asked the Member States to provide the EC with a report on the situation and development of MTL in their territory by 10 October 2017.
Article 38(3) CRM-Directive stated that the reports shall include information on the availability of MTL, the compliance by CMOs with the requirement of the Directive, and an assessment of the development of MTL in the Member States. The report was meant to answer particular questions around the passport system introduced by the CRM-Directive and give feedback from users on the development of MTL.
As of July 2018, the EC had received the reports from 14 Member States under Article 38(3) which is partly due to the late implementation of the CRM-Directive in some EU Member States. A summary of the available reports has been presented at an Expert meeting with Competent Authorities organised by the EC in March 2018. The available reports show that there are no examples of CMOs mandating another CMO's repertoire in order to grant MTL as provided for in Articles 29, 30 CRM-Directive, or right holders that have withdrawn rights for MTL as of Article 31 CRM-Directive. The implementation of the CRM-Directive into the law of the Member States and its effects on MTL will be shown in the examples of Germany, the United Kingdom and Sweden.

A Germany

A Report according to Article 38(3) CRM-Directive was delivered by the German DPMA as the competent authority of Germany on 10 October 2017.[598]
The CRM-Directive was implemented into German law by the Act on the Management of Copyright and Related Rights by Collective Management Organisations (CMO-Act) of 24 May 2016.[599]
The CMO-Act is divided into six parts. The first two parts deal with the subject matter of the Act, definitions and internal relationships, while the third and fourth parts set out special provisions on the multi-territorial licensing of online rights in musical works and supervision. The fifth and sixth parts deal with dispute resolution, and transitional and concluding provisions. The provisions on good

[598] Deutsches Patent- und Markenamt (Germany) *Report according to Article 38(3) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* (10.10.2017) Ref Ares(2017)6017700 DPMA Report (unpublished).
[599] Available at: http://www.gesetze-im-internet.de/vgg/index.html (German version) and at: http://www.gesetze-im-internet.de/englisch_vgg/index.html (English translation) (Federal Law Gazette *[Bundesgesetzblatt]* I 2016 at 1190).

governance, transparency and MTL of online rights in musical works as introduced by the CRM-Directive are found in parts one, two and three of the CMO-Act. Part four CMO-Act ensures CMOs' compliance with the provisions of national law by appointing the DPMA as the competent authority with the power to take all necessary measures to ensure that the collective management organisations fulfil their obligations.[600]

As of October 2017, there is only one CMO in Germany granting MTL for online rights in musical works. GEMA grants MTL through the international joint venture International Copyright Enterprise (ICE) between GEMA, PRS and STIM. Licences granted through ICE are comprised of the repertoire of the three CMOs. In the long run, GEMA plans to grant MTL through ICE which will only perform back-office activities and administration required for MTL together with the competent GEMA departments. The ICE agreement signed by all three CMOs (GEMA, PRS, STIM) requires each party to comply with the relevant provisions of the CRM-Directive. As of 2017, ICE had 35 MTL agreements with online music services, and expects this to rise in the near future.

Under the subsidiaries, SOLAR Music Rights Management Limited (SOLAR) and ARESA GmbH (ARESA), GEMA grants MTL for the reproduction rights for the Anglo-American repertoire of Sony/ATV (through SOLAR) and BMG (through ARESA). So far, the DPMA has not received any complaints regarding the provisions for MTL of online rights in musical works.

In the preparation of the DPMA Report, a consultation with groups involved was conducted asking for comments on the development of MTL for online rights in musical works. The majority of market participants affected have not yet experienced MTL of online rights for musical works and were unable to make assessments. However, GEMA and the Association of Private Broadcasters and Telemedia VPRT provided a detailed comment.

Overall, GEMA welcomed the established legal framework and indicated that there is an increase in offers of MTL and this is expected to continue to rise. The future focus should be on simplifying the administration of MTL to make them available from one single source. This could be achieved by creating central licensing and

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[600] Section 75 CMO-Act
(1) The supervisory authority shall be the German Patent and Trade Mark Office.
(2) The supervisory authority shall perform its duties and exercise its powers only in the public interest;
Section 76 CMO-Act
(1) The supervisory authority shall ensure that the collecting society properly fulfils the obligations incumbent upon it under this Act.
Section 85
Powers of the supervisory authority
(1) The supervisory authority may take all necessary measures to ensure that the collecting society properly fulfils the obligations incumbent upon it under this Act.

invoicing units within the provisions on MTL to make repertoire more accessible and improve conditions for fair and appropriate remuneration of right holders.

VPRT commented that it is not the availability of MTL that causes difficulties for users but the fragmentation of the repertoire which makes it time-consuming and costly to acquire the right licence for the world repertoire which is managed by numerous entities. While GEMA can grant MTL for authors' rights, including the joint repertoire of GEMA, PRS and STIM, through ICE it can also grant MTL for neighbouring rights including the repertoire of BMG (through ARESA) and Sony/ATV (through SOLAR).

B United Kingdom

A Report according to Article 38(3) CRM-Directive was delivered by the Intellectual Property Office as the competent authority of the United Kingdom on 10 October 2017.[601]

The CRM-Directive was implemented into law in the United Kingdom by The Collective Management of Copyright (EU Directive) Regulations 2016 (Directive Regulations) which came into force on 10 April 2016.[602] The Directive Regulations are divided into five parts. The first part contains definitions and applications, part two contains positions regarding CMOs, part three sets out regulations regarding MTL and parts four and five deal with dispute resolution, enforcement, amendments, and transitional provisions. The national competent authority to monitor compliance with the CRM-Directive in the United Kingdom is the Secretary of State through a unit within the IPO.[603]

PRS for Music is the only CMO in the United Kingdom offering MTL through the ICE joint venture with GEMA and STIM. Through the ICE, PRS for Music provides back-office services to Buma-Stemra, SABAM and, through Polaris Nordic, to KODA, TEOSTO and TONO.

After the implementation of Title III into the law of the United Kingdom in 2016, there is no evidence of consolidation in the online rights market yet. Licensing remains predominantly on a national level in most of the Member States and the use of the right to withdraw online rights from the management of a CMO as in Article 31 CRM-Directive is very limited.

The current situation has created a level of inefficiency which promotes duplication of expenditure by CMOs. The expected benefits of the CRM-Directives passport

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[601] Intellectual Property Office (UK) *Report on multi-territory licensing* (10.10.2017) Ref Ares(2017)6017610 IPO Report (unpublished).

[602] Available from http://www.legislation.gov.uk/uksi/2016/221/contents/made.

[603] Section 32 Directive Regulations; see also IPO *Guidance on the UK Regulations implementing the Collective Rights management (CRM) Directive* (February 2016) at 44.

system have not yet materialized and so far it has led to fragmentation and inaccuracy in rights management.

The existing market is extremely concentrated in a small number of MTL services, usually offered by CMO joint ventures rather than a single CMO. Users in the United Kingdom have criticized the services provided by CMOs, especially the pricing, as aggregated MTL providers increased rates; confusion over what is included in a licence has led to double-charges for the same repertoire and late payment claims, which complicates the rights' negotiation process

Therefore, the United Kingdom stakeholders' perspective of the development of MTL is very mixed and the benefits expected are not yet tangible.

C Sweden

A Report according to Article 38(3) CRM-Directive was delivered by the Swedish Patent and Registration Office as the competent authority of Sweden on 10 October 2017.[604]

The Swedish Patent and Registration Office has been assigned by the Swedish government to promote copyright and counteract infringement in the digital environment. The CRM-Directive was implemented into Swedish law,[605] and came into force in January 2017. Due to the late implementation, Swedish CMOs were still implementing the relevant regulations by the time the report was due.

The largest authors' CMO in Sweden is STIM which does not conduct MTL itself but through the ICE Hub (a joint venture between STIM, GEMA, PRS).

Supervision regarding the compliance of CMOs with Title III CRM-Directive was not yet necessary but CMOs were asked to assess themselves to identify whether there were any struggles regarding compliance with Title III CRM-Directive.

The Swedish report states that the demand for MTL has been lower than expected which could be due to the limited interest in content in the Swedish language outside of Sweden. The Swedish CMO STIM noted a change in the market after the EC Recommendation of 2005. Most publishers and CMOs licence their repertoire directly on a European market without including national or local CMOs and their repertoire.

The Swedish Patent and Registration Office has an ongoing dialogue with all the stakeholders and, due to this dialogue, there is a general consensus that the development of MTL is functioning well. The only concerns expressed by the Swedish CMOs regard the relationship between the CRM-Directives transparency and updated information on right holders and works regulations and those made in

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[604] Swedish Patent and Registration Office *Report on the situation and development of multi-territorial licensing in accordance with Directive 2014/26 EU, Art. 38* (11.10.2017) Ref Ares(2018)3743984 SPRO Report (unpublished).

[605] lag (2016:977) om kollektiv förvaltning av upphovsrätt.

the General Data Protection Regulation (GDPR) EU 2016/679.[606] There might be further consideration necessary in the future.

D Summary

The three reports show that the implementation of the CRM-Directive and the introduction of the passport system has not yet produced the expected outcomes. CMOs do not offer MTL directly but through joint ventures forming licensing hubs that bundle different rights. The anticipated tag-on construct of the passport system has not yet made an appearance and CMOs have instead set up joint ventures to provide for MTL following well-tried RRA structures.

The repertoire remains highly fragmented and its management is divided between CMOs, their joint ventures, publishers, record labels and newly developing private rights managing entities. This situation leads to problems with the rate-setting for licences, the scope of licences as to what repertoire is included, double invoicing and as noted in the Swedish report, the tendency to licence only the most popular repertoire as local repertoire is not highly frequented or included in MTL.

It remains to be seen whether the passport system comes into action or remains a dead duck. As of Article 40 CRM-Directive, the EC is required to assess the application of the CRM-Directive by 10 April 2021 and to write a report including an "assessment of the impact of the CRM-Directive on the development of cross-border services, on cultural diversity, on the relations between CMOs and users and on the operation of CMOs established outside the EU." If appropriate, the report shall be accompanied by a legislative proposal.[607] The EU has already made legislative approaches, proposing two copyright related Directives[608] aimed at easing the copyright controversies for the online environment and it is most likely that amendments will be made to the CRM-Directive in 2021.

IV Conclusion

The overall aim of the EC has always been to create a single market for Europe and decrease the national differences by establishing basic regulations and principles for all Member States. Not only on an EU but on an international level it proved to

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[606] GDPR is an EU law on data protection and privacy for the EU and the EEA.

[607] Article 40 CRM-Directive.

[608] European Commission *Proposal for a Directive of the European Parliament and the Council on copyright in the Digital Single Market (14.09.2016) COM(2016) 593 final, 2016/0280 (COD);* European Commission *Proposal for a Regulation of the European Parliament and the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmission of television and radio programmes (14.09.2016) COM(2016) 594 final, 2016/0284(COD).*

be difficult to incorporate new technologies and find common ground whenever new technical possibilities to exploit musical works arose. Early on, it became clear that cross-border rights management could only be achieved if it were based on common rights management regulations, especially those concerning the efficiency, transparency and governance of rights managing entities. The European legislator hesitated to regulate too much too soon, while meanwhile, the market grew more complex and fragmented, forcing rights managing entities to find ways to adapt to newly arising challenges.

The proposed Directive of 2012 was the starting point for introducing regulations aiming to establish common grounds for governance and transparency of CMOs in combination with regulations on multi-territorial licensing but was limited to only authorial rights. Despite the Proposal of 2012 being criticised for not considering the existing legal framework or factual circumstances causing the controversies over the existing rights management system and representing a problematic sectorial approach with a great potential to worsen the situation, the CRM-Directive was finalised making only minor adjustments. The CRM-Directive can be seen as the first attempt to regulate the operation of CMOs as the main rights managing entities to create common ground and ensure the enforcement of copyright and related rights in all EU Member States. The CRM-Directive contains extensive rules on good governance for CMOs and independent management entities but narrows the scope for regulations regarding MTL to authorial rights managing CMOs, excluding the much more fragmented neighbouring rights and their management. It would have been favourable to include all rights managing entities and not differentiate between authorial and rights in the sound recording as the regulatory framework allows right holders to freely choose a rights managing entity to manage their online rights. The analyses of the CRM-Directive show clearly that regulations on cross-border or international licensing of musical works for their online exploitation cannot, by themselves, solve the existing problem of repertoire and rights management fragmentation but would need to include legal and technical measures in order to provide a common ground for rights enforcement and management. The anticipated competition based on uncommon grounds between rights managing entities which are subject to different and/or additional regulations leads to distorted competition in an already fragmented market and takes away from the goal of creating a safe and fair environment for right holders and more possibilities for new businesses.

The greatest hindrance of multi-territorial licensing was seen in the territorial restrictions for licensing services, right holders and commercial users, and therefore the main focus was on breaking up those restrictions and enhancing competition between CMOs.

The reality, however, showed that dealing with intellectual property is more complex than was expected, and focusing on only one aspect of a rather complex area can create more problems than solutions.

The newly introduced regulations on good governance will inevitably even out disparities and lead to more compliance in regard to the functioning and operation of CMOs in the EU Member States but will not solve the main problem of fragmented repertoires and time-consuming searches for right holders and respective rights managers. Instead of simplifying the licensing system and providing for easy access to multi-territorial licences for the online exploitation of musical works with total legal certainty, the shift from providing for territorially limited multi-repertoire licences to a passport system providing for repertoire limited multi-territorial licences has the potential to add to the fragmentation of repertoires, especially in regard to the management of rights in the sound recording, adding to the licensing controversy. The passport system anticipated as a measure to decrease the repertoire fragmentation has not fulfilled expectations. Instead, CMOs have set up joint ventures to provide for MTL following well-tried RRA structures. However, the repertoire remains highly fragmented and its management is divided between CMOs, their joint ventures, publishers, record labels and newly developing private rights managing entities or artists managing their own rights. It is costlier and more time-consuming now to acquire sufficient licences that guarantee legal certainty and an unlimited repertoire for online music service providers aiming to serve an international market. The problems with the rate-setting for licences, the scope of licences as to what repertoire is included, double invoicing and a tendency to license only the most popular repertoire, as local repertoire is not highly frequented or included in MTL, becomes a hindrance for establishing new online music services.

In order to make online licensing more effective, it needs to include regulations applying equally to all parties involved combined with technical measures taking the unique character of the internet into account and making use of the unique possibilities it offers.

Chapter Five
Where to from here? The Future of International Licensing of Musical Works in the Digital Age

"It is increasingly evident that more and more obstacles will surface when anything based on precedent and tradition, as well as resistance to change, comes face to face with technology."[609]

The digital revolution has watered down the basic copyright concept of territoriality, introducing the possibility of fast, direct communication between right holders and users sharing their music instantly on streaming platforms and through social media. The availability of high-speed technology and the expansion of internet connectivity made it possible to access streaming services through smart devices on the go and across existing physical borders. Therefore, an international approach to protect artists and their works in the online world equally and globally seems to be the unavoidable solution to the existing disparities.

As discussed earlier, the need for international copyright protection was evident when the patronage system that had supported European artists for centuries was replaced by a market-driven economy based on the sale of sheet music.[610] The scope of this new economy was soon growing from national to international, making it necessary for composers and their publishers to license their works abroad to ensure remuneration and copyright protection. However, the protection of foreign musical works under national copyright legislation linked to respective licensing models and royalty flows proved to be problematic and to diverse to suit the newly forming online market.

