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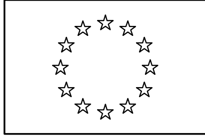

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7 July 2005

COMMISSION STAFF WORKING DOCUMENT

STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT

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EXECUTIVE SUMMARY

This Study concludes that present structures for cross-border collective management of legitimate online music services -- that are based on models developed for the analogue environment need to be improved for music to fulfil its unique potential as a driver for online services. Action is now required at EU level because revenue achieved with online content services in the US in 2004 was almost eight times higher than online content revenue produced in Western Europe. As music pervades European culture and society, only music has the real potential to kick-start online content services.

This Study examines the present structures for cross-border collective management of copyright for the provision of online music services. It concludes that the absence of EU-wide copyright licences for online content services makes it difficult for these music services to take off. Improving cross-border licensing for music services requires the creation of entirely new structures for cross-border collective management of copyright.

In order to improve cross-border management of copyright, this Study considers three options: (1) Do nothing (Option 1); (2) Suggest ways in which cross-border cooperation between national collecting societies in the 25 Member States can be improved (Option 2); or (3) Give right-holders the choice to authorise a collecting society of their choice to manage their works across the entire EU (Option 3).

The Study concludes that Option 3 offers the most effective model for cross-border management. With respect to cross-border licensing, allowing right-holders to choose a collecting society outside their national territories for the EU-wide licensing of the use made of his works, creates a competitive environment for cross-border management of copyright and considerably enhances right-holders' earning potential. With respect to cross-border distribution of royalties, the right-holders freedom to choose any collecting society in the EU, will be a powerful incentive for these societies to provide optimal services to all its right-holders, irrespective of their location – thereby enhancing cross-border royalty payments.

The Study therefore proposes a series of principles that Member States would have to adhere to in order not to stifle the emergence of Option 3 as a competitive model for the cross-border management of copyright works.

1. PROBLEM DEFINITION

1.1. What are the issues or problems that may require action?

The EU suffers from a lack of innovative and dynamic structures for the cross-border collective management of legitimate online music services. This affects the provision of legitimate online music services. For the purposes of this Study, an online music service includes any music service provided on the Internet such as simulcasting, webcasting, streaming, downloading, online "on-demand" service[1] or provided to mobile telephones[2].

The online music market is growing at a rapid pace. This is especially true for the US, where the online music market is expected to grow to €1.27 billion by 2008. In contrast, online music revenues in Europe are expected to reach €559 million by 2008.[3]

In 2004, online music revenue in Western Europe amounted to €27.2 million (23.4 million attributable to "downloads" and €3.8 million to subscription-based services). The US market amounted to €207 million (€155.9 million attributable to downloads and €51.1 million to subscription-based services).[4] In 2004, US online revenues were almost eight times higher than those achieved in Western Europe.

For 2005, online music revenue is expected to rise to € 106.4 million within Western European, while the US revenue will forge ahead to €498.3 million.[5] This gap between US and Western European online music revenue needs to be redressed.

It is of little value to speculate as to the different reasons for this revenue gap,[6] when the Commission can identify at least one issue where action is required at Community level in order to narrow this gap. This issue is the way in which copyright for online music services is cleared across the 25 Member States that comprise the EU.

Online music services can be accessed across the EU and have therefore sparked a particular demand for multi-territorial licensing that spans at least the EU. This is because the ubiquity of the online environment potentially exposes online content providers to liability for copyright infringement in all territories in which his service is technically accessible. In order

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1 A s**imulcast** is a "**simul**taneous broad**cast**", and refers to programs or events broadcast across more than one medium at the same time. **Streaming** allows data to be transferred in a stream of packets that are interpreted as they arrive for "just-in-time" delivery of multimedia information. A **webcast** is similar to a broadcast television program but designed for internet transmission.. A person/computer receiving information via a computer refers to it as a **download**. Online music provided **on demand** is a downloading service of musical works on demand against or without payment

2 There are estimates that 50% of mobile content revenues will be from music. Source: IFPI Digital Music Report 2005.

3 Rightscom, *DRM and Services in Europe and the USA*, 2005.

4 Ibid.

5 Ibid.

6 Some argue that the principal hindrance to revenue growth in online music services is the widespread use of illegal peer-to-peer networks to share electronic music files, the lack of interoperability and consumer acceptance. Whilst these are contributory factors in each area, especially in the case P2P file sharing, efforts are being made separately either at a legislative level (Directive on Enforcement) or by market initiatives on greater interoperability. Moreover, P2P is a phenomenon which is probably more prevalent in the US than it is in Europe. Discovery in the *MGM v Grokster* litigation revealed that in the US billions of music files are shared across peer-to-peer networks each month.

to avoid liability for copyright infringement, online content providers need to clear copyright for all of these territories. But this requires innovative licensing solutions and the best way of achieving multi-territorial clearance is not necessarily by building on existing models that originate in the analogue environment.

For the purposes of illustration of the issues involved in the collective management of copyright, the emphasis of this Study will be on cross-border collective rights management in the music industry. Although digitisation has had an impact in the other sectors, it is in relation to the cross-border provision of music services that the impact on the collective management of copyright has been most felt. In no other sector has technology had such an impact on both the territorial scope of the services provided and the current business models of collective management of copyright. In addition, no other sector but the music sector operates such complex licensing arrangements.

This Study will present policy objectives and options aimed at adapting cross-border collective rights management services to the provision of online music services in the light of the conclusion that there is no effective structure for cross-border collective management of legitimate online music services.

1.1.1. How does collective management of copyright work?

Cross-border collective management of legitimate online services is part of the wider activity of collective management of copyright and related rights. This is the system under which a right-holder authorises a body to administer his rights through a variety of services. Copyright allows the right-holder to authorise or prohibit the use of the copyright work for a limited period of time.

The collective management of copyright takes place within a broader framework of the supply of copyright works by CRMs and demand for these works by commercial users. The services provided by CRMs include: (1) the grant of licences[7] to commercial users; (2) the auditing, monitoring of rights by ensuring payment and terms of licensing; and pursuing infringers (enforcement); (3) collection of royalties; (4) and distribution of royalties to rights-holders. CRMs deduct a fee for the provision of these services. These services are not the only services provided by CRMs. Other services include activities which are not linked to the collective management of copyright such as social and cultural, promotional and funding activities.[8]

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[7] Permission given by the owner of copyright to another person to use a copyright protected work, which without permission, would infringe copyright.

[8] The copyright system ensures that right-holders may benefit from property rights entitling them to a share in the revenue for the use of their work. It is central to their success and rests on a simple premise that creative effort which results in a work of value to those who experience or consume it, should be paid for or remunerated. Collective management of copyright was first undertaken—and this remains its principal rationale—when right-holders realised that the ability to administer their works individually was impractical. As right-holders cannot individually monitor all the different uses made of their works, they entrust this task to collective rights management societies. There were simply too many instances in which use was made of their works for them to monitor and administer their copyright themselves. Where individual rights management is neither practicable nor economically viable, collective administration is the most efficient method for licensing, monitoring and enforcing copyright due to the number of uses, users or right-holders. On the supply side, there are economies of scale and scope, if a collective rights manager undertakes the negotiation involved in the grant of a licence on behalf of several right-holders collectively. It is also argued that there are economies of scale involved in the collection and enforcement as the per-work cost of enforcing the rights should also be less, where a

Collective management of copyright applies mainly in the following areas: music, print and publishing, audio-visual and film. Other areas include the administration of rights in dramatic works, artist's resale right for works of art, rental right in films, and public lending right of literary works. Of these sectors, collective management of copyright is central to the music business and also to the print and publishing sector. The film industry relies less on the collective management of copyright and more on individual management of rights.

For the purposes of this Study, these services and the bodies that provide them to right-holders are referred to respectively as the "collective management of copyright" and "collective rights managers"[9] ("CRM").

1.1.2. How does collective management of copyright work across national borders?

The current practice of collective management of copyright on a national territorial basis requires each collective rights manager to cooperate with others in the other territories, if a commercial user's service is accessible in another territory. In practice, this means that a commercial user requires a licence from each and every relevant collective rights manager in each territory of the EU in which the work is accessible. Cooperation among CRMs across borders for the exploitation of non-domestic repertoire is conducted via "reciprocal representation agreements."[10]

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

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

---

single collective rights manager is responsible for a multitude of right-holders. On the demand side, collective management offers an effective market structure by providing a single point of reference for users seeking to obtain licences for copyright protected material, access to the repertoire for users and the guarantee of the scope of the repertoire in a single transaction. In particular, this provides legal certainty against the risk of infringement.

[9] The term "collecting society" is not used although it is typically this body which is involved in the collective management of copyright. The term "collecting society" is defined in the Cable and Satellite Directive as follows: "For the purposes of this Directive 'collecting society' means any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes".

[10] The term "reciprocal" in the context of these private agreements means "in return for of an identical grant". It does not connote "**reciprocity**" for which there is a specific meaning in international law especially in the international copyright conventions i.e. where rights are granted by one country to its nationals, the nationals of another country can only have the benefit of those rights where there is commensurate recognition of these rights by the other country.