As discussed in Chapter One, the development of international legislation for rights regarding the public exploitation of musical works and their management can be divided into four phases, each focusing on different aspects.

The first phase was dominated by the interests of composers and songwriters and led to the recognition of author´s rights and eventually to the first international copyright agreement, the Berne Convention.

The second phase was triggered by the mechanical and electronic media development and dominated by the interests of neighbouring right holders, especially record producers and performing artists, leading to the first international agreement on neighbouring rights, the Rome Convention.

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[609] Ciminero "Technology, the Internet and the Evolution of Webcasters" at 111.
[610] Laing "Copyright, Politics and the International Music Industry" at 71.

The third phase started around the 1980s, shifting the focus from right holders to their work as an intellectual product that can be traded globally. Instead of strengthening international copyright conventions, the focus was now on bilateral relations between governments and the inclusion of intellectual property regulations in international trade agreements like TRIPS.[611]

The fourth phase started in the early 2000s with the development of new ways of making musical works available in an instant, not only publicly but globally. The focus shifted again from the work as an intellectual property product to the rights managing entities as the main provider of such products in the market. The different operational methods and licensing systems, especially, came under scrutiny.

Neither the focus on strengthening international copyright legislation nor the trade agreements have brought a solution to the problems faced when licensing musical works for the use in the online market but new attempts focusing on restructuring the management of rights and licensing systems have potential to solve the existing controversies if they can overcome the gridlock caused by old structures rooted in the first bilateral agreements and the general national scope of rights management and enforcement.

The question this thesis has asked was to what extent and in what manner the CRM-Directive contributes to the establishment of a more comprehensive and suitable international licensing system for the online exploitation of musical works. As discussed in the previous chapter, the CRM-Directive focuses on the establishment of governance and transparency regulations for rights managing entities to create a level playing field for more competition in the online market. It has also introduced a licensing passport system in order to make it easier to acquire licences for the use of musical works online. The solution introduced by the CRM-Directive has not adequately solved the problems of online licensing. Therefore, this thesis argues that the existing licensing problems cannot be solved by legislation alone, but need to be accompanied by the introduction of interoperable systems and respective regulations for all rights managing entities. The following chapter will analyse the potential of a combination approach of the CRM-Directive and the MMA 2018 by incorporating parts of each solution.

Therefore, this chapter will review the licensing procedures in Europe and the United States in order to outline the existing problems and analyse to what extent and in what manner the CRM-Directives regulations in combination with the MMA 2018 can contribute to the establishment of a new, more comprehensive, international licensing regime.

In order to make the licensing process for the online exploitation of musical works more comprehensive, cost-effective and accessible, the proposed solution would

[611] Laing "Copyright, Politics and the International Music Industry" at 71.

leave the existing national and international rights untouched and introduce guidelines modelled after the CRM-Directive, including regulations and recommendations on governance and transparency for rights managing entities accompanied by mandatory database participation, and a royalty distribution system that includes distribution agreements and centric licensing.

I Licensing Procedures for online streaming services in the EU and the United States after the CRM-Directive and the MMA of 2018

The existing licensing problems are best illustrated by more closely examining the licensing procedures in Europe and the United States for online streaming services like Spotify.

A Licensing Procedures in the EU after the CRM-Directive

To operate an interactive online streaming service like Spotify, it is necessary to acquire licences for the reproduction and public performance rights in the musical composition and the sound recording. Due to the regulations in the CRM-Directive, it is now possible for CMOs to licence their own repertoire for the entire EU territory but there are also entities and CMO intermediaries that are able to license combined repertoires.

Reproduction and public performance rights in the musical composition have to be cleared with the respective CMOs managing these rights in each country or through intermediaries offering multi-territorial licences in their own or combined repertoires. Due to the possibility of withdrawing from collective management, the Anglo-American repertoire is managed separately by the respective publishers directly, through CMO or their intermediaries. The royalty rates are negotiated in the free market following a reasonable pricing approach and non-discrimination and good governance regulations set by the CRM-Directive.

The reproduction and public performance rights in the sound recording must be cleared with the respective record producers/record labels which usually manage their own rights and those of respective performing artists. Usually, national CMOs can license the entire repertoire for their respective territory of operation but not on a multi-territorial basis. Online music services can negotiate with respective CMOs on a country to country basis or enter into direct negotiations with the respective right holders.

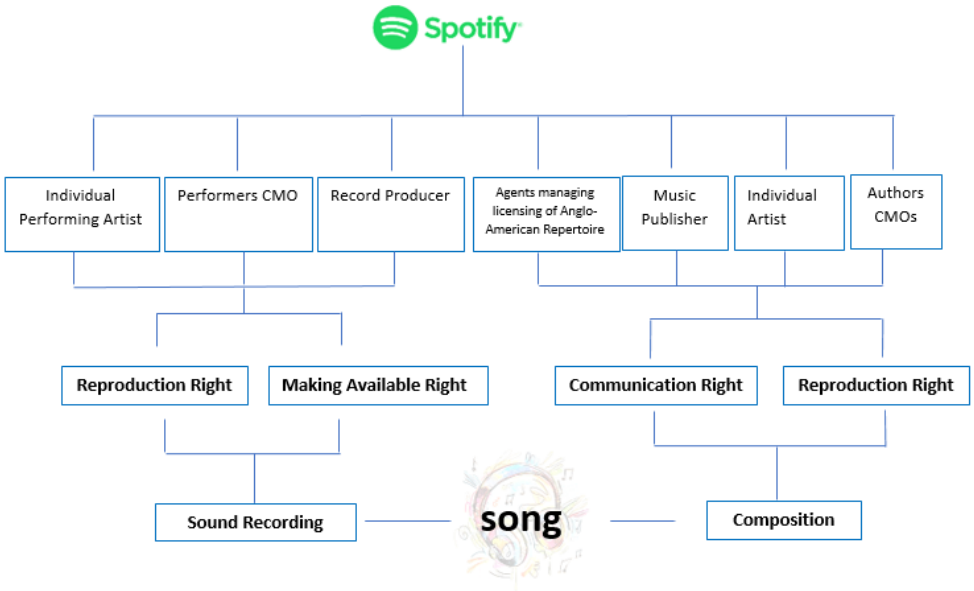

Figure 4 Licensing Procedure for Spotify Europe (interactive service)

B Licensing Procedures in the United States after the MMA 2018

Interactive music services have to clear licences for the use of the sound recording and the underlying musical composition. The MMA, signed into law in October 2018, made changes to the licensing system regarding the mechanical licences for musical compositions and the royalty rate proceedings for ASCAP and BMI which manage the public performance rights in musical compositions.[612] Furthermore, it recognises a royalty contribution system that includes non-right holders that are part of the creative process previously used by SoundExchange on a voluntary "letters of direction" basis.[613]

1 Music Modernization Act of 2018

The Music Modernization Act of 2018 seeks to restructure the licensing procedures, especially for online services. The MMA of 2018 was set to combine four different bills, but only three were finally incorporated.

Title I of the MMA of 2018 focuses on music licensing modernization and incorporates the Musical Works Modernization Act introducing compulsory

[612] American Royalties Act of 2015 (Introduced 04/16/2015) Read twice and referred to the Committee on the Judiciary and Orrin G. Hatch-Bob Goodlatte Music Modernization Act Public Law No: 115-264 (10/11/2018) (MMA 2018).
[613] Title I MMA 2018.

licensing systems which allow a person or company to use a copyright-protected work by agreeing to pay a set rate, without having to negotiate with or get explicit permission from the rights holder.[614]

Title II of the MMA of 2018 focuses on classics protection and access and incorporates the Classics Protection and Access Act. This title provides federal protection for sound recordings fixed before February 15, 1972, which are currently only covered by state law. The Classic Act provides for a new exclusive federal right for sound recordings fixed before 15 February 1972. This ensures royalty payments for pre-1972 sound recordings subject to statutory royalty rates.

Title III of the MMA of 2018 focuses on the allocation for music producers and incorporates the Allocation for Music Producers Act or the AMP Act

This title provides statutory authority for and expands existing practices for distributing royalties to producers, mixers, and sound engineers who made a creative contribution to a sound recording. A nonprofit collective designated by the Copyright Royalty Board shall adopt procedures for such royalty payments for various digital transmissions of the recording.

The Allocation for Music Producers Act sought to formalise royalty payments to producers and engineers involved in the making of the sound recording by implementing the system of letters of direction which was voluntarily used by SoundExchange. Featured recording artists and contracted producers or engineers involved in the creative process of making the sound recording can agree on a royalty share.

The Musical Work Modernization Act creates a blanket licence for online music services that includes permanent and limited downloads, and interactive streams, and improves royalty rate settings. The Act aimed to fix existing problems stemming from the differences in licensing negotiation processes and royalty rate settings. While licences for reproduction and distribution rights in sound recordings are negotiated directly in the free market, the same rights for musical compositions are governed by statutory licences and set royalty rates requiring a notice of intention that must to be filed with each copyright holder for any song intended to be used.[615] The research of right holders is costly and time-consuming due to decades of incorrect, contested, or missing data. Usually, users assign such research to specialised entities like the Harry Fox agency and, in cases where the right holder cannot be located, file notices of intention with the Copyright Office.[616] This

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[614] H.R.1551 — 115th Congress (2017-2018) <www.congress.gov/bill/115th-congress/house-bill/1551>.

[615] Bill Rosenblatt "Improving the Music Modernization Act" (07.02.2018) Copyright and Technology <copyrightandtechnology.com/2018/02/07/improving-the-music-modernization-act/>.

[616] Paul Resnikoff "An Insanely Detailed Discussion about the Music Modernization Act" (17.10.2018) Digital Music News <www.digitalmusicnews.com/2018/10/17/music-modernization-act-details/>.

process is inefficient as it delays the royalty distribution process for right holders and creates additional administration costs and legal uncertainty for users. The Act solves the problem in two steps. First, it introduces a service managing the reproduction and distribution rights in the musical composition that mirrors the service provided by SoundExchange for the public performance rights in the sound recording. The Mechanical Licensing Collective would manage the distribution and reproduction rights in the musical composition by issuing blanket licences to users in order to eliminate the need for notices of intention for each song. Services that obtain such a blanket licence will be exempt from the liability of statutory damages as it is the responsibility of the Licensing Collective to find the right holders and distribute royalties accurately. The Licensing Collective takes music play data feeds from interactive streaming services, calculates the underlying composition and their right holders and distributes the respective royalties to each right holder.[617]

Online services would pay administrative fees to the Licensing Collective instead of paying the private services they use now to identify respective right holders. The respective royalty rate would be set by the Copyright Office in a five-year period based on certain economic principles and testimonies from stakeholders.

In order to be eligible for mechanical royalties distributed by the Licensing Collective, the right holders or their representatives must register their rights directly whether national or foreign.[618] If not registered, the right holder is not locatable and special distribution regulations obtain.

The earned, but unpaid, royalties for works where the right holders cannot be located will be held in an "unclaimed accrued royalties" fund for a minimum of three years, after which they can be distributed to other entities based on their financial music publishing market share.[619] This would include all the outstanding notices of intent that were filed with the Copyright Office prior to the MMA.

To estimate the market share, online services are obliged to provide all relevant information regarding the negotiated direct licences to the Licensing Collective.

The Licensing Collective will be set up by a non-profit organisation and managed by a board of directors consisting of fourteen board members and three non-voting members.[620] The ten board members are composed of ten publishers and four independent or self-published songwriters while the three non-voting members must be one representative of a non-profit trade association of music publishers, one representative of the digital licensee coordinator (to be created by the government), and one representative of a nationally recognized non-profit trade association whose primary mission is advocacy on behalf of songwriters.

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[617] Bill Rosenblatt "Improving the Music Modernization Act".
[618] Paul Resnikoff "An Insanely Detailed Discussion about the Music Modernization Act".
[619] Rosenblatt "Improving the Music Modernization Act" Copyright and Technology.
[620] Resnikoff "An Insanely Detailed Discussion about the Music Modernization Act".

There is no pre-established Licensing Collective nor are the board members identified. Within 270 days from 11 October 2018 when the MMA was signed into law, a respective entity is required to be established.[621]

Although the MMA makes many changes to the existing licensing system, some problems remain unsolved. The first would be to find a non-profit organisation establishing a Licensing Collective, as similar services are currently privately offered in a highly competitive market. The Licensing Collective would create a monopoly for a single agency similar to ASCAP and BMI without regulating its accountability or oversight. There are no specific regulations for governance or transparency in place, especially on how to protect confidential information regarding the direct licences negotiated by online services. Once the money from the unclaimed accrued royalties is distributed, it cannot be recovered and is forever lost to the rightful owner. Mistakes made by the Licensing Collective when distributing the collected royalties would be at the expense of right holders. Registering the composition with the Licensing Collective is mandatory in order to be paid the respective royalties. This could be problematic and compromise Article 5(2) Berne Convention to a certain extent, especially in respect of foreign right holders and the short time of three years the money is held before being regarded as not retraceable.

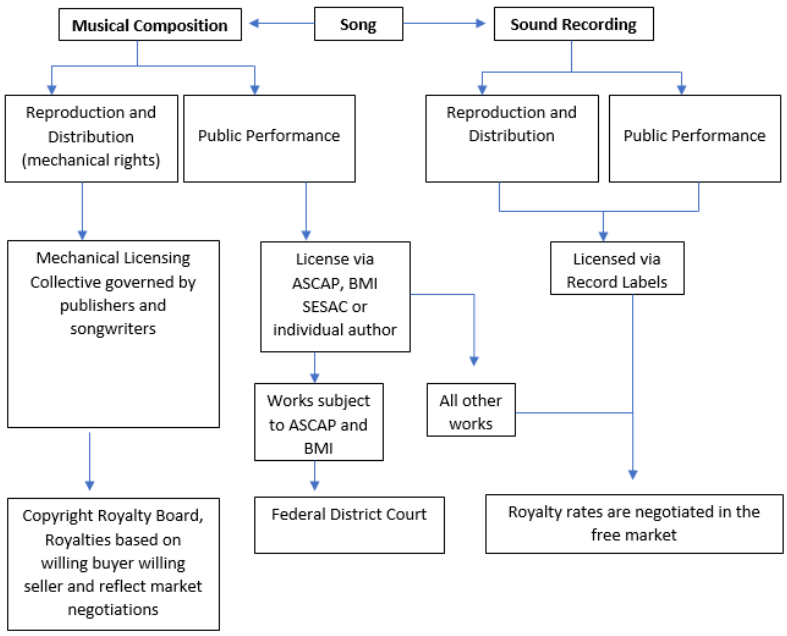

Figure 5 Licensing System after MMA 2018 (interactive services)

[621] See <www.copyright.gov/music-modernization/> for up to date information's on the legislative history of the MMA of 2018 (this source was not available at the time this thesis was finalised and added in September 2020).

2 Mechanical licence for the composition

An interactive online service like Spotify that is based in the United States can acquire a blanket licence for the mechanical rights in musical compositions from the Licensing Collective. The licence includes every existing musical composition and offers online services more protection against statutory damages by shifting the responsibility of locating the respective right holders and paying them their royalties to the Licensing Collective. Despite the Licensing Collective and its power to issue blanket licences for musical compositions, online services have the opportunity to "opt out" and negotiate direct licences with the respective right holders. Restrictions are in place for online services that are considered "significant". Such services are required to pay an "administrative assessment" fee to the Licensing Collective.[622]

Online services are required to monitor what has been streamed and send a respective report to the Licensing Collective in an agreed timely manner. The online services entering into direct licences are obliged to provide information on what compositions and recordings are being used, how many stream times it had and how much money had been generated in royalties. Based on the reported information the market share is calculated to distribute "unclaimed accrued royalties."