Moreover, not all European CRMs have concluded bilateral representation agreements among themselves with the effect that there is no seamless system that covers the aggregate EU repertoire for any type of right or any form of exploitation. Gaps in the network of reciprocal representation remain.

1.1.3. Who participates in cross-border management of copyright and what are the service elements necessary for this activity?

Within the framework of reciprocal representation agreements, cross-border collective management entails management services that one collective rights manager provides on behalf of another collective rights manager. As right-holders tend to entrust their rights to collective rights management societies established in their home territory, these right-holder's works becomes part of the repertoire of the collecting society in the territory where he is domiciled (the "management society").

If copyright works are accessible in another territory, the management society active in that territory (the "affiliated society") will enter into reciprocal agreements with the management society, allowing it to commercially exploit the latter's repertoire in its own territory. In effect, this means along with its own national repertoire, an affiliate also obtains the right to the repertoire of the management society with which it has a bilateral arrangement. Via a network of bilateral reciprocal agreements, each local collective rights manager represents in its national territory, both its own repertoire and the repertoire of the CRM with which has entered into a bilateral reciprocal agreement. In this way, the world music repertoire can be licensed globally as most collecting societies have developed networks of interlocking agreements by which rights are cross-licensed between societies in different Member States and outside the EU.

In order to facilitate the creation of a network of the above bilateral reciprocal agreements, CRMs have formed alliances (e.g. CISAC for authors' rights in musical works, BIEM for authors' rights in mechanical reproduction, SCAPR and IMAE for performers' rights in musical works). Most CRMs belong to one of the principal umbrella organisations mentioned above. These alliances have led to model agreements which cover cross-border licensing, collecting and distribution of royalties. On the basis of these model agreements, CRMs have concluded bilateral reciprocal representation agreements. However, the model agreements and the bilateral reciprocal representation agreements concluded pursuant to them apply a series of restrictions which are contrary to the fundamental EU principle that services, including collective management of copyright or individual services associated with the collective management of copyright, should be provided across national borders without restriction based on nationality, residence, place of establishment.[11]

1.1.4. What are the problems with cross-border collective management of copyright?

The Study has found that the core service elements "cross-border grant of licences to commercial users" and "cross-border distribution of royalties" do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services.

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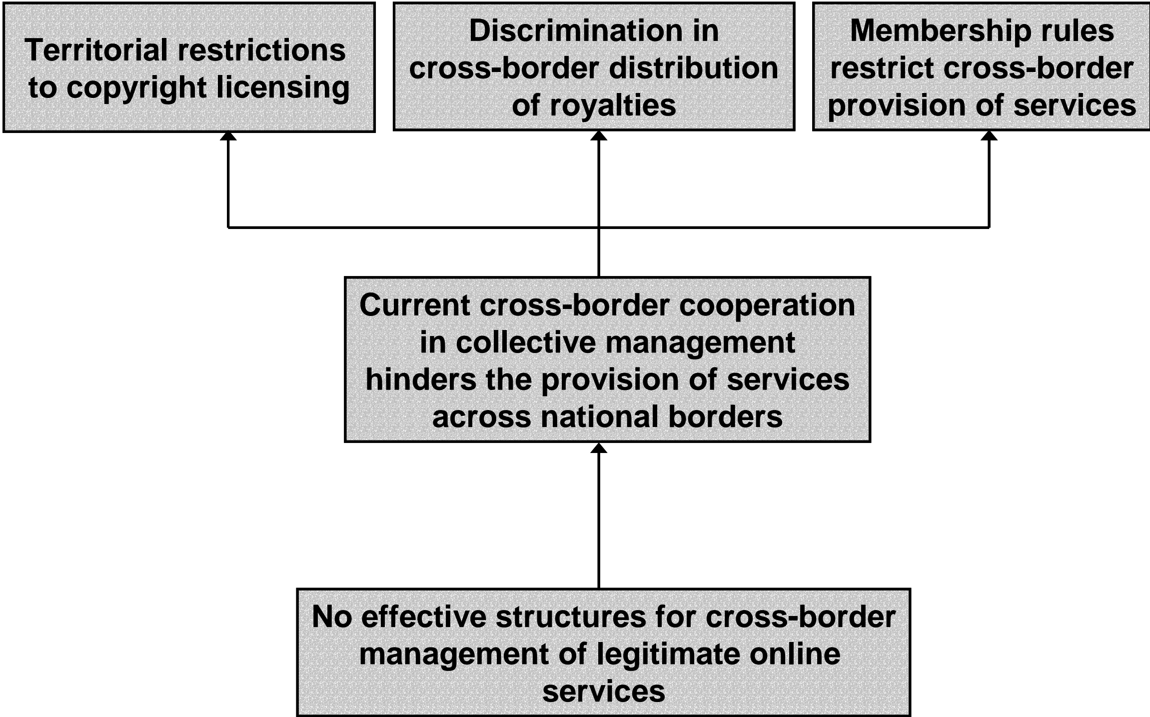
[11] The Court of Justice has dealt with reciprocal representation agreements in the context of licensing of physical premises e.g. discothèques Ministère Public v Tournier Case 395/87 1989 ECR 2521; Lucazeau v Sacem Joined Cases 110/88, 241/88 and 242/88 1989 ECR 2811.

This is a result of the restrictions in the reciprocal representation agreements that apply to the service elements of licensing, distribution and membership policy. The principal restriction is the limitation on the scope of licensing by territory. Moreover, these agreements also limit or prevent right-holders and commercial users from seeking the provision of collective management services in another Member State other than their own by applying rules restricting one CRM from accepting members of the other society or with the nationality of the Member State in which the other CRM operates.

Table 1: Summary of main problems with cross-border collective management of copyright for legitimate online music services



1.1.4.1. Restrictions: cross-border licensing

With respect to cross-border licensing, this STUDY has identified the following main obstacles:

First, there is no universally acceptable multi-territorial arrangement in place for the online rights of all categories of right-holders. This is because traditional models of cross-border cooperation works on the assumption that each CRM is exclusively responsible for the cross licensed or "represented" repertoire in a particular territory and with respect to all commercial users established in that territory.

For example, the CISAC model agreement on public performance and performing and broadcasting rights (Paris 1974, as amended) that covers a wide range of online forms of copyright exploitation, such as uploading or downloading of music or films on a computer disk, mobile phones or other devices, provides for the following restrictions limiting the licensing authority of a CRM that is party to a reciprocity agreement:

> *"For the duration of the present contract, each of the contracting societies shall refrain from any intervention within the territory of the other society in the latter's exercise of the mandate conferred by the present contract." (Article 6 II)*

In addition, under Article 1 I of the CISAC model contract, the authorisation to licence conferred by the licensor CRM is restricted to the territory of the licensee CRM. Therefore, the licensee CRM obtains the right to license the entire repertoire of the licensor CRM on an exclusive basis in its territory. In these circumstances, a member of the licensor CRM cannot allow another CRM in another territory to license any of his rights directly on his behalf. Moreover, a CRM is restricted from licensing its own members' repertoire outside its domestic territory. In conclusion, the present CISAC model grants each CRMs that adheres to the CISAC model contract, territorial protection in relation to all other CRMs in the network.

Second, with respect to reproduction rights, the standard bilateral reciprocal BIEM model agreement covering the right of reproduction (1984), the right of mechanical reproduction, and the right of fixation in sound recordings contains the following territorial restrictions:

> *"The protection of the reproduction rights relates to the recording and the mechanical reproduction of the works of the other company in the companies' appropriate utilization area and the distribution of the produced recordings and reproduction, irrespectively of the form or place (article I.2).*
>
> *During the duration of this contract the companies will not intervene in the other company's mandate granted for this area of the contract."*

In addition, the BIEM Barcelona agreements for the online reproduction, whilst eliminating the above-described territorial restrictions, still contain undue limitations to the cross-border provision of copyright management services, as the territorial restrictions with respect to the licensing authority of the CRM are replaced by a customer allocation clause which again functions on the principle of territoriality. Territorial restrictions as to the customer that may be served do not comply with the freedom to provide cross-border services.

Third, although there have been moves by the market to put in place multi-territorial licensing and these market initiatives are addressed in greater detail at 1.4.1, these initiatives have failed to produce a universally acceptable model to all stakeholders.

Therefore, multi-territorial licensing agreements for both the online rights of authors and the online reproduction rights are unlikely to arise, which leaves online content providers with a situation in which these online rights have to be cleared on a territory-by-territory basis.

1.1.4.2. Restrictions: cross-border distribution of royalties

With respect to cross-border distribution of royalties, this STUDY has identified the following main obstacles:

First, CRMs do not provide for non-discriminatory distribution of royalties for right-holders from all Member States. In particular, many existing reciprocal representation agreements either do not make provision for or do not apply in practice provisions that royalties collected should be distributed in an equitable and non-discriminatory manner among domestic and represented right-holders from other Member States;

Second, current reciprocal representation agreements in the area of musical performers' rights treat categories of right-holders differently. There is no coherent framework for cross-border distribution of royalties because there are two kinds of reciprocal agreements between CRMs. Reciprocal agreements for certain categories of rights (especially neighbouring rights such as performance rights) do not include the transfer of royalties to the CRM in which the right-

holder is domiciled (Type B agreements). For example, the SCAPR model agreements contain the following restrictions:

> *"(Type A) The collecting societies agree mutually to collect the remuneration due to the performers who are resident in the country of the other party and send the sums to which they are entitled to the collecting society in the country of their residence. The collecting society in this country is then charged with the distribution of the money to the individual entitled performers according to the information it receives from the collecting society in the country of collection and without any deductions of costs for administration.*
>
> *(Type B) There is no direct payment made across borders between the societies or individual right owners. The collecting societies agree mutually that the revenue arising in a country due to artists resident in the country of the other party should remain in the country of collection and be used in accordance with the rules of the collecting society in the country of collection.*
>
> *(Type C) They are intended to overcome the difficulties arising from the fact that the distribution systems of the contracting parties follow different criteria, leaving the option for performers to claim to be remunerated in accordance with the distribution system in the other country."*

1.1.4.3. Restrictions: provision of cross-border collective management services

The current representation agreements are applied in a way in which prevents right-holders in one territory from seeking to join a CRM in a different territory. This has the effect of locking in members with the respective management societies which are in turn locked in to the network of reciprocal arrangements. The ultimate effect of this obstacle is the freezing of the prevailing and mostly domestic structure of membership which, in consequence, prevents the emergence of models that would entail more innovative and efficient licensing system and direct cross-border flow of royalties.

For example, the CISAC model agreement on public performance and performing and broadcasting rights (Paris 1974) contains two forms of restrictions preventing a member of a particular CRM to seek out the services of another CRM in another Member State. There are still a number of CRMs within the EU whose bilateral agreements contain this clause and who effectively apply this clause. A CRM that adheres to the CISAC model cannot accept members of other CRMs, or even right-holders having the nationality of another CRM, without the latter:

> *"While this contract is in force, neither of the contracting societies may, without the consent of the other, accept as member any member of the other society or any natural person, firm or company, having the nationality of one of the countries in which the society operates. (Article 11 II)"*

Article 11 II implies that CRMs that adhere to the CISAC model contract allocate authors among themselves on the basis of their nationality. The effect of this provision is that authors cannot become members of the CRM of their choice nor can CRMs accept right-holders of the nationality of the society in which the society operates.

With respect to concurrent membership in the management and the affiliate society, the *Institut pour la tutelle des artistes-interprètes et exécutants* (IMAIE) model agreement contains the following restrictions:

> *"Les Sociétés contractantes reconnaissent mutuellement que le principe du traitement national prévu au préambule du présent contrat n'impose pas à l'autre Société l'obligation juridique d'admettre comme membres des auteurs de films appartenant à l'un des territoires visés (article 8.1).*
>
> *Si l'une des Sociétés contractantes souhaite entrer en contact avec un membre de l'autre Société, elle demandera à celle-ci de négocier en son nom (article 8.2)."*

With respect to membership, in relation to performers' rights, the *Societies' Council for the Collective Management of Performers' Rights* (SCAPR) Policy and Guidelines for International Cooperation contain the following restrictive provisions:

> *"In respect of both users' and right owners' interests, experience has shown that performers' rights can only be administered in a reasonable and efficient way, if all resident right owners are gathered in one and the same national Society and that the individual right owner belongs to one Society only, and if the Society also is authorised to represent him or her in respect of the rights he or she is entitled to in other countries.*
>
> *The following principles are adopted by the SCAPR societies:*
>
> *1. A right-holder should preferably be a member of one society;*
>
> *2. A right-holder should have membership in one country only;*
>
> *3. The right-holder should adhere to the/a society in the country where he has his permanent place of residence."*

The SCAPR Guidelines only allow right-holders to depart from these rules and join another society in circumstances where there is no society operating in the right-holder's own territory. Once a society is established in the territory of the right-holder, the right-holder is required to join that society.

In addition, the SCAPR Code of Conduct sets out the principle that performers should adhere to one performing rights society for a category of rights and then only in the country of residence:

> *"A right owner should be a member preferably of one PRCMO only for the same category of performers' rights, and preferably of a PRCMO in the country of his/her residence. (Principle 2)"*

Finally, impediments to the free flow of royalties across EU borders may also result from the fact that certain categories of rights-holders, e.g., music publishers are denied membership, although between 70-80% of works they represent are non-domestic. Such denial of membership precludes certain categories of rights-holders that represent works of right-holders from other Member States from having any say in how royalties collected on their

behalf are distributed. For example, in France, Poland, Portugal and Greece music publishers are denied membership in certain collective rights management societies.[12]

1.2. What are the underlying drivers of the problem?

1.2.1. Technological drivers in the way that online content providers work

The development of new broadcasting platforms such as web-based and other online delivery solutions will lead to more cross-border services. These new technologies have also led to the emergence of a new generation of international content providers, e.g. Online content providers and webcasters. Any service provided online can be seen and accessed across Europe. Webcasting is already well-established in the US, where there are currently 1250 privately licensed services.[13]

The Information Society has also changed the traditional mode of delivery from hard copy e.g. CDs, records or paper delivery (books, newspapers) to ever developing digital formats. New formats bring about new types of use for copyright works. Digital delivery has also had a pronounced impact on the conventional market mechanisms or business models. This impact is evident both from the point of view of right-holders and users at the beginning of the supply or distribution chain. Digital formats enable the wide dissemination of copyright works and have altered user behaviour and demands. The digital transmission of a protected work beyond national borders expands the limits of traditional markets. It also creates a number of challenges and opportunities for CRMs, right-holders and users which affect the supply and demand side.

1.2.2. Technological drivers in the way collective management of copyright works

The fundamental review of rights management that the introduction of digital technologies in rights management has brought about is not merely the result of shifts in user behaviour but also from calls from collecting society members themselves. By facilitating identification and tracking of the use of works, in principle, digitisation has empowered right-holders to control the licensing; transformed the collection and distribution of royalty into a process of individual electronic payment; and allowed remote monitoring.

The development of digital technologies will lead right-holders to scrutinise the costs of CRMs. This presents a challenge to CRMs but also provides opportunities for more competition and innovation in the provision of collective rights management services. Digital technologies provide an opportunity to collective rights management to streamline their activity by allowing for significant reductions in management costs and an improved accuracy in royalty distribution. Digital technologies thereby increase the competitiveness of collective rights-managers which makes them more attractive to right-holders.

Digital technologies can therefore be harnessed to maintain the central role of collective management in the music sector and adapt CRMs to the digital environment. The scope of the benefits that CRMs derive from digital technologies for the collective management of online music rights depend on which path the music industry takes and to what extent consumers embrace online services. But it is fair to assume that collective management of online music

[12] Certain CRMs dealing with musical works, such as AEPI in Greece, ZAIKS in Poland, SPA in Portugal and SACD (as far as music is concerned) in France do not admit music publishers as members (cf. submission by ICMP/CIEM, p. 5, footnote 23.

[13] See press release IFPI on webcasting agreement: http://www.ifpi.org/site-content/press/20041018.html

rights on a national basis is economically difficult to justify: if collective rights management for online rights continues to be provided at a national level the historic transaction cost advantages of collective management of copyright will decline as digital technology continues. In order to preserve these advantages, collective management needs to take on a European-wide scope.

In addition, digital technologies allow CRMs to outsource some of their management services when this is more efficient than providing these services themselves. This could lead to cost savings as outsourcing specialists achieve economies of scope by combining certain operational "backroom" management functions (such as the maintenance of databases comprising the different right-holders that contributed to a musical work) on behalf of several CRMs.

1.2.3. Legal drivers

The Information Society has added new services which are provided electronically at a distance (right of communication to the public) or on specific request from the consumer (the right of making available). The introduction of the right to "make available" works or other subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them[14] has brought this development to the fore. The "making available" right, as it is known, is a right was formulated with the Internet in mind for cross-border exploitation and thus most closely reflects the potential of the online environment and on-demand services available online. Due to the technical accessibility of an online service throughout the European territories, content providers require multi-territorial licenses as a way of insurance against copyright infringement action in the different jurisdictions in which the services may be accessed. Ensuring that optimal conditions exist for the proper management of the making available right will ensure its smooth transition into the market place. The market segment in which this right will operate is the growing market in interactive and on demand services with an array of options for the users which are provided electronically at a distance. The making available right is an exclusive right which is managed on an individual basis in the case of the on-demand services.

1.2.4. Commercial drivers

International content providers are looking for copyright cross-border clearance in line with their international reach. With few exceptions, collective management of rights has remained national in scope. Effective cross-border clearance services that cover all 25 EU territories do not exist for authors and performers' rights and the Commission has received little evidence on how an agreement concluded between record label CRMs for the areas of simulcasting and webcasting functions in practice. But in the era of online exploitation of copyright, commercial content providers need a pan European licensing policy that is in line with the ubiquity of the online environment.

The issue within the EU is that while the online provision of content has become international in scope, the traditional collective rights management structure has remained national and thus territorial in scope. But online music content providers see the requirement of territory-by-territory management imposed by CRMs as an impediment to the roll-out of new cross-border online services.

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[14] Article 3 of Directive 2001/29/EC.

With the advent of digital media, CRMs now face the challenge of adapting toward the cross-border provision of collective management of copyright services in the interests of their members and to satisfy the demand of users.