3 Public performance licence for the composition

Public performance licences for the musical composition have to be acquired from ASCAP, BMI, SESAC or directly from the right holders. The statutory royalty rate proceedings of ASCAP and BMI are overseen by randomly assigned judges from the Southern District of New York. The judges oversee questions of consent decree interpretation and are permitted to consider sound recording royalty rates negotiated in the free market when determining the rates for public performance licences for musical compositions.[623]

4 Reproduction, distribution and public performance licences for the sound recording

Licences for the sound recordings must be acquired through the record labels directly and a royalty rate has to be negotiated between the respective parties.

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[622] Resnikoff "An Insanely Detailed Discussion About the Music Modernization Act".

[623] Copyright Alliance "Summary of H.R. 1551, the Music Modernization Act (MMA)" (October 2018) <copyrightalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf>.

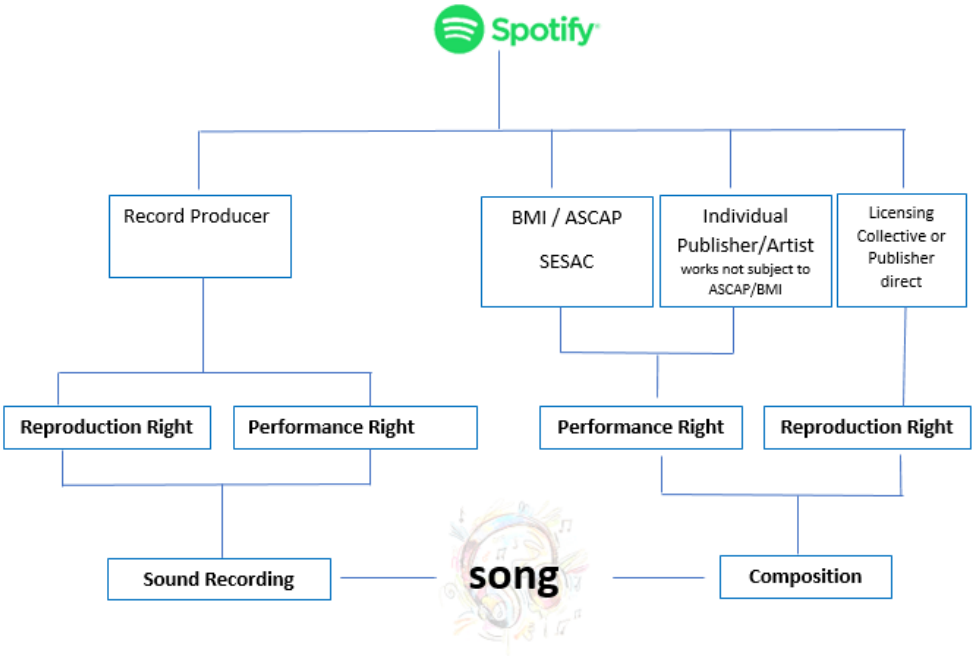

Figure 6 Licensing Procedure: Spotify United States after MMA 2018 (interactive)

II Remaining Problems and Existing Possibilities by Levels of Their Occurrence

The European licensing scheme relies on a system where many offer to licence the same rights in the musical composition, differing in territorial scope and repertoire sizes. The focus of rights management is on the class of right holders, rather than the special use of the protected works. While it is possible to acquire a blanket licence that includes all rights in the world repertoire in music in each country of the EU, it is not possible to acquire a similar licence for the online use of musical works that includes the entire EU territory and the world repertoire in music, including all respective rights. The CRM-Directive introduced transparency and governance regulations, but the passport system brought no facilitation for online services seeking easy access to multi-territorial licences for the entire EU territory. Rather than looking at more competition between licensing entities, the United States introduced a new single entity to manage the mechanical rights in a musical composition through a registration system that provides for public information through a music database.

The rights management of the United States is organised by classes of rights and right holders. While the rights in the musical composition are divided, based on their use and managed by the newly introduced Licensing Collective and ASCAP,

BMI and SESAC respectively, the rights in the sound recording are bundled and managed by record producers/record labels in the same way as in Europe. The licensing system of the United States relies partly on a statutory royalty setting system controlled by the Copyright Royalty Board revised in a five-year period for royalties regarding the musical composition only.

This system has the rights management classified by the use of the rights and special royalty rate-setting processes in place for the musical composition, while the regulations for the management of the rights in the sound recordings are not regulated in that way and negotiations are left to the free market.

The introduction of a Licensing Collective lacks governance and transparency regulations especially in regard to handling the confidential information online services are required to provide. A further problem could be the registration requirement which is mandatory for right holders in order to receive payments of royalties collected. This has the potential to put foreign right holders in a disadvantageous position while at the same time freeing online services from the responsibility to locate the respective right holders.

The approach of neither the EU nor the United States has the potential to establish a more comprehensive and suitable online licensing system with an international scope on its own. Their respective solutions bring the two licensing systems one step closer together and therefore contribute, to a certain extent, to a more comprehensive licensing system. The best course of action to resolve the existing licensing controversies could lie in the combination of the two approaches.

The remaining problems in both territories exist on different levels triggered by the combination of parts, rights and right holders that contribute to a musical work and that copyright is global in scope but remains local in execution, leading to the establishment of different licensing systems and regulations. The remaining problems occur on different levels which can be categorised as on the rights level, the rights management level, and the price and market level.

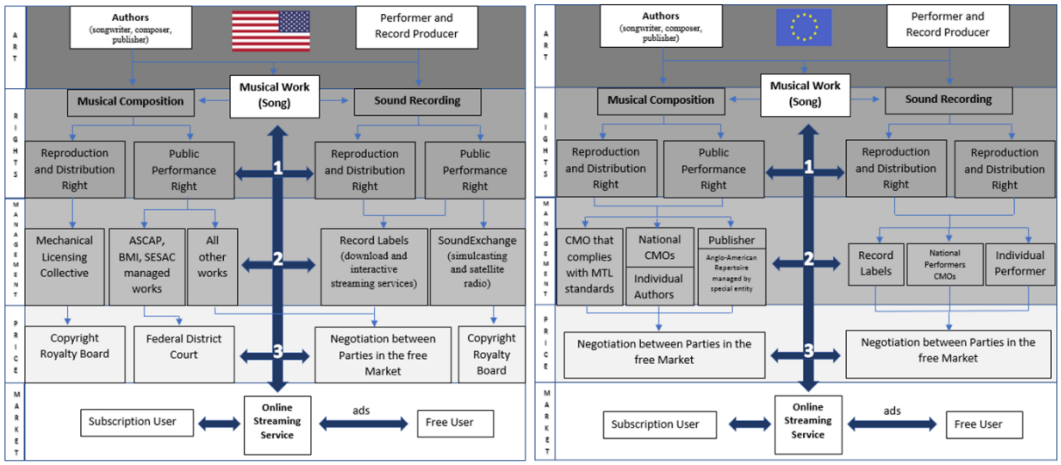

Figure 7 Comparison Licensing Procedure by Lebel: United States of America after MMA 2018 and EU after CRM-Directive

A Rights Level

The rights level shows the complexity of copyright embodied in a single musical work consisting of numerous layers of rights and their corresponding right holders governed by national and international legislation. During the first and second phase of developing international rights in musical works, a consistent refusal to acknowledge the contribution of new forms of right holders led to the separation of composition and sound recording, and the respective rights therein regulated in two different legal documents, the Berne and Rome Conventions. Subsequently, a musical work was split into two main parts: the musical composition and the sound recording. The musical composition includes two authorial rights: the right in the lyrics, and the right in the musical composition. Holders of those rights are usually songwriters, lyricists, authors and composers having both the exclusive right to reproduce and perform their work in public. A musical work having been recorded, the sound recording triggers a new set of rights: the rights in the sound recording, and the recorded performance. Holders of those rights are usually the record producer and performing artists, who both have the right to reproduce and perform their work in public (make it available to the public) and the right to equitable remuneration. To ensure remuneration and to make their works known, most authorial right holders assign or license their rights to third parties, usually, collective rights managing entities regulated by and organised under national legislation. Publishers, record producers and performers can be organised collectively, but most record producers and publishers choose to manage their rights separately which leads to an imbalance in regard to regulations on rights management and royalty negotiations. When rights in intellectual property became more and more a product, the separation of rights into authorial and neighbouring rights, numerous right holders and differences in the respective rights management became the biggest issue for users seeking to license music.

The most common proposals for changes on the rights level are considering a harmonisation or unification of copyright and restructuring, but are unable to solve all problems which arise. Gervais, for example, proposes to structure copyright so that it corresponds to its primary objective, leaving it to the right holders to define the authorised use.[624] He suggests a single economic right that is divisible by contract to allow the right to respond faster to any changes. His approach emphasises the effect of the use of the copyright protected work, rather than its technical nature and suggests defining the use of the protected work in order to make it independent of technology. The scope of the proposed right would incorporate proper limits by aligning it with its actual purpose. This would

[624] Daniel J. Gervais *(Re)structuring Copyright - A Comprehensive Path to International Copyright Reform* (Elgar Monographs in Intellectual Property Law, Edward Elgar Publishing Ltd, Cheltenham, United Kingdom, 2017) at 132.

introduce a teleological rather than technological structure of rights based on the definition of their actual use. The economic component to such a right would focus on prohibiting uses that demonstrably interfere with actual or predictable commercial exploitation. The proposed approach would provide strong exclusive rights for uses that impact on commercial exploitation and are not covered by a specific exception or limitation. The solution presented by Gervais would craft a new single international copyright norm that effectively defragments economic rights and creates the necessary distance between the right and the technology used to exploit the value of, or otherwise use, the work. The way to introduce such a right would be through a new draft of the Berne Convention drafted in an exemplary way by Gervais.

The approach taken by Gervais allows for the existing problems of rights divisibility and would certainly contribute to streamlining rights for the online use of musical works. In addition, "the problems arising when it comes to the management of rights, negotiation and distribution of royalties as well as royalty rate setting would perpetuate." It could be a difficult exercise to get parties to agree to such a new right due to their national differences, especially in regard to the structure of neighbouring rights and royalty rate setting systems. A proposal like that would have to be accompanied by guidelines or general regulations on rights management, royalty negotiation and distribution systems for all right holders and rights managers, and by streamlined IT systems which could guarantee sufficient information and communication between the parties to achieve a functioning licensing system.

Similar to Gervais's proposal of a new international right, but taking it a step further, the EU legislator and many scholars were working towards harmonisation of copyright in order to create a universal European copyright law.[625] The introduction of a universal copyright code rather than reviewing the old, or drafting new single rights that would suit the online market, was seen as the best way to gain common ground between the Member States.

Bernt Hugenholtz argues that the next step towards uniformity of copyright law in Europe would be the introduction of a unified European Copyright Law.[626] Such a unified copyright law would have the potential to end territoriality and establish a unified legal framework creating an unfragmented single market for copyrights and related rights offline and online. He argues for a unified European copyright code which would enable enhanced legal security and transparency for right holders and

[625] Bernt Hugenholtz "Is harmonisation a good thing? The Case of the Copyright Acquis" in Justine Pila and Ansgar Ohly *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press, Oxford, New York, 2013) at [57-73].

[626] Bernt Hugenholtz "Is harmonisation a good thing? The Case of the Copyright Acquis" in Justine Pila and Ansgar Ohly *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press, Oxford, New York, 2013) at [57-73].

users, while reducing administration and transaction costs. He suggests that a European Copyright Law could be undertaken in parallel with improvements on the national level or further harmonisation of copyright.

A similar approach was taken by Jacklyn Hoffman[627] in a proposal to combine a new universal EU Copyright Code with a Pan-EU licensing requirement aiming to end copyright territoriality and geo-blocking and, at the same time, introduce an accompanying licensing system. In order to introduce a unified copyright code that would take effect in a timely manner, Hoffman suggests using the legal instrument of a Regulation rather than a Directive, as a Regulation takes direct effect in all Member States and cannot be individually modified like a Directive. The universal copyright code would be accompanied by pan-EU copyright licensing requirements which would guarantee EU-wide licences for users without territorial restrictions. The proposed concept would extend the territorial scope of licences to the whole of the EU territory without restrictions. This approach reflects the passport system to a certain extent and would trigger the same problems and not sort the problem of repertoire fragmentation or ease the rights clearing process for musical works.

Neither of the approaches of introducing a unified copyright code for Europe would be able to solve the problem of fragmented rights and repertoires, especially in respect of rights management and multi-territorial/multi-repertoire licensing. The EU legislator has more recently sought to follow a more cautious path, leaving the national dimensions of the copyright system intact, aiming to reduce the existing national differences and allow for wider online access to protected works across the EU rather than working towards a complete copyright unification.[628] This approach has already been taken in the CRM-Directive seeking to reduce differences and introduce basic regulations of rights management leaving enough room for national specifics.

Many international scholars have also argued that the integration of rights in a harmonised international copyright code would be the best answer to solve all copyright-related problems in the online realm. In her examination, Professor Jessica Litman (2010) concludes that limiting the scope of copyright to a commercial exploitation right would be simpler than the existing array of rights.[629] She suggests a single right of commercial exploitation focusing on the effect of somebody's actions on the copyright holders' opportunities for commercial

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[627] Jacklyn Hoffman "Cross Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union" (2016) The Geo. Wash. Int´l L. Rev. Vol. 49 143 at 167.

[628] Reto M. Hilty, Valentina Moscon (ed) *Modernisation oft he EU Copyright Rules – Position Statement oft he Max Planck Institute for Innovation and Competition* (Max Planck Institute for Innovation and Competition Research Paper Series, No. 17-12, Munich, Germany, 2017) at 14.

[629] Jessica Litman *Real Copyright Reform* (2010) 96 IOWA L. Rev. 1 20 at 43.

exploitation.[630] Similarly to Litman's approach, Professor Andrew Christie proposes a general simplification of the whole copyright legislation by grouping economic rights in two categories, reproduction and dissemination. Another more radical proposal from Miller and Feigenbaum is to replace copyright in whole by a right of distribution to the public and control the public distribution of the copyrighted work as an organising principle that replaces the actual copyright.[631] This would return copyright to its initial historical focus on distribution to the public where a violation of right only occurs if the public distribution of a work was not authorised by the copyright owner.[632]

These solutions would solve the problems only to a certain extent as they would only reduce the rights that need to be licensed for a certain technical use but still depend on the technical nature of the use. The right would still be owned by various right holders and entities involved with the management and licensing of such rights. The approach to combine certain rights in order to make copyright more comprehensive must, therefore, consider the execution of such a right, especially in regard to its management and respective licensing structures. The example of the United States right of internet transmission in sound recordings shows that solving problems only partially can worsen the situation for right holders immensely if the rights introduced lack regulations on execution and management.[633] As analysed above, authors and publishers that belong to one of the two main CMOs, ASCAP and BMI, must grant licences due to the application of an antitrust consent decree that leaves very little negotiation power, while neighbouring right holders with rights in the sound recording are free to negotiate royalties on the free market.[634] The newly introduced MMA of 2018 provides for remedies but does not overcome the disparities of royalty negotiation and rate setting processes for authors and neighbouring right holders. The example illustrates the crucial interaction between rights and rights management and its impact on licensing and royalty rates that needs to be taken into account when looking for a satisfactory solution. All the examples show that changes at the rights level only cannot overcome the existing problems as long as their management and rate setting systems are not aligned to support these changes at the rights management and price setting level in the market.