1.2.5. The above technological, legal and commercial drivers create demand for new models for cross-border collective management services

In principle, the digital transmission of a copyright work across borders creates demand for a new set of cross-border management services:

- Commercial online services require a licence for more than one territory which gives legal certainty and insurance against infringement suits for all territories (multi-territorial licence);

- This demand for a multi-territorial licence cannot be satisfied within the current structure of traditional reciprocal arrangements, so alternative solutions should be sought. The territorial scope of the licence that a collective rights manager may grant should be determined by the collective rights manager (licensor), the right-holder and the commercial user (licensee);[15]

- Right holders should benefit from digital transmission technologies by having a choice as to which collecting society to join and to give mandate to for the multi-territorial online management of their rights.

The introduction of choice in the online environment alters the traditional rules of supply and demand as they apply to the collective management of copyright in the offline environment. On the supply side, the scope and choice of licensing regime affects both CRMs and right-holders: how licences may most effectively be granted, and by whom.

On the demand side, commercial users would like to be in a position to have better access to works and simpler, more efficient management of rights, especially the terms on which the repertoire is licensed. Further down the chain, another challenge is how the payment of royalties can be secured, collected, and where necessary licence terms enforced.

Given that within the EU, CRMs occupy a key position in the access to the catalogue of works or repertoire, they must succeed in providing efficient cross-border management services in the interests of both right-holders and users.

1.3. Who is affected, in what ways, and to what extent?

There are three main players: (1) right-holders that make up the membership of the CRMs; (2) the CRMs themselves; and (3) the commercial users of copyright protected material.

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[15] In relation to the those rights which are not administered by a collective rights manager, and which remain with the individual right-holder, a licence may be granted under the contract law of choice e.g. the Member States where a right-holder is established or resident for the EU wide exploitation of his rights. In so doing, the licence, although granted for contractual purposes under the law of a particular Member State is exploited by the licensee under the copyright law of each one of the 25 jurisdictions of the Member States. There might be limitations in the law of any of the Member States which might prevent certain matters granted under the individual contract from being upheld in a particular jurisdiction.

There are two groups of right-holders: authors, composers and editors who own "copyright" and performers, producers of phonograms (record labels) and broadcasting organizations who own "neighbouring rights" in relation to their performances, phonograms and broadcasts respectively.

There are different CRMs depending on the types of use which govern the rights in question. Right-holders and others who own the copyright (although they may not have been involved in the creation or production of a copyright work[16]) make up the membership of collecting societies.

Commercial users are persons or organisations that require licences from CRMs in order to pursue their various activities.

Music

Collective management of copyright is most highly developed in relation to the commercial use of music. Collective management is expected to continue to be crucial with respect to the online delivery of music services as well.

A royalty is payable on almost every occasion that a piece of music is played (whether by audio or audio-visual means). The many types of uses associated with music include all performances provided live (instrumental or vocal); by mechanical means such as recording of music on phonograms, tapes, CDs, films; traditional transmission or diffusion of broadcasts (radio and television); and of course by new media and the new forms of exploitation such as digital transmissions including downloading, webcasting or streaming.

For the music industry, the principal right-holders include the authors, artists/performers, record producers, music publishers. The music publisher is a unique category of right-holder whose role is not readily apparent to those outside the music industry. Music publishers manage the promotion, licensing, royalty collection, distribution and protection of copyright in musical works written and composed by songwriters and composers (the "writers"). Music publishers generally pay "writers" advances against royalties following the signature of a publishing agreement in return for the rights being assigned or licensed (in whole or in part) to them. Music publishers are principally concerned with licensing reproductions of musical works for example for securing releases, for the performance of music (both live and recorded), for online use, in synchronization with visual images in films, television programmes and commercials and for use as telephone ring tones.

CRMs may differ depending on the rights involved. Within the music industry, different right-holders tend to hold different rights (e.g., a singer has rights in his performances and a song-writer in the composition of the song). These different rights are typically managed by different CRMs.

- Rights of authors are the main category and are administered by authors' societies on behalf of the author and music publishers. Authors hold the rights in the composition of the lyrics/music and include the following:

[16] This last category includes those persons, corporate or individuals who under the law of certain Member States own the work either because it was created in the course of employment or they have taken an assignment of the relevant rights.

- Right of reproduction i.e. the right to reproduce the work by making physical or intangible copies. Physical copies are those made by mechanical means, e.g. CD pressing. This aspect of the reproduction right is referred to as the "mechanical reproduction right". Intangible copies include those made by digital means e.g. upload, download, transmission in a network or storage on hard disk;

- Right to communicate the work to the public including making available to the public i.e. transmission of the work by playing recorded music in public or live, via a broadcast or on commercial premises or digital audio equipment.

- Rights of performers, and record producers (record labels) are related rights and remunerate the producers' and the performing artists for use of a sound recording. Such use includes making physical and intangible copies, broadcasting, but now also includes the use related to Internet activity such as streaming and webcasting. The rights include the following:

  - The right of performers to reproduce the fixation of a performance; communicate to the public including the right to make the work available. These rights in their performances (not related to the composition) are administered by CRMs representing performers;

  - The right of record producers to reproduce; communicate to the public including the right to make available the sound recordings. These rights of record producers are administered by separate CRMs representing record producers that hold the rights in the sound recordings themselves.

For the music industry, the commercial users in the online and the offline environment include broadcasters (radio or television i.e. public, or commercial, pay or free access), cable network operators, online content providers, small businesses e.g. bars, restaurants, hairdressing salons.

It is worthwhile mentioning the role of consumers. In the traditional offline environment, consumers purchased CDs or consumed music in bars, at live performances in concerts. In these cases, CRMs would license the record producer or the concert manager. In the online environment, although consumers may contract directly for on demand services such as downloads, these services are provided by content providers under licence from a collective rights manager and/or record producers. Consumers do not usually have to deal with CRMs in either the offline or the online environment.

Online content providers

The introduction of new broadcasting platforms such as web-based and other online delivery solutions will lead to more cross-border provision of online music services. These new technologies have also led to the emergence of a new generation of service providers, e.g. Online content providers and webcasters.

For example, the number of online services where consumers can buy music has increased four-fold to more than 230 worldwide – and over 150 of those are in Europe.[17]

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[17] IFPI Digital Music Report 2005.

The US company, Apple is currently the clear leader in the online music market in both Western Europe and the US. The company's iTunes music store provides the most comprehensive catalogue. But other online music services based on Microsoft Windows Media technology are starting to compete with Apple in terms of market share, price and catalogue size.[18]

New business models[19]

Music fans downloaded well over 200 million tracks in 2004 in the US and Europe – up from about 20 million in 2003. This helped bring record companies their first year of significant revenues from digital sales, running into several hundred million dollars. Analyst Jupiter estimates that the digital music market was worth US$ 330 million in 2004, and is expecting it to double in value in 2005.[20]

Among the major brand names, two distinct business models have emerged in digital music: pay-per-download and subscription services. Pay-per-download services meet consumer demand to 'own' music, but with greater flexibility than CDs as tracks can be selected and downloaded on the spot. Services such as iTunes, MSN Music, Wal-Mart (US) and Tesco (UK) sell downloads from US$ 0.80 per track.

Subscription services offer a very wide choice of music for a monthly fee, allowing users to access all the music they want with the option to purchase selected tracks. Services like Napster, Rhapsody and Virgin Digital offer streaming and radio-play access for a monthly fee – typically from US$ 9.99. Downloads and burns are available for an extra per-track fee from US$ 0.79. Some subscription services such as Napster now allows 'tethered downloads' which are transferable to portable players for as long as the consumer remains a subscriber.

In the era of online exploitation of musical works, commercial content providers need a licensing policy that is in line with the ubiquity of an on-line service. In 2004 record companies digitised and made available their repertoire in bulk. For 2005, they envisage to market, promote and sell music, for online applications such as download, hire, subscription, across Europe. These services can be accessed across Europe and, in consequence, legal certainty for users (irrespective of the territorial scope of the service) requires copyright to be cleared throughout the EU.

While the provision of music content in the online environment has become international in scope, the traditional collective rights management structure has remained national and thus territorial in scope. But content providers see the requirement of territory-by-territory management imposed by CRMs as an impediment to the roll-out of new cross-border online services. Online content providers require copyright cross-border or trans-national clearance in line with their international reach and clearance services. These services cannot be provided effectively or efficiently when copyright clearing services have remained mostly national in scope.

The Growing Legitimate Digital Music Market

According to the IFPI 2005 Digital Music Report, legal music sites have quadrupled to over 230 in 2004 up from 50 sites a year earlier. Over 150 of these services are available in 20

[18] Rightscom, *DRM and Services in Europe and the USA*, 2005.

[19] IFPI Digital Music Report 2005.

[20] Source IFPI Digital Music Report 2005.

countries in Europe and over 30 services in the UK alone. More than 20 are available in Germany and 10 in France.

The available repertoire has doubled over 12 months to 1 million tracks from January 2004 to January 2005. Paid-for downloads increased tenfold in 2004 to over 200 million world-wide. In the UK, paid-for downloads increased from zero to nearly 6 million in the UK (UK Official Chart Co, BPI). In Germany paid-for downloads increased to nearly one million from Musicload (Musicload).

The digital music market was worth US$330 million in 2004 - up on 2003 and set to double in 2005 (Jupiter research). This represents about 1.5% of record company revenues. Analysts and record companies predict digital sales could reach 25% of revenues in five years. It is estimated that 50 million portable players were sold in 2004 (IDC), of which 10 million were iPods (Apple).

CRMs in the music sector

At a national level, there are different CRMs depending on the rights in question. There are many right-holders and rights that could be involved in a single transaction in the music industry. A licence granted by a CRM for one form of exploitation does not mean that any other from of exploitation is authorised and so a separate licence has to be sought from a different collective rights manager i.e. an authors' society, record producer's society and performing rights society for any single transaction.

The principal revenue sources of collective rights managers is the collection of royalties from licensing. A second source is collection of remuneration by way of levies on equipment and media for private copying of audio and audio-visual works, in those jurisdictions where levies exist.

The income derived from licensing is based on tariffs for royalties which are either set at national level depending on the users and types of use involved (e.g. certain educational uses); or is subject to contract. The introduction of new technologies e.g.for online activity often leads to the introduction of additional revenues streams being requested by right-holders for these new forms of exploitation. The income derived from levies for private copying is set by national law or by CRMs that have the authority to do so.[21] The extent to which tariffs are negotiated is a question of the bargaining power of the parties involved. In relation to external scrutiny of these tariffs, in only two Member States are there arbitration structures in place to contest royalties (UK, Germany).

On the basis of turnover, collective rights management societies can be divided into three main categories, irrespective of the rights they administer:

(1) very large undertakings achieving turnover in excess of €100 million annually;

(2) large undertakings achieving turnover of between €10 and 100 million; and

(3) medium sized undertakings achieving turnover below €10 million.

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21 Member States' replies to Commission consultation within the Contact Committee established under Article 12 of Directive 2001/29/EC, October 2004 (as yet unpublished).

Annex 1 gives an indicative list of the main CRMs in the EEA.

Overall, the Commission's survey[22] identified 152 collective rights management societies, acting on behalf of approximately 1.6 million right-holders and, in 2003, managing € 4.9 billion of royalties per year. Out of this revenue collected, €3.8 billion was distributed. Cross-border distribution of royalties within the EU, in 2003, amounted to € 322 million. Distribution to third countries outside the EU amounted to €184 million.

Table 2 below reflects the most important collective rights management societies in Europe not by category of right but by turnover. Out of the 152 societies, 11 achieve an annual turnover that exceeds € 100 million. 80% of the revenue generated with collective rights management arises from the exploitation of musical works and is generated by the top ten societies that are active in this field. The top four societies, in terms of revenue, are all authors' societies. Two of the top 11 societies (PPL and GVL) are not classical author's societies but represent record producers.

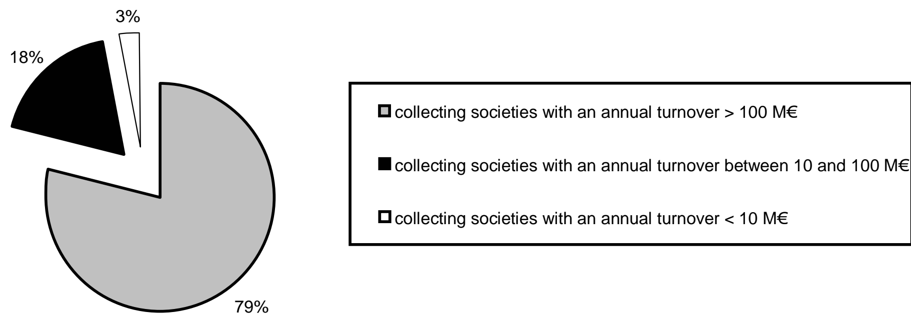
Table 2: EU revenue figures for the top ten collective rights management societies in the area of music

Member State	Collecting society	National right-holders	2003 royalties collected (€)
DE	GEMA	61.500	813.620.000
FR	SACEM	108.356	708.510.448
IT	SIAE	73.000	475.323.126
UK	PRS	40.669	400.414.281
FR	SDRM	171.451	349.897.040
UK	MCPS	16.382	325.508.660
ES	SGAE	80.000	300.760.000
DE	GVL	108.082	147.701.000
UK	PPL	33.298	114.342.877
NL	BUMA	14.000	106.000.000

CS above 100 M€	10
CS between 10 and 100 M€	28
CS below 10M€	165
Number of right-holders represented:	1.6 million

[22] By letter of 22 December 2004 from the Commission to all Member States requesting data on collecting societies active in their respective territories and on royalty collection and distribution. The Commission received replies from all Member States, except for Ireland, Spain, Latvia and Slovenia.

80% of revenues arise in the music sector and is achieved by the 10 biggest CMR



Print and publishing –types of use; rights and CRMs

The main commercial use in the print and publishing sector that is subject to the collective management of copyright is reprography or large scale photocopying. More recently, this sector has also been confronted with mass digital copying. The industry has begun to put in place arrangement for digital document delivery services on a cross-border basis.

The principal right is the right of reproduction of authors and print publishers who may have taken an assignment of the authors' copyright. The other rights are the right to communicate the work to the public and the right to make available the work. In general, these rights are managed by so called "reproductive rights organisations". There may be different CRMs depending on the particular copyright works involved e.g. newspapers,[23] books.[24]

Films

Rights in films and other audiovisual works are usually licensed for use to third parties, e.g. distributors and broadcasters by the film producers who often hold the rights and manage them on behalf of the authors and performers. As a consequence, the level and type of collective management also differs significantly from the music sector.

The business practices for the licensing of films and other audio-visual works are quite different from those prevailing in the music sector. Collective management does play an important role in the audio-visual sector. However, its prevalence relates not to licensing, but to administration of certain remuneration rights (e.g., for private copying, rental, and certain forms of communication to the public depending on the Member State and the relevant right holder).[25] The main right-holders are film and television directors, audio-visual producers, broadcasters and performers.

There is now also an emerging market in the EU for digital film distribution e.g. video-on demand and near video on demand services which makes use of streaming technology or download in which the program is brought to a set top box before viewing starts. A successful transition to the emerging market for the distribution of films over digital networks will

[23] Newspaper Licensing Agency (UK) operates a collective scheme to licence newspaper article and distribute royalties to publishers.

[24] Association of Copyright Collective Administration for Authors of Scientific and Technical Works (KOPIPOL) (Poland).

[25] Collective management of rights for cable retransmission of audiovisual works is also provided for by Directive 93/83/EEC.

continue to be based on direct licensing with collective management playing a role in certain cases to secure remuneration for the use of their works for some right holders.

Other

The collective management of copyright also applies to the remuneration for private copying[26] of literary works, audio and audio-visual works i.e. home copying by individuals using consumer electronics equipment. The remuneration for private copying is administered by way of an exception to the exclusive right of reproduction. It takes the form of levies on equipment and/or media (blank tapes) and is payable by the importer, distributor or manufacturer of the equipment and media to the collective rights manager.

1.4. How would the problem evolve, all things being equal?

If left entirely to the market, innovative and dynamic structures at EU level for cross-border collective management of legitimate online music services would not emerge. This applies to both cross-border licensing and cross-border distribution of royalties.

The evidence presented below provides evidence as to how the market has failed to produce effective structures for cross-border licensing (1.4.1.) and to put in place effective systems for the cross-border distribution of royalties (1.4.2.) In addition, the STUDY identifies a series of restrictions preventing authors or other right-holders from seeking the best collective management services across national borders (1.4.3.)

1.4.1. The market has failed to produce effective structures for cross-border licensing

The current system of reciprocal representation agreements does not ensure an effective system of cross-border licensing that is suitable for the international online exploitation of copyright.

For most forms of exploitation – in particular the new online rights – the Internal Market has become the appropriate economic environment. The effect of digitisation which allows a protected work to be transmitted cross-border has been felt across all the copyright industries. This implies that, in the emerging multi-territorial environment of online exploitation of copyright-protected works, access to these works needs to be as efficient and simple as possible, while maximising the revenue that is transferred to right-holders.

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

There has been much criticism of this approach especially in the online environment where the fact that a protected work crosses border means that the only possibility for a content

[26] Directive 2001/29/EC provides an optional exception of "private copying" for those MS that choose to introduce or maintain such an exception to allow for legitimate acts of private copying in the home or family circle that have no commercial relevance.

provider to legally carry out its activity would be to ask for a licence for each and every use from every CRM whose repertoire it uses. The market has had to seek models to accommodate the demand for multi-territorial licensing.

The traditional reciprocal agreements have therefore been amended by CRMs establishing alliances and joint ventures aimed at providing users with multi-territorial copyright licences for the online environment. These agreements depart from the traditional reciprocal agreements which allow for cross-border licensing only in the home territory of the affiliated society:

– Multi-territorial licensing has been introduced for the right of record producers[27] to *communicate to the public* via simulcasting and webcasting (IFPI/Simulcasting[28] and Webcasting);

– Multi-territorial licensing has been introduced for the authors' right of online *communication to the public* including making available for the provision of music downloading or streaming use of authors' rights (Santiago);[29]

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

But the structure put in place by the parties to the Santiago and BIEM/Barcelona Agreements results in commercial users being restricted in their choice to the collecting society established in their own Member State for the grant of the multi-territorial licence. This restriction is described in the Agreements as the so called "authority to licence" and has the effect of allocating customers to local CRMs. Customer allocation would mean that multi-territorial licences could only be given for online exploitation and by the collective rights manager in the territory where the licensee has its "economic residence". This would be an undue hindrance to the provision of a cross-border commercial rights management service to users resident in other territories.