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[630] Jessica D. Litman *Digital Copyright* (2nd edition, Prometheus Books, Amherst, N.Y., 2006) at 180.
[631] Ernest Miller and Joan Feigenbaum "Taking the Copy out of Copyright" (2001) *Digital Rights Management Workshop* at [233-44].
[632] Miller, Feigenbaum "Taking the Copy out of Copyright" (2001) *Digital Rights Management Workshop* at [233-44].
[633] Gervais *(Re)constructing Copyright* at [132-133].
[634] Gervais *(Re)constructing Copyright* at [132-133].

B Rights Managing Level

The rights managing level is predominantly national in its regulatory scope but one of the most influential in regard to music licensing as it combines national and international regulations in the form of rights management through third parties. The standardisation of practice and collaboration between CMOs has been widely discussed and considered as a solution to address the inefficiency of rights management caused by differences in the rights granted to right holders, and their enforcement. As discussed in the previous chapter, RRAs between CMOs in Europe conflicted with competition regulations and were reduced to a minimum that complied with these standards. The most challenging task in the management of rights is the identification of various rights associated with numerous right holders. As Mario Bouchard aptly commented:

> Collective management is divided not only according to rights (performance/communication, reproduction) or subject matter (work, performance, sound recording) but also to a right holder´s craft (musician, singer, backup artist) and linguistic background.[635]

A system of centralised collective management under which one or only a couple of CMOs offer licences on behalf of all other CMOs and right holders could ease the licensing controversy and save users administration costs and enable online services to achieve economies and efficiencies of scale with the potential to increase revenues.[636] As seen before, a pure one-stop-shop system is most likely to clash with competition regulations. Although the CMO cooperation system has the potential to reduce administration costs and minimize the research effort, it cannot solve all the problems experienced by the EU after the introduction of the passport system accompanied by regulations of multi-territorial licences.

There are proposals to combine the administration and licensing of various rights on one single object, especially communication/performance and mechanical reproduction rights, under one entity enabling all-encompassing licensing of rights.[637]

Combining rights could be problematic in regard to the differences in marketing and royalty collecting strategies, in addition to negotiation and distribution of

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[635] Mario Bouchard "Collective Management in Canada" in Daniel Gervais (ed) *Collective Management of Copyright and Related Rights* (2016) at 265.

[636] Gervais (ed) *Collective Management of Copyright and Related Rights* at 13; *see also* Tilmann Lüder "The Next Ten Years in EU Copyright: Making Markets Work" (2007) 18 Fordham Intell. Prop. Media&Ent. L.J. 1 19.

[637] Andrew Gowers "Gowers Review of Intellectual Property" (2006) assets.publishing.service.gov.uk <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf>; *see also* Robert P. Merges "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organisations" (1996) 84 Cal. L. Rev. 1293 at 1317.

royalties of rights managing entities. Balancing the widespread interest of different right holders and stakeholders could be challenging but streamlining the operation of managing entities as emphasised by the European CRM-Directive could be a first step in the right direction, making such a scenario more likely and achievable. A similar approach of combining rights in order to make rights management procedures more efficient and sustainable was taken by the United States with its MMA 2018 by introducing a licensing collective in combination with the establishment of a mandatory public information database.[638] The two approaches show that the civil and the common law system are developing in a similar direction, but the European legislator is working on more improvements.

Shortly after the final implementation date of the CRM-Directive on 14 September 2016, the EC published a new package of proposals aimed at the modernisation of European copyright which the Max Planck Institute commented on in a Position Statement[639] identifying important issues and providing solutions.

As identified in the Position Statement, the creation of EU copyright law has suffered from two main limitations: different national implementation of EU Directives, and national exercise of copyright based on territorial limitation.[640] For a long time, the EC cultivated the idea of a universal European copyright title but after recent events like Brexit, the EC retracted and replaced that approach by concentrating on the reduction of differences in the Member States and focusing on the development of wider access to protected works and leaving national copyright dimensions untouched rather than drafting a harmonised European Copyright code. The EC declared that "the full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today."[641] The proposed copyright packages consist of two Directives and two Regulations covering subject matters like exceptions and limitations, copyright contract, internet service providers, online transmission of broadcasting organisations, and retransmission of television and radio programmes.[642] The three general objectives that sound through the new copyright package are basically: (1) to allow for wider access to protected content across the EU focusing on TV and radio programmes, EU audio-visual works and cultural heritage; (2) to facilitate digital use of protected content for education,

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[638] Public Law No: 115-264 (10/11/2018) Orrin G. Hatch-Bob Goodlatte Music Modernization Act TITLE I--Music Licensing Modernization - Musical Works Modernization Act.

[639] Hilty, Moscon (ed) "Modernisation oft he EU Copyright Rules – Position Statement oft he Max Planck Institute for Innovation and Competition" at 14.

[640] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 14.

[641] European Commission Communication *Towards a modern, more European copyright framework* (09.12.2015) COM(2015) 626 final.

[642] Proposed Directive COM (2016)593 final; Proposed Regulation COM (2016)594 final, Proposed Regulation COM (2016)595 final and Proposed Directive COM (2016)596 final.

research and preservation in the digital single market; and (3) to ensure a well-functioning marketplace for copyright were right holders may set licensing terms and negotiate on a fair basis with those distributing their content.

Spreading new regulations over four new legal documents adds new provisions to existing ones, which already deal with similar issues and makes copyright even more complex and has the potential to cause significant inconsistencies. As an alternative, the Position Statement of the Max Planck Institute proposes to replace existing legislative measures with a new (possibly single) one, thereby avoiding overlaps and inconsistencies in the EU legal framework.[643]

The choice of not only the legislative instrument, partly Directives and partly Regulations,[644] adds to the controversy but also the lack of conceptualisation and semantic and linguistic consistency.[645]

In relation to this thesis, the most relevant shortcomings of the proposed new copyright package that need to be considered when examining a more efficient licensing scheme are Articles 10 and 12 of the proposed Directive COM(2016) 593 final.

In Article 10, the proposed Directive provides for regulations on copyright contract law in order to protect authors and performers but falls short of regulating additional measures like contract formalities, exploitation and reporting obligations, time limitation for licensing agreements, and renegotiation or rights reversion mechanisms. These additional mechanisms are identified as a necessity to counteract the weaker bargaining power of authors and performers compared to their contractual partners in copyright contract law.

Another aspect that needs to be taken into account when regulating copyright contract law is to determine the "appropriateness" of payment to right holders in a more comprehensible way.[646]

Claims to fair compensation are regulated in Article 12 of the proposed Directive COM(2016) 593 final lacking a clarification of the term "right holder," "fair compensation" and "equitable remuneration." In the Position Statement, it was suggested that:

> EU legislature should ensure that both authors (and performers) and derivative rightholders who take on the risk of making the necessary investment for the work

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[643] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 14.

[644] While Directives are implemented into national law, Regulations impose upon national courts the disapplication of national law when it is in contrast to the Regulation itself. Furthermore, a subsequent Regulation repeals a prior Directive according to the principle of *lex posterior derogate priori* (a later law repeals an earlier law).

[645] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 17.

[646] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 77.

> to yield revenues, including publishers, obtain a share of fair compensation in proportion to the harm resulting from use of the work;[and] that authors obtain in any case a remuneration for the use of their work made under an exception or limitation where such use requires fair compensation.[647]

It is proposed that all parties investing in the exploitation of the work should receive a proportional share of the fair compensation for harm and author's remuneration should be based on the value of the use of the work, irrespective of any actual harm or ownership of the respective economic right, taking into account the special position of CMOs.[648]

Both the European approach and that of the United States opted for changes at this level in order to make the existing licensing systems more efficient. It is the level that illustrates the complexity of copyright legislation and the influence it has on national and international licensing systems. Not only differences in national legal systems but in the system of rights management, especially the operation and structure of rights managing entities clash and create additional problems which need to be taken into account when drafting an international online licensing solution. Differences not only exist between CMOs managing authorial rights but other entities like publishers and record labels managing their own rights in the sound recording under slightly different legal prerequisites rooted in the rights splitting that occurred earlier.

The differences are illustrated on the example of Europe and the United States after their legislative changes by the CRM-Directive and the MMA 2018.

1 EU after the CRM-Directive

The CRM-Directive focused on the operational and structural differences of CMOs in the Member States in order to harmonise those basic structures for all collective rights managing entities. The combination with a European Licensing Passport ought to ensure the equal representation of all authorial right holders. Despite expectations, the new regulations led to the establishment of new CMO joint ventures and intermediaries managing authorial online rights and granting multi-territorial licences for their respective repertoire while the rights in the sound recording remained managed by record labels, individual artists and specialised CMO intermediaries (for the Anglo-American Repertoire). The CRM-Directive worsened the repertoire fragmentation that was first triggered by the Recommendation of 2005 and made blanket licences on a multi-territorial level

[647] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 89.
[648] Hilty, Moscon (ed) "Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition" at 89.

disappear for good, leaving online music services with high administration costs and time-consuming research in right holders and managing entities. The licensing scope changed from a mono-territory repertoire blanket licence to a multi-territory repertoire limited licence. During the time between the Recommendation of 2005 and the final CRM-Directive, the European Member States developed their own solution to the licensing problems, relying on RRAs accompanied by special national rules like the examples of Germany and Sweden illustrate.

(a) Germany

The German CMO GEMA manages the rights in the musical composition and, under an RRA with GVL, the rights in the sound recording respectively for certain uses. Publishers, record labels, producers, authors and performing artists can manage their respective rights separately. The rule-of-thumb that ensures practical and sufficient prosecution is known as the GEMA-assumption rule under which courts sometimes assume that the collecting society has a sufficient legal mandate, requiring users to provide express evidence that works used by them without permission of the society are not included in the society´s repertoire.[649] The scope of the licences remains a mono-territory repertoire blanket licence for specific uses of musical works. The implementation of the CRM-Directive had little influence on the German licensing system as far as multi-territorial licences are concerned, as such licences are granted exclusively through a joint CMO intermediary, the ICE-Hub.

(b) Sweden

Along with the German GEMA, STIM, the Swedish CMO managing authorial rights in musical works is part of the ICE-Hub through which it grants multi-territorial licences in its repertoire. A special characteristic of the national Swedish collective rights managing system is Sweden's participation in the Nordic extended collective licensing model (ECL). The ECL model presupposes the existence of a representative CMO operating under a sound system of good governance and transparency. Under the ECL model, the participating CMOs not only represent their own members but all right holders of the same class of rights.[650] The ECL model is based on the existence of a representative CMO that licenses the intended use rather than the rights of certain right holders.[651] CMOs negotiate licences for their respective class of rights with users and those negotiated agreements are

[649] Goldstein, Hugenholtz *International Copyright: Principles, Law and Practice* at 277; see also *GEMA-Vermutung II* BGH GRUR 1986 66; *GEMA-Vermutung III* BGH ZUM 1988 199.
[650] Jütte *Reconstructing European Copyright Law for the Digital Single Market* at 470.
[651] Axhamn, Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage" at 71.

automatically extended to all right holders of the same class of rights. Right holders have the right to individual remuneration and can opt out of negotiated user agreements, provided that they can prove the extent of the use of their works.[652] The licensing scope is a multi-territorial repertoire blanket licence for a specific class of rights limited to participating CMOs and their repertoire.

The model is similar to the German GEMA-assumption rule but instead of assuming that the CMO manages all authorial rights in a musical work, for prosecution purposes the ECL model assumes that one CMO manages all rights of a certain class/use. The ECL model leaves little room for right holders to freely chose a CMO for the management of their right and competition between CMOs as emphasised by the CRM-Directive. However, the development of rights managing intermediaries specialising in one class of rights and one category of licence, the online exploitation of musical works which is licensed on a multi-territorial basis, shows similarities to the ECL model.

2 United States after MMA

In the United States, the management of authorial rights is categorized by the use of the respective work. The reproduction and distribution rights in the musical composition are managed by a new, yet to be formed, Mechanical Licensing Collective, while the public performance rights are managed by CMOs ASCAP, BMI, SESAC (foreign right holders) or individually. The rights in the sound recording are managed entirely by record labels for interactive online services and by SoundExchange for simulcasting, satellite radios and other non-interactive online services. Due to the system to manage foreign rights through a special entity, the licences granted include the territory of the United States only and are limited to the respective repertoire of the managing entity with the exception of the licences issued by the Mechanical Licensing Collective which are organised as blanket licences.

The MMA codified a voluntary share in royalty system priory accepted by SoundExchange. This grants producers, mixers, and sound engineers who were part of the creation process of the sound recording a statutory right to receive a share of the public performance royalties.[653] In order to receive a share of the performance royalties for all records made after 1 November 1995, the featured artist(s) is required to issue a letter of direction to SoundExchange that includes the individual

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[652] Axhamn, Guibault "Cross-border extended collective licensing: a solution to online dissemination of Europe´s cultural heritage" at 71.

[653] Ross J. Charap, Matthew L. Finkelstein, Celests M. Moy, Jackie M. Robinson „Copyright Law Enters the Digital Age: The Music Modernization Act is Signed into Law" (12.10.2018) Lexology <www.akerman.com/en/perspectives/copyright-law-enters-the-digital-age-the-music-modernization-act-is-signed-into-law.html>.

and their share of the royalties.[654] For recordings made prior to 1 November 1995, compensation for up to 2 percent of the featured artist's performance royalties can be claimed if the individual can prove entitlement to a share of those royalties.
The flexibility of the share in the royalty system makes it easy to include new participating parties involved in creating a sound recording.

3 Remaining problems

The remaining problems at the rights managing level are multi-layered and differ from country to country due to the differences in categorising and classifying rights and their dispersed management and the scope of licences issued. While the CRM-Directive aimed for the establishment of a few CMOs specialised in providing for multi-territorial licences of all authorial rights combined, only differentiated by their genre-specific assorted repertoire, the United States MMA established a rights management system classified by the respective use of the musical work. In theory, the newly introduced Mechanical Licensing Collective would ease the process of acquiring a mechanical licence for the authorial reproduction and distribution rights and provide for legal certainty by shifting the liability from commercial user to the Licensing Collective. While under the licensing system of the United States licences are granted for the territory and the repertoire of the respective managing entity depending on the use of the rights, the scope of the licensing system emphasised by the European CRM-Directive is to grant licences for authorial rights within the entire territory of the EU, limited to the repertoire of the respective rights managing entity. The Swedish licensing system's scope is a mixture of the two latter approaches granting blanket licences for the repertoire and territory of participating CMOs for a specific use of rights, while the German national licensing system grants repertoire blanket licences for the national territory but differentiates between authorial and neighbouring rights for specific uses.
Neither the CRM-Directive nor the MMA simplifies the existing complexity of the rights management system. This directly impacts the price and market level, creating another layer of problems.

C Rate Setting and Market Level

The costs for licensing and the respective royalty rates vary due to differences in the price setting systems and calculation principles, limiting the leeway of online service providers. The rate-setting and the market are affected by the respective rights and the rights managing entities that control the licensing process.

[654] Charap, Finkelstein, Moy, Robinson „Copyright Law Enters the Digital Age: The Music Modernization Act is Signed into Law".

As the rate setting is based on the respective use of certain rights bundles, Professor Jessica Litman suggested a model of implied licensing arguing that if each distinct exclusive right in copyright is conveyed to separate entities, a licensed right should also include other rights incidental to the subject the licence was acquired for.[655] Such a system of implied licensing of rights has been used by courts if copyright-related contracts have not been clear enough about the scope of the licence granted for a specific use.[656] The system of implied licensing was challenged by the streaming process which sparked the discussions of whether the reproduction that occurs during the process is incidental or not. One example is the *MyVideo*[657] case where German courts held that splitting a composite technical process creates the risk of unjustified multiple claims and legal uncertainty, and therefore reproduction is implied if the public performance rights are licensed in the digital world.[658] Such a system would enable courts to react faster to new technical developments and changes in the way of exploiting music works but, at the same time, carries the risk of uncertainty in regard to whether specific economic rights should be implemented in licensing contracts and how the different right holder would be remunerated. One suggestion to overcome these problems is to take a minimalistic approach when implementing rights in existing licensing agreements, and granting only the smallest possible amount of rights in implied licences.[659]

As noted previously, such a system of implied licensing can be problematic as has been found by courts during the process of the classification of the streaming process and whether or not a reproduction is incidental. In recent judgements, courts are not only considering the technical process but basing their decision on the fact of the right holders' consent.

> The act of temporary reproduction of copyright protected work obtained by streaming on a website belonging to a third party offering that work without the consent of the copyright holder could therefore not be exempted from the right to reproduction.[660]

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[655] Jessica Litman "Lawful Personal Use"(2007) 85 Tex. L. Rev. 1871 at 1917.

[656] Christopher M. Newman "What Exactly are you Implying?: The Elusive Nature of the Implied Copyright License" (2014) 32 Cardozo Arts & Ent. L.J. 501 at [520-521].

[657] District Court Munich *MyVideo v. CELAS* [2009] 7 O 4139/08.

[658] Fabian Niemann "German Court Decides that the Split of Online Music Copyright is Invalid" LEXOLOGY (14.12. 2009), <www.lexology.com/library/detail.aspx?g=698bb05d-7417-4b48-bf4d-8e97bf75a1d0>.

[659] Jyh-An Lee "Copyright Divisibility and the Anticommons" (2016) Am. U. Intl. L. Rev. 154 at 154.

[660] Case *C-527/15 Stichting Brein v Jack Frederik Wullems (Filmspeler);* a similar decision was made in *Case C-463/12 Copydan Bandkopi v Nokia Danmark [2015] ECLI:EU:C:2015:144* at [351, 357].

A system of implied licensing would not ease the situation or make licensing more comprehensive in general. It could worsen the situation but would not make changes to the problems of repertoire fragmentation and differences in the right management. Again, this example shows that a solution to the existing problems cannot be reached by addressing one issue separately as this has the potential to worsen the general situation even further.

1 United States

The royalty rate-setting system of the United States is threefold, dependent on the right and rights managing entity the rate is set by the Copyright Royalty Board, the Federal District Courts or negotiated between the parties in the free market. The royalty rate for the reproduction and distribution rights in a musical work managed by the Mechanical Licensing Collective is set by the Copyright Royalty Board based on the willing buyer and willing seller concept.

For the public performance rights in a musical composition that is managed by ASCAP or BMI, rates are set by the federal district court based on considerations of market evidence including sound recording royalties. For public performance rights in a musical composition that is not managed by ASCAP or BMI, and reproduction, distribution and performance rights in sound recordings, royalty rates are negotiated in the free market between the respective parties.

2 Europe

Differently from the rate-setting system of the United States, the EU leaves the negotiations over royalty rates entirely to the respective rights managing parties but sets basic rules and provides for independent and impartial alternative dispute resolution procedures.

The CRM-Directive states in its Article 16 (1), (2) that licensing negotiations are required to be carried out in good faith, and tariffs are required to be reasonable in relation to the economic value of the use of the rights in trade, and to take into account the nature and scope of the use of the work and the economic value of the service provided. The responsibility to grant sufficient dispute resolution mechanism is left to the Member States. They are required to ensure independent and impartial alternative dispute resolution procedures for disputes between CMOs offering MTL and operating in their territory over licensing issues, Art. 34 (2)(a) CRM-Directive. Additionally, Member States are required to ensure that disputes concerning existing and proposed licensing conditions or breach of contract can be submitted to a court or another independent and impartial dispute resolution body that has expertise in IP law.

3 Germany and Sweden

Negotiations over royalty rates are conducted in the free market by the respective rights managing CMOs in Germany and Sweden following the rules laid down in the CRM-Directive. For example, GEMA, the German authors' CMO, calculates its royalties based on the acquisition of gain, taking into account revenues from subscriptions, advertisements and the level of interactivity offered by the service in combination with a minimum charge per year which is offset against the actual royalty payment.[661] Both countries provide for a specialised body and court concerned with IP law issues.

The royalty rate-setting system used in Europe and the United States reverse the legal control mechanism. While in the United States the royalty rates are set by legal bodies and to some extent negotiated in the free market, the European system relies entirely on royalty negotiations in the free market but sets basic rules and provides for a dispute resolution system. The differences in the negotiation process and the numerous entities offering licences with different scopes makes it difficult for online services to calculate royalty payments in each country of operation. This restricts the market to an extent where online services only differ in the range of their repertoire but offer a similar service for almost the same price.

As can be seen, most of the streaming services offer not just music listening but other interactive features which create value. This fundamental transformation of the music market from selling music in a physical form to selling streaming music has led to the creation of new value based on the users' interests, requiring all players in the market to adjust their business models.[662] The streaming services' efforts to boost their libraries by convincing artists to make their works available through their platforms are complicated in that they do not pay artists directly, but rather the record labels that represent them, and whose contracts with those creators dictate the percentage of streaming income that finds its way to the artists.[663]

The controversy over streaming revenues paid by streaming services and received by artists shows the imbalance of the online music market and questions copyright legislation, rights management and licensing practices, particularly when it comes to the exploitation of music through new online business models. Fitting new international operating music streaming services like Spotify and Apple Music into existing national licensing procedures soon became more and more complicated.

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[661] GEMA Tariff available from <www.gema.de/fileadmin/user_upload/Musiknutzer/Tarife/Tarife_VRA/tarif_vr_od8.pdf> last viewed 31.10.2018.

[662] Waelbroeck *Digital Music* at 394.

[663] Stuart Dredge "Apple Music launches to take on Spotify – and traditional radio" (30.06.2015) The Guardian <https://www.theguardian.com/technology/2015/jun/30/apple-music-launch-spotify-radio>.

III Proposed Rights Management and Licensing Model for the Online Use of Musical Works

The complexity of the music market and the national differences in the underlying licensing systems leave little room for a harmonised international licensing scheme that regulates online licensing and balances a national copyright system to the satisfaction of everybody involved. As the historical development of international legislation for rights in musical works shows, it is not easy to find a one-size-fits-all solution, but rather an ideal compromise. Despite national differences, the latest developments in the EU and the United States have shown that the general online licensing methods heading in the same direction, combining the management of rights and right holders for the purpose of licensing the online exploitation rights and away from creating new rights, exceptions and limitations based on a specific technical way of exploitation.

As examined above, the research to date tends to focus on the general harmonisation of copyright regulations from a merely legal point of view, rather than taking into account the unique structures of the online environment and the importance of rights management and rate setting methods for a satisfactory execution of rights granted. However, improving copyright is like a game of chess, to be successful it is necessary to think three moves ahead, consider the opponent's options, and react swiftly to changes.

As analysed earlier in this chapter, the problems occur at different stages and take effect during the licensing process. The problems with the greatest impact for the cross-border online licensing process are the differences in the structure of rights, the separation of right holders and their respective rights management, triggering problems like rights divisibility, repertoire fragmentation, rights management disparities, and unequal distribution of royalties. Due to the complexity of copyright and neighbouring rights regulations, these problems are intertwined and cannot be solved by examining them separately or from a legal perspective only, nor through sole legislation. Most of the existing proposals focus on one aspect and, rather than solving problems, creating new ones on a different level of the rights management and distribution chain when using a protected work. As this thesis argues, a solution has to incorporate all aspects of the existing problems which can only be achieved by combining technical and legal solution approaches without creating new rights or international treaties or agreements that focus solely on one aspect of the problems. Taking Gervais's[664] suggestions into account, it is also stressed that in order to provide for sufficient online licensing, it is necessary to shift legal

[664] Gervais *(Re)structuring Copyright* at [132,133].

responsibilities from commercial users to rights managing entities to guarantee legal certainty to commercial users and avoid legal action.

Therefore, the aim of the proposed model is to overcome the main problems embedded in the structure of rights and the separation of right holders by streamlining the management of rights, the licensing methods and the rate-setting and distribution processes to ensure equal treatment and remuneration of all right holders involved in the production of a musical work.

The focus of the proposed solution is on creating additional mandatory regulations for the management of rights, the distribution of royalties, and interoperable systems to guarantee more legal certainty and a price setting system that incorporates differences in regional market structures in the form of industry standards rather than by introducing changes to existing legislation or introducing new international legislation and/or copyright agreements. The solution introduces a centralised, interoperable collective licensing database accompanied by governance and transparency regulations for rights managing entities and a voluntary royalty attribution system in order to provide for a fair and sufficient licensing concept for all parties involved, and rights managing entities in particular.

The proposed model is based on a combination of certain aspects of the CRM-Directive and the MMA 2018 in addition to available data management and information technology systems to bridge the gap between monitoring and royalty distribution in order to shift responsibilities from commercial users back to the professionals involved. The proposed rights management and licensing model for the online use of musical works would be based on a combination of existing rights management models and IT systems for interoperable data management. In general, the proposed model would make no changes to existing international or national legislation, but instead, introduce common international guidelines based on industry standards. To harmonise regulations for rights managing entities, those standards would be based on the European CRM-Directive combined with a centralised licensing database model based on that introduced by the United States MMA 2018[665]. In addition, the model proposes rate-setting standards based on royalty distribution and share agreements, additionally using a system of centric licensing. This proposal would introduce guidelines on a voluntary basis rather than new legislation or rights, and strengthen the position of all classes of right holders by streamlining regulation and operation of rights managing entities, and introduce an equal royalty rate-setting system. The next part analyses the proposed rights management and licensing model for the online use of musical works and outlines the necessary improvements regarding governance and transparency regulations

[665] MMA of 2018 TITLE I--Music Licensing Modernization, Musical Works Modernization Act.

and MTL, and examines the overall feasibility of such a model on an international scale.

A Governance and Transparency Standards

The proposed model would introduce international guidelines for all rights managing entities regarding governance and transparency in the form of music industry standards which would be binding for all parties operating in that specific area. International guidelines introduced in the form of industry standards addressed to rights managing entities would leave enough room for them to incorporate the systems in their regulations, while at the same time moving the international harmonisation process forward. Such guidelines could be introduced by leading international organisations like CISAC and IFPI shifting the harmonisation process to rights managing entities rather than developing new legislation. Focusing solely on the online or digital exploitation of rights could bring faster and more flexible results, and regulations which would be more suitable for the online environment. This would also be in line with the latest developments regarding the management of online rights as discussed earlier.

The necessary concurrent individual aspects of the proposed rights management and licensing model for the online use of musical works regarding governance and transparency regulations for rights managing entities will be discussed in more detail hereafter.

1 Licensing guidelines for rights managing entities

The proposed rights management and licensing model for the online use of musical works would follow the European CRM-Directive to a certain extent by establishing rules on good governance, transparency and IT systems for all entities managing the online exploitation rights for musical works collectively, including CMOs, publishers, record producers and new subsidiaries specialising in the management of online rights. This could ultimately result in a few rights managing entities specialising in the management of online exploitation rights, including but not limited to, musical works as emphasised by the CRM-Directive. Other than the CRM-Directive, the proposed model would include neighbouring rights managing entities and leave room for licensing services wishing to manage the online exploitation rights of all right holders collectively as done by some of the national CMOs for their respective territory. This could lead to the establishment of a structure where rights managing entities would be able to combine different rights and issue multi-territorial/international licences for certain uses of their respective repertoire. The possibility to manage online and offline rights separately and assign certain rights to specialised rights managing entities follows the current trend in

Europe triggered after the CRM-Directive was implemented into national legislation.
Individual right holders would still be able to choose their rights managing entity and terminate their membership following the example of the CRM-Directives regulations on non-discrimination and freedom of choice.
As stressed before, from the start of the development process that led to the CRM-Directive, it was recognised that a functioning cross-border licensing system would need unified basic regulations for rights managing entities regarding governance and transparency in order to avoid competition and antitrust issues and provide the basis for a fair remuneration system.
Following those findings, the proposed model would introduce regulations in the form of industry standards which would require compliance from all collective rights managing entities granting licences for the online exploitation of musical works. Principles of good governance, namely equal treatment of right holders, equitable distribution of royalties and the information duties of rights managing entities towards their members and licensees regarding the represented repertoire, applicable tariffs and changes of such could be made compulsory. Regulations would include key principles of non-discrimination on the basis of nationality, the possibility for right holders to split the online rights from other rights and assign them separately to a rights managing entity of their choice.
The CRM-Directive was criticised for fostering the emergence of competing societies with unstable repertoires. As there are different concepts and structures within rights managing entities, it is important to set basic rules and regulations for the management of rights as this affects the price setting and licensing procedures. All rights managing entities granting licences for the online exploitation of their rights would be required to comply with the same basic rules which would guarantee a common starting point for licensing and price setting procedures. Basic rules could be modelled after the CRM-Directives governance and transparency principles and rules. The most important rules to incorporate in such industry standards would be the equal treatment of right holders, non-discrimination when granting licences to users, equitable distribution of royalties to right holders, information duties of rights managers towards their members regarding repertoire represented, the territorial scope of licences and respective repertoire and applicable tariffs. In addition, the transparency and accountability to members and licensees, harmonised requirements applicable for rights managing entities and their general operation to ensure a common standard of governance, financial management, transparency, and repertoire would also be regulated under the industry standards. The non-discriminatory freedom of choice concept for all right holders, whatever their nationality, accompanied by membership termination and the freedom to grant licences for the non-commercial use of musical works would also form part of the

industry standards. The opportunity of rights splitting would be possible without the threat of repertoire fragmentation due to the introduction of an accompanying mandatory database option. A new mandatory regulation would require rights managing entities to comply with a mandatory interoperable database system and guarantee database maintenance to ensure all the information required is current and correct. The related database concept will be described in more detail when discussing the technical measures.
To prevent unfairness in royalty distribution, the proposed model would introduce some safeguards to guarantee a minimum pay-out.