While the various joint ventures by collecting societies are to be welcomed insofar as they show that moves are afoot to facilitate greater cross-border licensing by CRMs, without legislative or regulatory intervention, the emergence of EU-wide licensing models has created important differences with respect to how multi-territorial licences are granted by record producers' CRMs as opposed to those granted by the authors' societies.

These arrangements are unsatisfactory because for the distribution of the same song on a digital platform there are two different types of licensing practices in place, one for authors' societies and another for record producers' societies. The main divergence between the record producers and the authors' societies' respective models is that authors' societies (BIEM Barcelona, Santiago) limit the single point of entry for the grant of a multi-territorial licence

[27] The main function of these CRMs active on behalf of record producers is the administration of the rights of their record producer members for the purposes of broadcasting and public performance.

[28] See Press Release IP/02/1436 of 08 October 2002, case COMP/C2/38.014 IFPI *Simulcasting*, decision of 8 October 2002, OJ L107 (30.04.2003) p. 58.

[29] The Agreement was notified to the Commission in April 2001 by the collecting societies of the UK (PRS), France (SACEM), Germany (GEMA) and the Netherlands (BUMA), which were subsequently joined by all societies in the European Economic Area (except for the Portuguese society SPA) as well as by the Swiss society (SUISA).

to the collective rights manager in which the content provider has its economic residence or URL, a “customer allocation clause” -- contrary to the fundamental freedom to seek cross-border services -- while record producer societies (IFPI Simulcasting, Webcasting) have no “customer allocation” clause. In addition, the Santiago agreement expired at the end of 2004 and has not been renewed. This means that authors’ rights currently need to be cleared on a territory-by-territory basis.

The sheer number of territorial licences required from different CRMs for authors’ rights might present a new obstacle to the roll out of new services. On the one hand, record companies (and their CRMs) have digitised and licensed over one million tracks (titles/songs) to various music service providers in line with their reciprocal arrangements.

On the other hand, authors’ societies are reluctant to adopt the same business model and argue that authors are best served by a collective rights manager with physical proximity to the user in the provision of each of the service elements involved in the collective management of copyright but especially the enforcement, collection aspects which they argue cannot properly be provided by a distance even with the use of digital technology. Finally, commercial users claim that the obstacle is the licensing regime for authors’ societies. This demonstrates that the current system of cross-border collective management of copyright based on reciprocal agreements between CRMs needs to be reformed for the online environment.

1.4.2. The market has failed to put in place effective structures for the cross-border distribution of royalties

For each of the following service elements namely, licensing, collection, enforcement, there are changing rules that apply to the supply and demand of these services for the online environment. However, the need to properly remunerate right-holders and to ensure distribution of royalties to right-holders remains a constant factor. Proper consideration should be given to what the accrued benefit to right-holders would be for the provision of online services.

The issue that comes to the fore is the extent to which any of these reciprocal agreements operate to the benefit of better distribution of royalties to right-holders and other members in the interests of both the management society and the affiliate society. If the traditional reciprocal agreements remain sub-optimal for the offline environment when it comes to the distribution of royalties, and the same distribution scheme is applied to the online environment, then right-holders will not fully participate in the revenue that results from online exploitation of their copyright works.

Evidence of discrimination or inefficiency in the cross-border distribution of royalties

It is difficult to assess whether affiliate societies distribute royalties to domestic and non-domestic right-holder in a non-discriminatory manner. An exact appraisal becomes even more complex because not all cross-border royalty flows are channelled through the reciprocal agreements that govern cross-border licensing. A significant flow of cross-border royalties, at least in the music sector, is channelled through a network of so-called sub-publishers. Sub-publishers are national publishers who collect royalties from local societies and remit these monies to the main publishing companies who, in turn, distribute these monies to right-holders. The data presented below only captures royalties that are remitted between CRMs

within the framework of reciprocal representation agreements and thus disregards this parallel flow of royalties within the sub-publishing network.[30] Although the volume remitted outside of the CRMs reciprocal agreements appears to be substantial, it does not put into question the finding that there is not always a commensurate relation between non-domestic repertoire exploited in a particular Member State and the transfer of royalties to non-domestic right-holders.

A recent study conducted by Cap Gemini for BUMA Stemra provides estimates of the market share of the domestic music repertoire as a percentage of the different national markets and compares these figures with the revenue that are transferred to non-domestic right-holders.

The table below compares these two sets of data with respect to SACEM (F), SGAE (E), GEMA (D) and SIAE (I). The table below shows that there is no commensurate relation between non-domestic repertoire exploited in a particular Member State and the transfer of royalties to non-domestic right-holders. While the non-domestic repertoire represents between 55 and 62% of works exploited in Spain, the royalties distributed to non-domestic CRMs has been below 12%. In addition, in Spain and France, the royalties distributed to right-holder abroad are falling, although the market share of non-domestic repertoire exploited in the case of Spain is rising.

Table 3: Royalty distribution abroad and the importance of the non-domestic repertoire

	Royalties distributed to non-domestic societies (as a % of royalties collected)			
	SGAE (E)	SACEM (F)	GEMA (D)	SIAE (I) (music report)
2004	7,46%	na	Na	na
2003	9,16%	12,73%	13,96%	16,07%
2002	10,38%	12,61%	14,07%	15,32%
2001	11,22%	14,01%	13,60%	15,07%
2000	Na	13,39%	12,62%	14,26%
1999	Na	13,09%	13,52%	13,84%
	Market share of non-domestic repertoire in 1998 / 2002			
	Spain	France	Germany	Italy
2002				
Low estimate	53%	41%	55%	55%
High estimate	62%	42%	60%	55%
1998				
Low estimate	55%	45%	57%	57%
High estimate	58%	57%	60%	57%

The Cap Gemini reveals no improvement in rectifying this apparent bias in favour of the domestic repertoire. The table below shows that in two of the four societies identified, distribution of royalties to non-domestic societies grows at a lower rate than the general rate of income growth. In Germany, payments abroad are growing slightly faster than general royalty income, and only in Italy, payments to affiliated societies are growing faster than

[30] Sub-publishers estimate that approximately 60% of public performance royalties are channelled to the publishers via the network of local sub-publishers (Source: estimates of ICMP/CIEM).

general royalty income. The fact that royalty transfers between EU collective rights societies, under current reciprocal arrangement are falling is not good for the performance of the EU music sector as a whole.

Table 4: Collective right management societies are not equally efficient in the cross-border collection and distribution of revenues

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

1.4.3. The market has failed to put in place effective structures for the cross-border provision of collective management services

Under the current network of reciprocal agreements between the management and the affiliate society, right-holders are "locked-in" with their current management society. Even the recent moves aimed at providing users with multi-territorial, multi-repertoire licensing for the online environment (IFPI/Simulcasting, Webcasting and Santiago) would not introduce choice for right-holders with respect to the management society they want to clear their rights. Within the current structure of reciprocal representation agreements, there are two provisions which can be identified:

– CRMs have agreed among themselves, and many still apply the relevant clauses, that right-holders should not move between societies that are linked through reciprocal agreements; or

– CRMs have agreed that neither of the contracting parties linked by reciprocal representation agreements may accept as member any person, firm or company that has nationality of one of the countries in which the societies linked by reciprocal representation agreements operate.

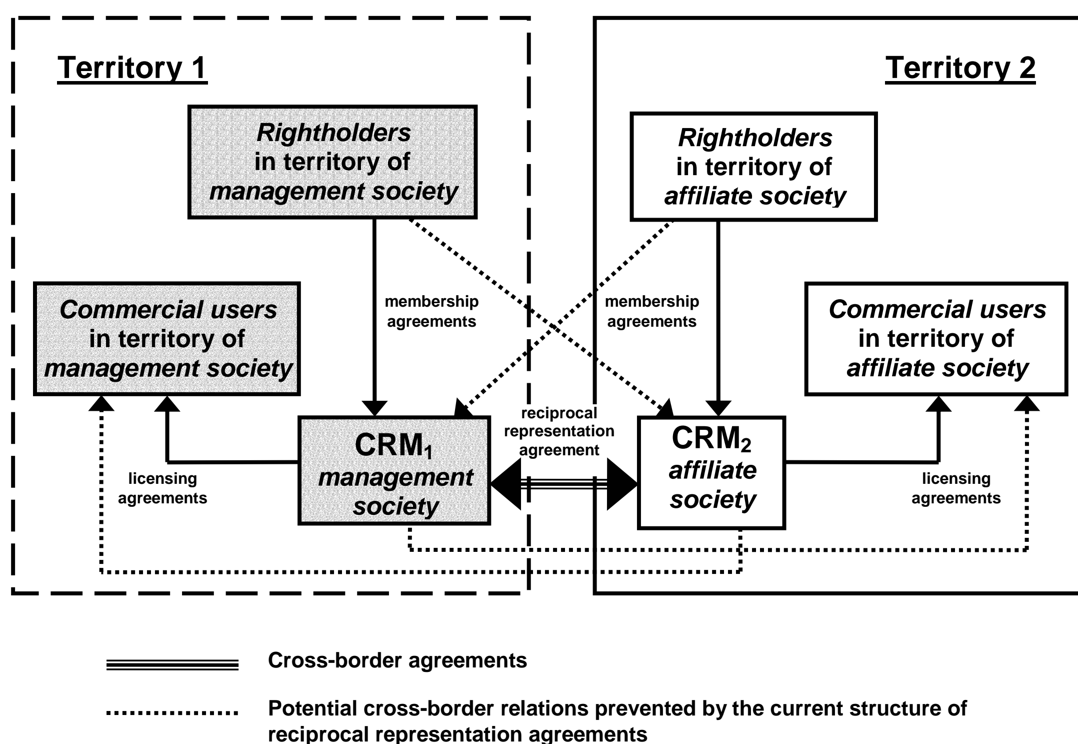
The effect of this is that new right-holders are allocated between CRMs on the basis of their nationality and this in turn amounts to discrimination on the grounds of nationality –both with respect to the right-holder and to the CRM that might wish to provide a service to a new right-holder. In addition, right-holders that are already members of a CRM which is part of a reciprocal representation network remain tied to the CRM to which they belong.

1.5. Does the EU have the right to act?

1.5.1. Treaty base

Collective management of copyright comprises a series of service elements that Section 1 above identified as requiring action at EU level. The EU's mandate to act results from the fact that collective rights management services are provided (1) cross-border; (2) to nationals of other Member States or persons resident in other Member States; (3) under reciprocal representation agreements which contain restrictions which limit the provision of these services, inter alia: (i) by territory; (ii) by nationality (iii) by Member State of economic residence.

Table 5: Overview of the potential cross-border services that are currently prevented by the structure of reciprocal agreements among CRMs



The proposed EU action is based on Article12, 49, the Treaty Article that governs the prohibition on discrimination on the basis of nationality and the freedom to provide services across national borders.

Multi-territorial licensing

The first cross-border service element in the collective management of copyright that is relevant for this Study involves the grant of multi-territorial licences[31] to commercial users. Currently these services are provided on a territory-by-territory basis but increasing user demand requires these services to evolve into cross-border services.

[31] Permission given by the owner of copyright to another person to use a copyright protected work, which without permission, would infringe copyright.

Cross-border distribution of royalties

The second cross-border service element relevant for this Study is the distribution of royalties to rights-holders in other Member States.

Cross-border provision of management services to right-holders

In addition, the Study identifies restrictions preventing authors or other right-holders from seeking the best collective management service across national borders.

Cross-border licensing to commercial users in other territories

Finally, the Study identifies restrictions in who can provide multi-repertoire and multi-territorial licenses, because this licensing authority is limited to customers having their "economic residence" in the same territory as the CRM.

1.5.2. Subsidiarity test

In the absence of further harmonisation, copyright protection continues to be asserted and, in particular, enforced on a national basis consistent with the law which grants it protection. The principle of territoriality, which governs the exercise of copyright, does not preclude action at EU level. There is no legal requirement that rights should be licensed on a national territorial basis only: right-holders may choose how many territories in which to license their rights. The principle of territoriality merely determines which law applies to the act of use or exploitation: this is typically the law of the place of exploitation. There is no requirement that copyright licensing should be limited to a particular national territory: it is a choice for rightholders.

Rights may be licensed with any territorial scope that is chosen by right-holders. Right-holders alone hold the sole authority over the territorial scope of the licence they grant for the exploitation of their rights.

To the Commission's knowledge, there is no obstacle in the law of any Member State which would preclude the provision of CRM services in more than one Member State or to nationals of other Member States either wherever they may be resident in the EU.[32] In the area of collective management of copyright, it is the CRMs, of their own volition, that have traditionally chosen, by agreement, to limit themselves along national territorial lines.[33] They have maintained these territorial restrictions in their cross-border reciprocal representation agreements. The provision of online music services has no territorial limitation and commercial users wishing to provide licensed services require legal certainty against infringement in those areas where the service is capable of being accessed, action at Community level would be required to overcome the territorial limitations that the CRMs

[32] It is noteworthy that in Italy, SIAE operates under a legal monopoly (Article 180 Italian Copyright Law N° 633 of 22 April 1914, as amended.

[33] Initially, CRMs justified the territorial self-imitations on their licensing authority with the argument that individual service elements require a physical presence of a local collective rights manager who knows the territory and can provide each of the service elements especially those that apply to collection and enforcement, at a more economic cost, than another non-domestic collective rights manager. But the introduction of electronic distance monitoring that runs concurrent with the emergence of new online content services puts this rationale into question.

have imposed on cross border licensing and which curtail the cross-border services that CRMs can provide to right-holders on the one hand and commercial users on the other hand. The principle of territoriality therefore does not preclude EU action. Member States acting alone within the confines of national copyright law would be able to regulate the activities of CRMs within their national borders but not in relation to the cross border provision of services.

1.5.3. Necessity test

Effective structures for the cross-border collective management of copyright for legitimate online music services requires regulatory intervention, because the market has failed to produce effective structures for cross-border licensing (Section 1.4.1.), cross-border royalty distribution (Section 1.4.2.) and has not rectified a series of contractual restrictions preventing authors or other right-holders from seeking the best collective rights management service across national borders (Section 1.4.3.)

While it is true that all the above mentioned restrictions that impede the development of effective cross-border collective management for legitimate online services do not result from acts of public authority, this does not render EU action unnecessary.

In *Walrave, L.J.N. Koch vs. Association Union Cycliste Internationale*[34] the European Court of Justice (ECJ) held that the Treaty rules governing non-discrimination on the basis of nationality and the fundamental freedoms are not only applicable to action taken by public authorities but extend also to rules of any other origin aimed at regulating in a collective manner, gainful employment and the provision of services.

The ECJ further held that the abolition of obstacles to the freedom to provide services across national borders are fundamental objectives of the Community and that these objectives would be compromised if the fundamental freedoms would not apply to the autonomous acts of associations or organisations which do not fall under public law.

In a more recent *Angonese*[35] judgment, the ECJ confirmed that "Article 48 is drafted in general terms and is not specifically addressed to the Member States" and that "the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well".

CRMs and their umbrella organisations (e.g. CISAC, BIEM, SCAPR) are powerful collective actors who, within the framework of the CISAC and other reciprocal representation model agreements, are effectively engaged in self-regulating their trans-national relationships[36].

It results from the above that Community action is not precluded by the fact that the various obstacles to the cross-border provision of collective management services for legitimate online music services are contained in reciprocal representation agreements concluded among CRMs. Nor are CRMs entrusted with the operation of services of general economic interest in

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[34] Judgment of 12 décembre 1974. B.N.O. Walrave, L.J.N. Koch contre Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española de Ciclismo.

[35] Case C-281/98, Angonese [2000] ECR I-4139, para 32.

[36] The Court of Justice has recognised the dominant position of collecting societies arising from their *de facto* monopolies in national territories in BRT v SABAM Case 127/73 21 March 1974 ECR 1974 313; GVL v Commission Case 7/82 ECR 1983 483.

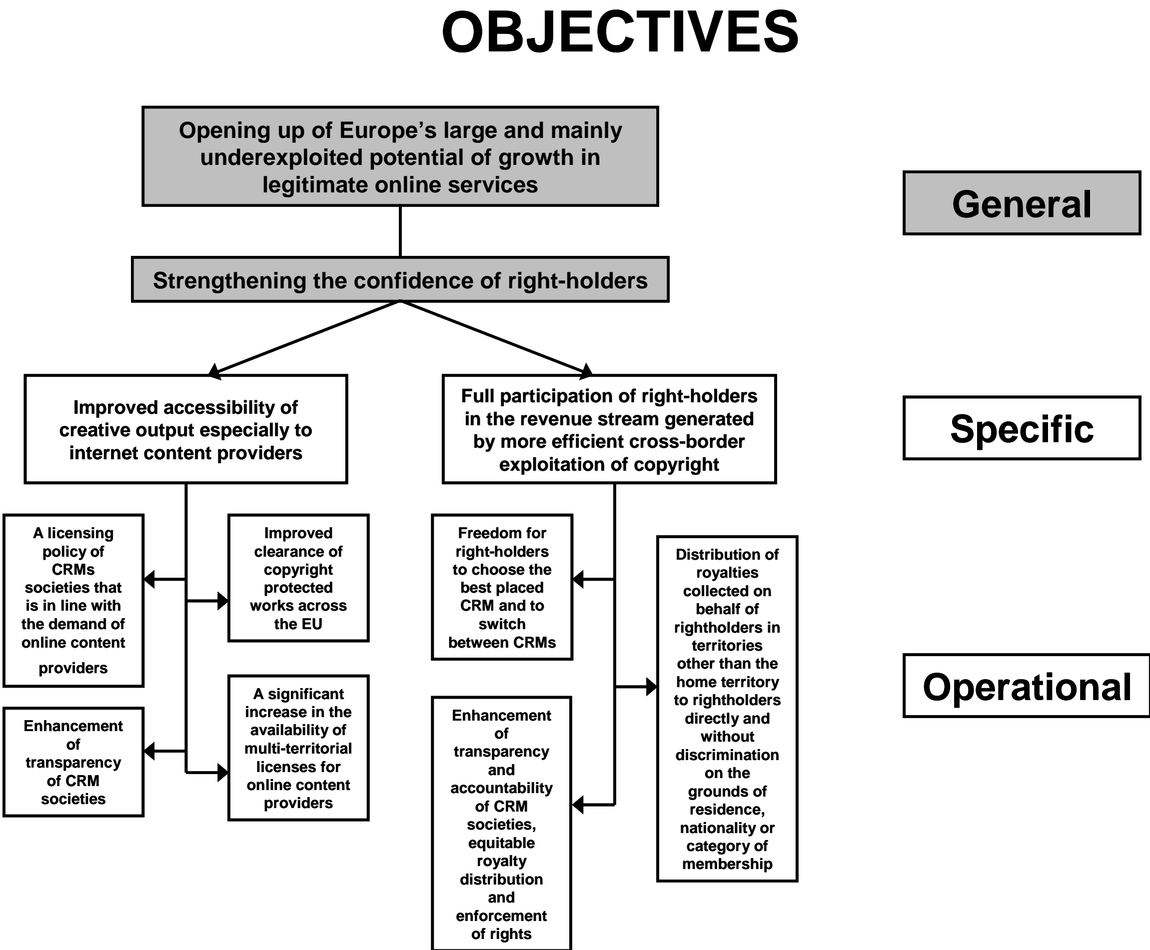
the sense of Article 86 of the Treaty but are engaged in the exercise of economic activities that would exclude Community action.[37]