2 Royalty distribution guidelines for rights managing entities

As described before, a song consists of a musical composition and a sound recording. The rights in a musical composition can be owned by one or numerous right holders, or publishers acting as their aggregators, while the rights in a sound recording are owned by record producers, performers and sometimes other contributors. This system makes it difficult to acquire licences that cover all rights and right holders for a specific form of exploitation guaranteeing legal certainty for third-party users. This is aggravated by copyright's territoriality and a rights management system dominated by national CMOs.
The proposed rights management and licensing model would introduce the possibility of concluding royalty distribution agreements combined with a minimum legal share principle to ensure equal treatment and remuneration of all parties involved. The idea is to create a system that redirects the royalty distribution to all right holders, equally shifting the whole royalty distribution process back to professionals like rights managers and record producers, and away from licensees in order to guarantee an easy, accessible, fair and efficient licensing system. This could be done by introducing industry standards for rights managing entities through international organisations like CISAC and IFPI accompanied by model agreements.
The industry standards could follow the concepts of the CRM-Directive codifying clear rules on the financial management of rights revenues to ensure non-discriminative behaviour and transparent payments and deductions.
In addition, the different right holders or other parties involved in creating a musical work would be free to conclude royalty distribution agreements regulating the royalty share for each party. If no royalty distribution agreement exists, the legal share principle would obtain, dividing the royalties equally between all right holders involved and other parties that can prove an involvement.
The model of royalty distribution agreements and the principle of minimum legal share is based on regulations first made under the Allocation of Music Producers Act which was incorporated into the MMA of 2018. As described earlier, the MMA

of 2018 formalises royalty payments to producers and engineers involved in the creation process of a musical work formerly done voluntarily by SoundExchange allowing parties with no legally recognised rights to agree on a legal share.

The following example illustrates how such a standard, modelled after the SoundExchange example, could be structured.

When creating a musical work, usually three groups of right holders are involved, authors, record producers, and performers. To pay credit to new developing technics and ways of music recording, producing, and exploitation, a fourth group should be included consisting of other involved parties or non-right holders.

When recording a song, these involved parties could conclude a royalty distribution agreement that sets out their share in royalties gained by the online exploitation of their rights in the respective musical work. Such agreements can take into account investments and other expenses related to the creation of the musical work. If such an agreement is non-existent, royalties are distributed equally to the three parties after administration and other costs. To assure fair negotiations, the principle of a minimum legal share would ensure a minimum percentage each party should gain from exploiting their rights online. A minimum percentage for each group of right holders could be set by international organisations like CISAC and IFPI as an industrial standard and re-negotiated after a set time frame.

The possibility of royalty distribution agreements in combination with a minimum share principle would encourage parties involved in creating a song to negotiate royalty shares and, at the same time, protect each group of right holders by granting them minimum remuneration.

This would allow for an overall royalty rate for a particular musical work that includes all rights needed for the online exploitation and creates a basis for easier online licensing.

To use a musical work for online exploitation, a user would have to acquire only one licence per musical work and would not have to worry about the right holders or potential other rights involved, split royalties or skyrocketing transaction costs. This model would guarantee the basis for more legal certainty, easy access to licences, more efficiency, and safeguard a royalty share for all parties involved.

Due to the complexity of rights management and licensing musical works, the possibility of royalty distribution agreements combined with a legal share principle is not the sole solution but needs to be accompanied by other parts to guarantee sufficient rights management and online licensing of musical works.

Therefore, the proposed model would introduce technical measures in the form of a centralised collective licensing database for MTL to accompany these governance and transparency guidelines.

B Technical Measures for Multi-Territorial Licensing

In order to ease MTL, the proposed solution would be based around a centralised collective licensing database containing information about musical works, their respective right holders and rights managing entities set up as an interoperable system.

The scope of such an approach would be international, as the rights managing entities would be able to grant international licences due to the structure of the centralised collective licensing database combining all rights and right holders but leaving enough room to make implementation in different copyright and licensing systems possible. The management and licensing of the respective rights in musical works required for the online exploitation would be detached from all other rights and territorial restrictions following the previously described trend of CMOs to set up specific subsidiaries for the management of online rights. How such a centralised database could work in combination with a user-centric licensing system considering the specific features of national market structures will be analysed in more detail hereafter.

1 Centralised database, interoperable systems and regional allocation

The Centralised Database forms the core part of the proposed rights management and licensing model for the online use of musical works and combines interoperable systems and minimum royalty rates for a trial period with regional and national rights management and licensing.

As discussed, both the United States and Europe have considered the idea of a centralised music database as a solution for a better and more comprehensive licensing system. While a centralised portal solution was briefly mentioned in the Recommendation of 2012, it was never discussed any further. The United States, in contrast, based their new licensing model for authorial rights on a Mechanical Licensing Collective managing the authorial distribution and reproduction rights. The system shifts the responsibility to find the respective authorial right holders and distribute royalties to them from the commercial user to the Licensing Collective. Although the Licensing Collective is a big step towards a centralised database, some issues remain. Not only would the Licensing Collective have a monopoly position but the mandatory registration requirement and the allocation of money for works without detectable right holders is not only problematic in the light of Article 5(2) Berne Convention, but in view of the non-discrimination principles and fair treatment of all respective right holders.

Worldwide databases providing identification data for musical works are not new and have been created by CISAC, the International Federation of Reproduction Rights Organisations (IFRRO), and the International Performer's Database Association (IPDA) allowing their members to identify foreign works,

performances and recordings managed through RRAs.[666] The setup of international databases has been discussed in both the United States and Europe many times, but failed because of divisions over setting up cooperation and cost sharing as the example of the GRD shows.

A wide consensus remains in the music business that a better system of rights ownership information management is crucial to the development of the digital music industry and that a global database still seems the best system to pursue.[667]

The database concept introduced by the United States MMA of 2018 could be a starting point but obscurities remain, including the setup and cost efficiency of such a model.

Therefore, the proposed rights managing and licensing model would take into account the struggles of the GRD that ultimately led to its failure and would introduce a global centralised database based on interoperable systems and agreed minimum royalty rate standards for a trial period. The centralised database would be the first contact point for commercial users seeking to license musical works for online use, and connect and redirect them to the respective right holders and rights managers in specified regions.

To avoid the problems discussed previously that led to the failure of the GRD and those that sparked competition issues in Europe, the proposed centralised database would be based on interoperable systems and foster the cooperation of all rights managers rather than overpower them and have them pay for database development and the running of such. Together with regulations for royalty distribution and guidelines for rights managing entities managing musical works, the centralised database would introduce data standards to enable interoperable connection between rights managing entities and their databases which could be, but does not need to be, overseen by a not-for-profit organisation modelled after ICANN[668] (Internet Corporation for Assigned Names and Numbers). This would also comply with the requirements of the CRM-Directive to establish competent authorities in order to monitor the compliance with the introduced rules on an international basis.

As previously indicated, international standards for processing usage reports (DDX format) and avoiding invoicing conflicts (CCID format) already exist and the CIS-Net introduced by CISAC allows CISAC members to view each other's databases to a certain extent. The proposed centralised database would take up the CIS-Net idea and connect individual rights managers databases in order to create a

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[666] Gervais *(Re)constructing Copyright* at 148.

[667] Milosic "The Failure of the Global Repertoire Database".

[668] "ICANN is a non for-profit organization responsible for coordinating the maintenance and procedures of several databases related to the namespace and numerical spaces of the Internet, ensuring the network's stable and secure operation." Article 1 Bylaws for Internet Corporation for assigned names and numbers | A California Nonprofit Public-Benefit Corporation As amended 18 June 2018 <www.icann.org/resources/pages/governance/bylaws-en>.

centralised global repertoire database rather than setting up an entirely new global database. Basing the concept of a centralised database on creating the opportunity to connect databases to a certain extent has two advantages. Firstly, rights managing entities would be required to raise their database to a certain standard in order to connect with other databases and would only be responsible for maintaining and updating their individual database. This should not exceed the running costs for usual administration and database maintenance and, therefore, avoid the cost problems faced by the GRD. Secondly, the power over data would stay with the data providing rights managing entity, preventing the creation of a monopoly on data. Introducing mandatory data standards for rights managing entities in order to connect their databases and create a publicly available information portal for anyone, creates a stable basis on which a more comprehensive global licensing standard can be based.

To ensure the participation of as many rights managing entities as possible, the passport system introduced by the European CRM-Directive, and discussed previously, could act as a safeguard system allowing rights managers that do not have the capacity to comply with the database standards or individual right holders to participate through a rights managing entity that already fulfils all the requirements.

The introduction of a centralised database that connects rights managers on its own would help, but certainly not solve the existing licensing problems. In order to streamline the licensing process for the online exploitation of musical works and make it easier for first-time licensees, the database concept could be accompanied by a licensing feature all participating rights manager agree on. To make that possible, the centralised database could be managed by a not-for-profit organisation that ensures the functioning of the database connections and opens the possibility for the centralised database to act as a one-stop-shop for first-time commercial users seeking licences for the online use of musical works.

The not-for-profit organisation could be modelled after the ICANN concept and consist of an elected board of directors which would include representatives of different regions, right holders (CISAC, IFPI, ICMP) and commercial users accompanied by advisory committees. This would guarantee a cost-efficient and equally controlled centralised database and provide the basis for an easier licensing model without compromising rights managing entities' exclusive licensing powers. Combining all rights and right holders in a database would counteract the repertoire fragmentation and shift the responsibility for correct royalty distribution from third party users to professionals. This would guarantee legal certainty for both third party users and all right holders.

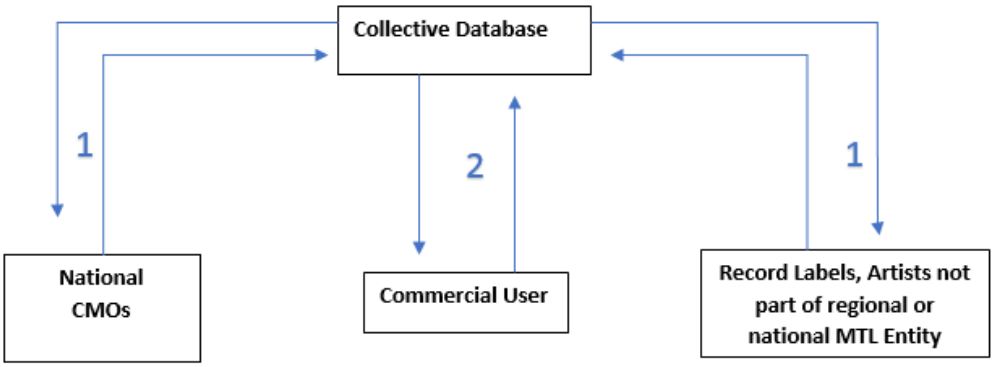

Figure 8 Model of Proposed Collective Database

2 User-centric licensing model and regional market structures

Based on the concept of the centralised database managed by a not-for-profit organisation composed of different kind of key representatives, the following licensing scenario seems possible.

The centralised database would have the power to issue time-limited blanket licences for the online exploitation of musical works for all or specified regions and repertoires to first-time users based on tariffs agreed by the respective participating rights managing entities, with the assistance of assumption and opt-out principles modelled after the German GEMA assumption rule and the Scandinavian ECL opt-out concept. Licensing agreements after the trial period are redirected and negotiated with the respective rights managing entities based on a commercial user's report showing the actual use of musical works in the specific regions.

The centralised database is the first stop for commercial users seeking a licence. The commercial user can request a blanket licence for all regions and all repertoire or specify the regions and repertoire he wants to use. If the user seeks a blanket licence, it is assumed that the centralised database has a sufficient mandate for all musical works and the respective rights and users have to provide evidence that works used by them are not included in the repertoire of the centralised database. Right holders managing their own rights outside a rights managing entity are free to opt out of the centralised database system. A list of right holders that have opted out would be made available after a licensing request is filed by a commercial user. As long as right holders have not officially opted out, they are part of the database system and royalties are collected on their behalf. Following the concept introduced by the MMA of 2018, money collected for orphaned works or those with untraceable right holders will be held in a special fund managed by the not-for-profit organisation which will decide on the distribution process.

Based on the users' licensing request, the centralised database issues a licence for a trial period and informs the respective rights managing entities and right holders by passing on the licensing request. The royalty rate for the trial period is set by the board of directors, taking into account the estimated profits and differences in markets and prices.

The commercial user is required to monitor the actual use of musical works over the trial period and make a detailed report available to the centralised database. The centralised database matches the report with its repertoire and sends the details to the respective right holders to issue an invoice for the next time period based on the reported usage of their respective musical works. The commercial user is required to send detailed reports within a certain time frame which will be used to calculate the actual payable royalty rate based on the actual use and offset against the upfront estimated royalty payment, resulting in a credit or additional payment. The royalty rate would be based on a calculation model that takes the acquisition of gain, the actual use of the musical work and the right holders' administration costs into account. The overseeing not-for-profit organisation managing the database would give recommendations to its participating rights managing entities in regard to royalty rates calculations to ensure reasonable, non-discriminatory and fair royalty rates for all right holders.

In general, first-time royalties for the trial period would be estimated by taking into account the time frame of the licence, the size of the repertoire licensed, the area of operation and respective markets, the estimated user, subscriber and respective total gain in the trial period. This model follows the existing GEMA radio licensing model to a certain extent.

The Database would distribute those royalties to the respective right holders based on their respective share agreements secured in the database.

The royalties payable would consist of administration costs, a minimum monthly royalty rate based on the overall number of free/paying users and the interactivity of the service and the actual streaming rate for each area.

The calculation base for the actual streaming rate would be a certain percentage of the total gain divided by the overall number of streams. The actual streaming rate would be the calculation basis for the actual royalties payable.

Taking the area specifics into account makes the royalty rate setting and distribution system more flexible and allows for regional differences. Each rights managing entity can propose their rate setting and calculation model but all entities operating in that area have to agree on the rate-setting and calculation model used for their area.

The commercial user would not be part of the royalty calculations or be responsible for royalty distributions but pay the calculated royalties for the trial period to the database. After the trial period, he would then pay estimated royalties for the next

time period in advance, calculated by using the users monitoring report of the previous period. Royalty rate setting would consist of:

1. Minimum monthly royalty rate set by Collective Database (managing not-for-profit organisation);
2. Administration costs;
3. Areas streaming rates at the time; and
4. Estimated gain.

A centralised database accompanied by a royalty rate-setting system based on the acquisition of gain reflects the market and the unique characteristics of different regions and would give online services more leeway to develop and individualise their services. This would shift the royalty distribution responsibilities away from users and back to professionals operating in the music market. The model would give new online services an easier start and the opportunity to customise their services and differentiate from other similar services to open competition on the market level and ensure more diversity of online music services. Because the database overseeing the not-for-profit organisation consists of already existing entities and does not necessarily influence the national royalty rate-setting system but gives guidelines and recommendations to make the process more transparent and fair, it should not be in conflict with competition or antitrust regulations.
The key to a successful centralised database that not only contains information about musical works and their respective right holders and right managers but is equipped with the power to connect all right holders under the umbrella of a not-for-profit organisation is the willingness of key stakeholders to work together and regain responsibility for fair royalty distribution. Shifting the royalty distribution and legal responsibilities from commercial users to rights managers would mirror the licensing system used for the analogue market and make the online licensing system more comprehensive and fairer. This responsibility shift is crucial for both right holders and commercial users in order to exhaust the possibilities of the online market and open the opportunity for competition between commercial users on the market level. Different legislation and royalty rate setting systems for the exploitation of online rights should no longer be an issue commercial users have to deal with. The proposed model not only shows the importance of rights managers but respecting national legislation and regulations. The key to success seems to be that rights manager of different rights and right holders have to work together and reclaim legal responsibility for fair royalty rates and distribution in order to guarantee a balanced and fair rights management and licensing system.

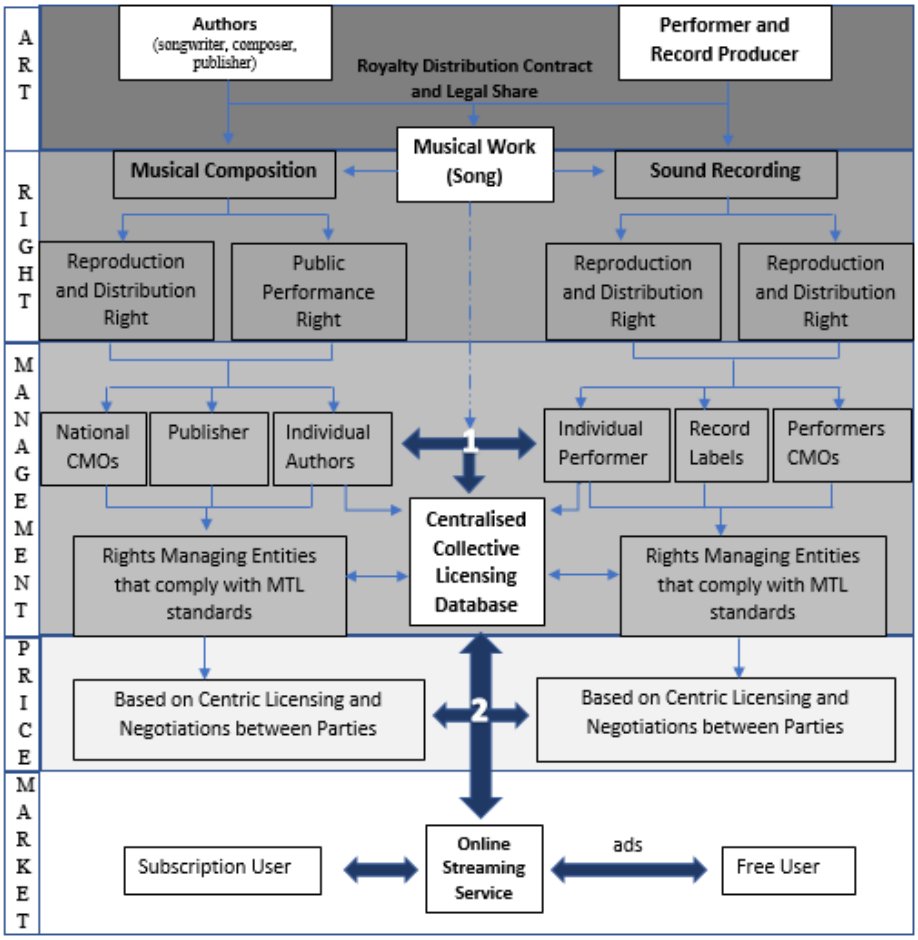

Figure 9 Proposed Licensing System

C Feasibility

The concept of a centralised database combined with royalty distribution, and governance and transparency regulations for all rights managing entities would have international potential and fit with the trajectory of the latest changes in Europe and the United States, as shown in the discussions of the CRM-Directive and the MMA of 2018.

The proposed model is not making any changes to international or national copyright, or neighbouring rights legislation or regulations but is focusing on connecting the different rights managing entities and right holders in order to solve existing problems with the help of industry standards and database technology.

Introducing a centralised database that connects rights managing entities overseen by a not-for-profit organisation consisting of international rights managing bodies and entities could bring together key stakeholders in order to develop a rights management, licensing, and pricing system that is better fitted for the online environment. Treating rights managing entities alike, and combining their powers

under a centralised licensing organisation creates a basis for fair competition that has the right holder in mind and prevents the spread of repertoire fragmentation. Ultimately, the competition is moved back to national services offered by CMOs and commercial users services. The key to a successful online licensing system is the shift of legal responsibilities and royalty rate negotiations away from commercial users and to professional rights managers. This cannot be done with newly created legislation alone, but by combining the existing legal and technical possibilities under the umbrella of existing specialised internationally operating organisations like CISAC and IFPI. The proposed model is only feasible if these organisations and respective rights managers come together and cooperate in the undertaking.

IV Conclusion

The development of the codification of copyright and related rights has always been a slow process, usually reversing the well-known Benjamin Franklin motto that an ounce of prevention is worth a pound of cure, and correcting a problem afterwards rather than preventing it from happening in the first place. This is especially true when it comes to new technical inventions related to the exploitation of protected works as the developing process for rights regulating radio broadcasting illustrates. The first step has always been to apply established legislation from a similar field to the new circumstances, usually creating a more problematic environment before introducing more drastic measures.

Music is the same basic story but the way it is told turns it into something new whenever it is retold. A musical work is basically musical tones or sounds accompanied by words. Both musical tones and words are limited but it is their special arrangement and performance that creates a new musical composition.

But music is only music if it is played and made available for listening.

To use a musical composition online, it is essential that it is played or performed by performing artists, recorded and made publicly available.

The end product is the musical work or song listened to. Many people are involved in the creation and production of musical works and have been credited certain rights over the years in order to acknowledge their work. But each technical advantage that opens new ways to exploit musical works publicly brings new challenges, especially in regard to rights managing and licensing methods.

Authors and performing artists have a large part in the creation of a song, but it is the performing artist who brings it to life, gives the musical work a voice and a face, making it known and usable on the market. The special circumstances of creating

and making a musical work known must be kept in mind when discussing rights, royalty rates, licensing terms and conditions.

Existing rights management and licensing systems have been established over time and reviewed whenever a new way of public exploitation of musical works has been developed. The first group protected under copyright regulations was the creators of musical compositions, namely authors, composers and songwriters. At that time, it was only possible to perform musical compositions live, and authors faced the problem of monitoring the use of their work in public. The establishment of CMOs was the answer and they were soon to be found in most countries collectively managing authorial rights in their territory.

The invention of recording and playback devices, and the radio not only called for new regulations to protect the rights of authors but added a new category of people involved in the making and recording of a musical work. It took decades until their contribution to the musical work was acknowledged and they were granted exclusive rights and legal protection.

Especially in regard to radio broadcasting, the public performance right in the sound recording was only recently acknowledged and granted to the respective right holders in the United States under the MMA of 2018. The history of terrestrial radio broadcasting is mirrored by the current events and challenges online services face. The global scope of the internet made matters worse for online music services. The international structure of the internet brought new challenges and opportunities and the mainly nationally organised rights management systems dominated by CMOs became the focus of attention when drafting new legislation like the CRM-Directive and the MMA of 2018.

This research posed the question of to what extent and manner the European CRM-Directive contributes to the establishment of a more comprehensive international licensing system for the online exploitation of musical works.

In response to the question, this study found that the CRM-Directive indeed provides basic regulations for authors' CMOs but this is not entirely sufficient for the online market, and improvements would be inevitably in terms of an internationally applicable licensing model. The CRM-Directive regulates only authors' CMOs in regard of multi-territorial licensing, leaving the problem of divided rights and right holders and the resulting fragmentation of repertoire unaddressed. This study has shown that the passport system emphasised, combined with regulations on governance and transparency for rights managing entities is not efficient enough to completely overcome the existing problems.

The findings of this study confirm the need for rethinking the existing copyright and neighbouring rights structures as they are having a far-reaching effect on collective rights management and licensing methods in general. This thesis concludes that only a combination of legal and technical measures, and cooperation

between stakeholders will bring favourable results for all parties involved. The Study suggests that the licensing of rights should occur through a centralised database in combination with agreed harmonised industry standards concerning governance and transparency regulations for all managers of rights.

The international scope of the online market calls for a rights management system and a licensing model that reflects the specialities and incorporates the additional changes and new opportunities, especially in regard to monitoring the use of musical works through a centric system.

Overall, this study strengthens the idea of separating the management of online rights from all other rights, and introducing licences for the online exploitation of musical works that cover all right holders, rights and territories, in combination with a centralised database and a comprehensive royalty distribution system.

In addition, it is suggested, that responsibility for royalty rate setting and negotiations of these should be conducted by professional right holder and or their respective managers rather than commercial users.

As a result of this study, further research might well be conducted focusing on the market to identify the most efficient royalty rate setting systems and how these could be combined with an international distribution system by combining technical and legal aspects of licensing.

The root of the licensing problem lies deep in the history of the development of copyright protection for authors and neighbouring right holders and their exploitation and safeguarding through CMOs. Early on, civil and common law countries could agree that the aim of copyright is to grant authors and companies that embody creative works exclusive rights to control the use of those works to ensure equitable remuneration and acknowledge their labour, however, their focus was slightly different. While civil law countries tended to focus primarily on the intellectual value of creativity, common law countries focused on the economic value of the embodied work itself. The gap between the two legal systems was never closed, and it is always compromised in all existing international treaties regulating copyrights and neighbouring rights.

The motto of WIPO presumes that the protection of arts and inventions is a duty of state which clearly includes the guarantee of an effective and efficient rights enforcement system. The enforcement of copyrights and neighbouring rights was never regulated on an international basis and was left entirely to national regulations by each state. This created various models of national rights enforcement and collective management services like CMOs with the greater or lesser addition of social and cultural components.

Technical developments called for new regulations, adding to the list of rights protecting intellectual property and acknowledging new categories of right holders. The protection of artistic works as a guarantor for cultural diversity became a focus

of attention and was acknowledged internationally in the Universal Declaration on Human Rights and in the Treaty on the Functioning of the European Union (TFEU) and the CRM-Directive. While Article 27(2) of the Universal Declaration on Human Rights protects the moral and material interests of authors in their artistic production, Article 167(1), (2) TFEU makes it clear that the EU is required to contribute to the flowering of the cultures by acting in respect of national and regional diversity and supporting or supplementing Member States' actions in regard to artistic creations. Recital (3) CRM-Directive includes the provisions of Article 167 of the Treaty on the Functioning of the European Union (TFEU) and reads:

> Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their right holders and the public.[669]

With no specific guidelines on the exploitation or management of copyright and related rights, right holders started to set up CMOs to collectively manage and enforce their rights, especially those related to the public exploitation of musical works. While it was difficult to keep track of where, how and when musical works were exploited in public, CMOs focused foremost on their national territory only. The first problems started to arise when new technology introduced new ways of exploiting musical works, leading to the protection of additional rights and the creation of new categories of right holders and users. The invention of recording and playback devices, and the establishment of radio stations, made music accessible to everyone and started its triumph. While the reach of radio and television transmission was limited to certain territories, their regulations remained national. The advent of the internet suspended the territorial limitation of transmissions and introduced a borderless environment in which musical works could be transmitted everywhere by a click. The new circumstances called for a change in the focus of copyright protection and exploitation of musical works as they were the first to experience the impact of online exploitation.

Record labels, as one of the largest right holders, were the first to call for legal action, taking their concerns over the unauthorised exploitation of protected musical works and resulting revenue losses to court. While the courts struggled to fit new ways of exploitation of musical works like filesharing and streaming under the

[669] Article 167 TFEU.

existing legislation, and what national law to apply, international organisations like WIPO tried to find a way to incorporate those new developments into international legislation.

While courts and international organisations tried to solve the problems by focusing on a legislative solution, CMOs were left with no guidelines for how to incorporate the new ways of international exploitation into their licensing system. The only way for CMOs to guarantee fair remuneration for their members and provide commercial users with the opportunity to operate their online services legally offering them sufficient licences was to join together under RRAs. The RRAs allowed CMOs to license each other's repertoire for the respective territory of operation, ensuring legal certainty for online service providers on national levels. However, soon the RRAs became a subject of the ECs critical scrutiny and their compliance with EU competition regulations was not confirmed. Adjustments were made to the existing RRAs, and the EC started to examine the collective rights management situation within the EU, breaking up territorial restrictions aiming to introduce more competition to the management of rights in the process. After the introduction of the Recommendation of 2005, the licensing scope shifted from territorially restricted multi-repertoire to repertoire-restricted multi-territorial licences for online rights creating an unbalanced market in which online music services struggled to exist.

The CRM-Directive which was introduced in 2014 aimed to untangle the complexity of the existing licensing regime and create common ground for multi-territorial online licensing that would meet the needs of right holders and online service providers. Despite the critiques, the CRM-Directive introduced common rules for governance and transparency for CMOs and independent managing entities. The applicability of those rules varies dependent on the form of the rights managing entity, and excludes publishers and labels as they are managing their own rights, and those assigned to them through private contracts.

The regulations on governance and transparency focus on fair treatment of right holders, and fair and transparent distribution of royalties, along with access to information on the managing process and right holders' participation in the decision-making processes of CMOs. The basic idea of aligning regulations on governance and transparency for CMOs can only develop to its full potential if the basic requirements for licensing negotiations are the same for all right holders despite how, or through what entity, the rights are managed. Setting basic rules for the fair treatment of right holders is a first step but does not have the power to overcome the existing differences in the royalty payments and distributions to copyright and neighbouring right holders. While publishers and record labels can negotiate licences in the free market, most of the CMOs are bound by special regulations and price setting systems, giving them less leeway. CMOs are owned

and controlled by their members and are required to apply the same standards to all their members while publishers and labels can conclude different rights managing agreements with parties represented. This is not only a consequence of the differences in the setup of the managing entities but the design of copyright as mostly exclusive and related rights as remuneration rights.

The alignment of basic governance and transparency rules for CMOs is a first step to reorganise the market and assimilate the two existing rights managing systems.

To accompany the governance and transparency rules, the CRM-Directive introduced a multi-territorial licensing system based on a passport construct as a solution for the online market. Despite critiques, the passport construct was chosen with the European goal of a single market in mind. Increased competition between CMOs seemed the best way to achieve the anticipated outcome and provide for multi-territorial licences for the online use of musical works.

The combination of breaking up territorial restrictions for right holders in granting them the freedom to choose their managing CMO, and giving CMOs the opportunity to license their repertoire for the entire EU territory, added a new component to the already complex licensing market, shifting the scope of licences from territorial limitation to repertoire limitation.

The passport construct was regarded as the best solution to make the licensing market more competitive, so it can restructure itself. CMOs wanting to offer multi-territorial online licences of their repertoire were required to comply with additional provisions on data processing, and invoicing, and providing access to information required.

It was expected that not all the existing CMOs operating in the EU would be able to comply with those additional requirements and that only a limited number of CMOs could offer multi-territorial licences. To ensure fair treatment of right holders and the protection of creative diversity within the EU, right holders were given the chance to withdraw the management of their online rights from a CMO that did not provide for multi-territorial licences and assign them to a CMO that did. Additionally, CMOs were provided with the opportunity to tag on their repertoire to a passport entity, meaning that smaller CMOs that could not or did not want to comply with the additional requirements for multi-territorial licensing could assign the management of their repertoire to a CMO that already provided for such licences. The idea was that CMOs would specialise in genre-specific repertoires which would ultimately lead to a system of genre-specific licences issued by a limited number of CMOs operating in the EU. The system was meant to improve competition between CMOs, attracting right holders and aggregating repertoires rather than leading to more fragmentation and the establishment of new rights managing entities.

However, reality proved to be a different story. The idea of granting right holders the freedom of choice in their rights managing CMO was meant to increase competition between CMOs and make them operate more efficiently. Instead of copyright holders, the large right holders of neighbouring rights, like record producers and publishers which were also members of CMOs, started to withdraw the management of their repertoire from CMOs, enabling them to negotiate licences for the online use of their works directly in the free market. The CRM-Directive did not consider the needs of online music services as they were looking for easy access to licences preferably those that included as many right holders, repertoires and territories as possible, and would guarantee great legal certainty. The few online music services that were established in the market had no interest in genre-specific repertoires as they would not meet their users' demands.

Although the passport constructs offered a tag on solution for smaller right holders and CMOs to guarantee cultural diversity and safeguard national repertoires, the option was not used, leading to a situation in which smaller right holders and country-specific repertoires in the national language are not highly frequented and are difficult to include in genres.

Instead of making use of it, CMOs bypassed the tag on solution it and started to outsource the management of online rights and form joint ventures to provide for a wider repertoire and licensing solutions better suited for online service providers.

Currently, there is no single European CMO offering multi-territorial licences but five licensing hubs that offer such services for the European market.

The ICE licensing hub established by PRS for Music, STIM, and GEMA offers a single licence for the online rights in their joint repertoire including the Anglo-American rights of Sony/ATV (and some parts of the former EMI repertoire which was split between Sony/ATV, UMPI and Warner/Chappell) which is managed by PRS and GEMA under the SOLAR joint venture, and the Anglo-American repertoire of BMG (now part of UMPI but managed separately) which is managed by GEMA through the ARESA agency.

The online rights for the Anglo-American repertoire of Warner/Chappell are managed by PEDL, a joint venture between PRS for Music, STIM, SACEM, SGAE, SABAM and Buma/Stemra.

The online licensing hub with the largest repertoire to date representing more than 13 million works in 33 territories (EU&EFTA) is the ARMONIA joint venture between nine European CMOs and the Canadian CMO SOCAN. Together they offer online licences for their combined repertoire, the Anglo-American and Latin American repertoire of UMPI and the Anglo-American repertoire of Wixen Music Publishing.

Independent music publishers and record labels are offering licences through IMPEL, organised by the Music Publishers Association (MPA), and Merlin, combining licences for 800+ independent labels from 53 countries.

Instead of incorporating the tag on system, as introduced by the CRM-Directive, CMOs fell back into the old well-known RRA-like patterns in order to comply with the additional data processing requirements mandatory for granting multi-territorial licences. In order to negotiate tag on requirements, the big CMOs opted for outsourcing the management of online rights all together, combining their existing technical know-how and sharing the costs to upgrade the data processing system to the required standards. This strategy allowed CMOs to adjust quickly to the new regulations of the CRM-Directive and offer multi-territorial licences which would have been more difficult and time-consuming relying on the tag on construction.

The passport system, in combination with the tag on construct, is only effective in a market in which data processing systems are well established and comply with the new rules as it is time-consuming and costly to bring the data processing systems up to the required standards. The tag on system would put CMOs that offer multi-territorial licences in a position in which they would be obliged to manage another CMO's repertoire for the online use on a non-exclusive basis, charging them only for the reasonable costs incurred. This would have left the passport CMO with all costs that are not related to the running and maintaining of the data processing system, and put them in a disadvantageous position. In the worst case, there would be one CMO that started to offer multi-territorial licences and all the others would have made use of the tag on opportunity in order to save costs, leaving development costs entirely to the providing CMO.

To avoid such a scenario, and to provide for multi-territorial licences as soon as possible, CMOs made recourse to joint structures sharing the management efforts and related costs equally.

The joint ventures under which CMOs license their combined repertoires for the online use stopped the anticipated passport system before it could develop, and stopped CMOs from offloading the management of their non-exclusive online rights to larger CMOs as it is not entirely clear, but very unlikely, that Articles 30 and 31 CRM-Directive would be able to stretch the tag on approach far enough to include CMO joint ventures as passport entities.

While the passport system has not had the anticipated effect on the market, the additional regulations on data processing have proven to be a good step in building a unified administration system and creating basic rights management standards that multi-territorial licensing systems are based upon.

While the overall concept of the CRM-Directive to combine governance and transparency standards with additional data processing standards for multi-

territorial licensing is promising and contributes to creating common standards for rights managing entities, it is not enough to provide for a balanced licensing system. It becomes apparent that the market will develop a system similar to earlier RRAs, as CMOs have already started to separate the management of online rights and manage them in joint ventures to share costs, IT know-how, and databases to offer licences with a wide scope.

The constrained focus on creating standards for multi-territorial licensing of authors' online rights only, rather than regulating for all rights embodied in a musical work, has occurred because neighbouring rights are structured differently and governed by different legal bodies, leading to a more complex management system.

While regulating all rights embodied in musical works at the same time would have conflicted with international legislation, it was a good step to address authors' online rights only and establish a solid system that works properly before taking the next step and making it applicable to neighbouring rights.

To create a functioning system for multi-territorial licensing of musical works for the online use that leads to fair and equal remuneration of all right holders involved, it seems that a change of the general structure of rights embodied in a musical work is unavoidable.

The CRM-Directive, even with its flaws, is a good example for the problems that would arise setting up an international licensing system, as it deals with the problems of different legal standards, market structures, and language barriers. An international system would also face the problems of territorial restrictions of copyrights and related rights, and would have to decide how to overcome such barriers. Following the example of the CRM-Directive and granting right holders the freedom to choose their CMO or rights managing entity would be most likely to break up the old structures relying entirely on CMOs and make way for the establishment of private commercial managing entities that combine the management and marketing of online rights.

To ensure a level playing field and the fair remuneration of all right holders, it would be important to introduce common standards on governance and transparency for online licensing, giving right holders the possibility to compare entities and make the best choice, while guaranteeing fair and equal remuneration.

At this point, it seems to be much more likely that an international licensing model could develop from the European example carried out by international licensing entities consisting of CMOs, publishers and record labels. The trend to restructure common licensing and rights management systems to make them fit for the online environment is not limited to Europe but can also be seen in the United States.

Rather than having a passport system accompanied by a tag on approach, managing joint ventures are more likely due to the cost and effort of data processing and database maintenance as the heart of the system.

Instead of focusing on repertoire competition between CMOs as done by the CRM-Directive, special emphasis should be based on creating a common ground for licensing systems, shifting the focus from increasing competition between CMOs to increasing competition between online music service providers following the example set by analogue radio. To increase competition between online service providers, it is important to create common grounds for licensing standards and prices which, in turn, would imply that all rights included in a musical work are worth the same and managed under the same conditions.

A musical work needs to be seen as one good, irrespective of how many rights or right holders are involved, as they all play a crucial part in its creation and success. It is important to keep in mind that music is only music if it is played, and made available and accessible to the public. It is time to acknowledge all parties that are involved in making music.

It is no longer an issue of treating right holders equally or equitably and granting them the same support and access to rights, but addressing the cause of the inequity and finally removing the systemic barrier that leads to the remuneration disparities.

The CRM-Directive circles the problems of multi-territorial licensing and introduces good structural governance, transparency, and data processing regulations which are important for the online market but is misled by its focus on the wrong level of competition which was triggered by the high revenue turnout of the market of the United States which was used as an example. Using the United States revenue turnouts as an example and comparing them with the European turnouts without taking into consideration the differences in the legal and price setting systems to justify increased competition between CMOs was short-sighted.

It seems as if the CRM-Directive lost sight of the big picture and the needs of the parties involved and left existing licensing structures out of consideration. It is a half-hearted approach to white-wash the controversies that started with the Recommendation of 2005.

This situation shows that copyright protection and exploitation measures are irrevocably linked to rights managing and price setting structures in the respective markets. It is, therefore, important to recall the general intention of copyright protection and the exploitation of such rights through collective management entities to protect the individuals and safeguard creativity. This needs to be taken into consideration when looking for a satisfying licensing solution that is adaptable for the online market.

This research posed the question about the extent and manner in which the European CRM-Directive contributes to the establishment of a more

comprehensive international licensing system for the online exploitation of musical works.

In response to the question, this research found that the CRM-Directive indeed provides basic regulations for authors' CMOs but this is not entirely sufficient for the online market and improvements would be inevitable in terms of an internationally applicable licensing model. The CRM-Directive regulates only authors' CMOs in regard of multi-territorial licensing, leaving the problem of divided rights and right holders, and the resulting fragmentation of repertoires, unaddressed. This research has shown that the passport system, combined with regulations on governance and transparency for rights managing entities is not efficient enough to overcome the existing problems completely.

The findings of this research confirm the need to rethink the existing copyrights and neighbouring rights structures as they are having a far-reaching effect on collective rights management and licensing methods in general. This thesis concludes that only a combination of legal and technical measures, and cooperation between stakeholders will bring favourable results for all parties involved. The study suggests that the licensing of rights should be done through a centralised database and agreed on industry governance and transparency standards for all managers of rights.

The international scope of the online market calls for a rights management system and licensing model that reflects the specialities and incorporates the additional changes and new opportunities especially in regard to monitoring the use of musical works through a centric system.

Overall, this study strengthens the idea of separating the management of online rights from all other rights and introducing licences for the online exploitation of musical works that cover all right holders, rights and territories, in combination with a centralised database and a comprehensive royalty distribution system.

In addition, it is suggested that responsibility for royalty rate setting and negotiations of this should be conducted by professional right holders and or their respective managers rather than commercial users.

As a result of this research, further research might well be conducted focusing on the market to identify the most efficient royalty rate setting systems and how these could be combined with an international distribution system by combining technical and legal aspects of licensing.

The remaining problems are complex and affect different levels in different ways. Therefore, a satisfactory solution would have to include improvements to align existing rights and all classes of right holders and provide for basic rights management and royalty rate-setting regulations, while shifting the responsibility for fair royalty distribution from commercial user to rights manager to guarantee fair price setting, sufficient licensing and fair negotiations, preferably between

professionals. The commercial user should not be forced to negotiate on different levels with numerous parties while being solely responsible to cover all rights and respective right holders in a musical work. The responsibility to guarantee legal certainty when licensing musical works should be redirected to the respective rights manager as they are better equipped for such a task.

The database concept would be a starting point with the potential to make international licensing possible but it would need the cooperation of all rights managing entities and international organisations operating in the music market. Whatever the chosen system for MTL might be, governance and transparency regulations for the operation of rights managing entities in general and the inclusion of all right holders would be unavoidable.

An interoperable database managed by a not-for-profit organisation made up of key members in the market could set basic royalty rates taking into account regional differences and right holders' needs.

Shifting the responsibility of correct and fair royalty distribution to professionals like the collective database and rights managing entities would ease the licensing controversies and bring endless royalty negotiations between third parties and rights managers to an end. Third party users would be able to pay royalties for a specific time period to the collective database, gaining access to the chosen repertoire and legal certainty to use it in respective areas. One licence for one musical work and one database for the world repertoire would counteract repertoire fragmentation and make it easy and less time-consuming for third-party users seeking to set up a new business.

As the collective database would be interoperable, no additional administration costs would emerge, but respective rights management entities would be responsible for keeping their database current and entering their share agreements and/or royalty rates and calculation methods for easy distribution of royalties by the collective database.

A multi-territorial licensing system would have to take national differences into account, especially regarding the rate-setting and royalty distribution methods. To date, the best way to achieve a functioning multi-territorial licensing system is to provide for a licence combining all rights in a musical work and to leave the royalty distribution process to the respective rights managers taking it out of the licensing process to guarantee easy access and legal certainty for third-party users. Following such an approach would bring the possibility to open the online market for new streaming services and ensure the development of new possibilities and markets for the online use of musical works.

V Recommendation

A sufficient solution can possibly be reached by combining guidelines on governance and transparency for all rights managing entities together with the establishment of an internationally operating centralised database.

The best way forward would be to establish international guidelines for the general management of online exploitation rights of all right holders that include governance and transparency regulations for managing entities similar to those introduced by the CRM-Directive but leaving enough leeway in respect of the existing national licensing models. Guidelines on governance and transparency could be introduced by the new not-for-profit organisation or leading international organisations like CISAC and IFPI, in the form of industry standards to ensure that rights managing entities can incorporate regulations but leaving enough leeway for national law and regulations.

Introducing international guidelines on governance and transparency for rights managing entities, together with a centralised database that connects managing entities with each other, would be a good starting point for a new international licensing system.

Investigating existing licensing models in Europe, like the Nordic ECL or the German GEMA assumption rules or the systems introduced by the CRM-Directive and the MMA of 2018, especially regarding transparency and governance regulations for rights managing entities, and regulations for an international database, would be a good start to creating a new international online licensing model.

Licensing the use rather than certain rights belonging to certain right holders in combination with a central database would be a promising solution for all parties involved and provide for legal certainty and equal payment.

Shifting royalty distribution from users to rights managing entities, and therefore back to professionals, would ease the system and make it more comprehensive and more easily accessible for new online services.

Royalty rates must reflect the regional markets and the capital gain of the user. Such a shift would affirm and strengthen the role of CMOs in music licensing and managing, and ensure fair and equal remuneration of all classes of right holders. By streamlining the regulations for all rights managing entities, the possibility of cooperation between CMOs, publishers, record producers and other right holders becomes more likely, and guarantees a strong basis for negotiations with commercial users.

Centric licensing based on actual use treats all right holders equally, reflects the regional market and includes the total gain from using musical works. Combining the rights and focus on licensing the special use of musical works, rather than individual right holders and their individual rights in the musical work, would

complement a centric licensing system that focuses on the actual use of those works. Both the CRM-Directive and the MMA move in the same direction and are becoming closer to an online licensing system that already shows similarities to those existing for terrestrial radio.

The latest developments and improvements on copyright legislation and rights management systems, especially in regard to licensing methods, show that the importance of regulating and harmonising the rights management systems and licensing methods have been recognised. To create a fair licensing system for all participating parties, it is necessary to treat right holders and rights managing entities equally, and respect their individual share in influencing the creation and success of a musical work. To develop a full picture and the best solution possible, additional studies will need to examine how to best combine legislation and information technology to conduct a licensing system that is not focused on one aspect, but rather, reflects the whole picture.

Final Words

This research only touches one aspect of the online rights controversy and gives a basic example and a rough idea of how licensing models could develop to make them more efficient in the online environment. The example of music shows that the establishment of basic rules and methods for rights management is a promising start, and regulations on licensing, royalty rate setting and other aspects could be included over time.

The future for the online exploitation of musical works will most probably move in the direction of a licensing system that focuses more on the actual online use of the protected works, rather than the different rights that are triggered by a specific way of use. The newest developments in Europe and the United States show that rights management systems and licensing methods are developing in that direction. In Europe, new entities were set up to manage online rights and combine their databases to offer multi-territorial licences, and the United States introduced a mechanical licensing collective in order to shift some responsibilities back to professionals who know the market and the complicated system of licensing.

The whole scenario is faintly reminiscent of the licensing controversies terrestrial radio faced when it was first introduced, sparking heavy discussions and concluding with the introduction of new rights and licensing settlements.

Online music services are moving down the same path, and the future will show whether history repeats itself and an online licensing system will be established which is similar to that used for terrestrial radio but with additional special features that reflect the characteristics of the online market, especially its borderless concept.

It is also important to keep in mind that even though music is art, it is also a jigsaw of different components and without their combination it could not succeed. Therefore, it is important to reflect the values of discovering, nurturing, creating, refining and promoting music, not only in the remuneration but in legal regulations. When creating new copyright legislation or regulations it is important to keep the WIPO motto in mind and remember that:

> Human genius is the source of all works of art and invention; These works are the guarantee of a life worthy of men; It is the duty of state to ensure with diligence the protection of the arts and inventions.

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