Action at Community is also necessary to recall Member States' obligation to ensure that directly effective Treaty provisions, such as Article 49 of the Treaty have a direct effect in the legal orders of the Member States and confer rights on individuals (be it right-holders or commercial users) that must be protected by the national courts.

2. OBJECTIVES

The following graph gives an overview of the general policy objectives, the specific objectives and the operational objectives.

Table 6: General objectives, specific objectives and operational objectives



<u>General objectives</u>

<u>Opening up of Europe's large and mainly underexploited potential of growth in legitimate online services</u>

[37] GVL v Commission, paragraph 32 and BRT v SABAM, paragraph 23.

The specific objective of EU policy in the field of copyright should be to harness the potential that European music has in stimulating growth of the EU online sector. European policy must therefore create a vibrant market for online exploitation of copyright across the Community.

Strengthening the confidence of right-holders that the pan European use of their creative works will be financially rewarded irrespective of where their musical works are exploited or where the right-holders are located

European policy must therefore create a vibrant market for online exploitation of copyright across the Community in which the revenue stream is transferred back to creators in the most efficient and direct manner possible.

Specific objectives

Improved accessibility of creative output especially to Online content providers

In order to drive the growth of the online music sector, accessibility of copy-right protected works needs to be enhanced. This implies that the way in which copyright-protected works are cleared across the European Union needs to be improved radically.

Full participation of right-holders in the revenue stream generated by more efficient cross-border exploitation of copyright

Right-holders must be able to enjoy copyright and neighbouring right protection wherever such rights are established, independent of national borders, modes of use during the whole term of their validity. Therefore, any EU initiative on the collective cross-border management of copyright must strengthen the confidence of artists, including writers, musicians and filmmakers, that the pan-European use of their creative works will be financially rewarded.[38]

Operational objectives

– With regard to accessibility:

A licensing policy of CRMs societies that is in line with the demand of online content providers

New technologies have also led to the emergence of a new generation of service providers, including. online content providers, webcasters, digital terrestrial, mobile telephony, 3G. In the era of online exploitation of musical works, commercial content providers need a licensing policy that is in line with the ubiquity of the online environment.

Enhancement of transparency of CRM societies

The freedom to choose the CRM which provides the best service would lead to a society being chosen on the basis of the best cost-benefit analysis with respect to quality of service. Competition between CRMs will enhance transparency, accountability, royalty distribution and the quality of enforcement.

[38] Report by the EP on a Community framework for collecting societies for authors' rights, 11 December 2003, recital 29.

Improved clearance of copyright protected works across the EU

Right-holders have a particular incentive to choose their collecting society for the management of their online rights. The freedom to choose the best placed CRM would create the competitive discipline that forces CRMs to compete among themselves for right-holders and negotiate advantageous royalties on their behalf.

A significant increase in the availability of multi-territorial licences for online content providers

The overall number of multi-territorial licences awarded for the online exploitation of musical works needs to increase in line with the number of service providers engaged in cross-border content service provision.

– With regard to efficient cross-border exploitation and royalty payments:

Freedom for right-holders to choose the best placed CRM and to switch between CRMs

A core aim in fostering effective structures for cross-border collective management must entail giving right-holders the possibility to freely choose and move among CRMs. If their services were either inefficient or too expensive, right-holders would move to another rights manager. This level of competitive discipline would counteract any tendency toward monopoly at the Community level.

Enhancement of transparency and accountability of CRM societies, equitable royalty distribution and enforcement of rights

This implies that all right-holders, authors, composers, publishers, performers or others, should be treated equally, irrespective of their domicile, by the putting in place of effective structures to enhance transparency, and accountability.

Distribution of royalties collected on behalf of right-holders in territories other than their home territory to right-holders directly and without discrimination on the grounds of residence, nationality, or category of membership

EU policy must aim to ensure that royalties collected on behalf of right-holders in territories other than their home territory should be distributed to right-holders as directly as possible. Distribution of royalties must be fair and equitable and there should be no difference in treatment on the basis of where a right-holder is resident; on the grounds of his nationality; or his category of membership in the collective rights management society.

3. POLICY OPTIONS

In order to create efficient pan-European structures for cross-border collective rights management, three policy options are considered:

– Do nothing (Option 1);

– Eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between CRMs (Option 2); or

– Give right-holders the choice to authorise a collecting society of their choice to manage their works across the entire EU (Option 3).

3.1. Do nothing

Should the do nothing option be chosen, we would expect the marketplace to achieve a limited form of multi-territorial licensing – most likely a multi-territorial licence would be made available for online exploitation but there would be no choice as to the collective rights manager who would provide this licence. However, this customer allocation clause would mean that multi-territorial licences could only be given for online exploitation and by the collective rights manager in the territory where the licensee has its "economic residence". This would be an undue hindrance to the provision of a cross-border commercial rights management service to users resident in other territories.

3.2. Eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements concluded between CRMs

Option 2 limits EU policy to improving the traditional way in which national collective rights societies in the 25 Member States cooperate in order to ensure the cross-border management of copyright. It would introduce a single entry point and choice for commercial end users but it would not introduce increased choice as to collective rights manager at the level of for right-holders.

Option 2 would also improve the way reciprocal agreements function. In particular, it would improve the way the affiliate society monitors, collects royalties and transfers them back to the management society.[39] In relation to licensing, this option would ensure that the territorial restrictions in classical reciprocity agreements that hinder the affiliate society from licensing the management society's repertoire beyond its own home territory (the "territorial restriction clause") (see for example Article 6 II CISAC Model Agreement; Article I .2 of BIEM Model; and the relevant provisions cited above in the SCAPR Guidelines and the Code of Conduct) are removed from all reciprocal representation agreements.

Moreover, reciprocal representation agreements should no longer provide that the affiliate society is restricted to granting a multi-territorial licence to content providers whose economic residence is located in its "home" territory (the "customer allocation clause").

In addition, Option 2 will not remove limitations contained in several reciprocal representation agreements (for example Article 11 II of the CISAC Model Agreement, Article 8.1 of IMAIE Model Agreement and the SCAPR Guidelines and Code of Conduct). These limitations restrict right-holders' freedom to select another CRM in another territory and entrust this CRM with the EU wide management of their rights.[40]

With Option 2, there is therefore no scope for CRMs to improve their services or differentiate their repertoires by actively competing for the business of right-holders. As a result, Option 2 will not resolve the issue that most CRMs are entirely dependent on reciprocal agreements in

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[39] This would be consistent with submissions made on behalf of performers' –GIART, BECS and AER. See Section 6.1 below.

[40] Many CRMs can point to nationals of other Member States amongst their membership. However, to the Commission's knowledge, the CRMS do not provide an EU wide mandate for their services. Services are provided to them on a mono-territorial basis as with other members.

order to offer their repertoire. This leads to a situation where almost no CRM has an attractive repertoire of its own, but all of them, by virtue of a network of reciprocity, offer an identical repertoire to commercial users.

3.3. Give right-holders the choice to authorise collecting societies of their choice to online rights for the entire EU

Option 3 would not rely on reciprocal representation agreements to give 25 CRMs licensing authority over a homogeneous product – the aggregate repertoire of all EU CRMs. Instead, it would give all right-holders across the EU the possibility to adhere to any collective rights manager of their choice for the EU-wide exploitation of their online rights. Option 3 would effectively cut out the intermediary – the affiliate society – in favour of direct membership in a CRM who, by choice of the right-holder, could receive an EU-wide mandate to manage this right-holder's copyright protected works. Option 3 would therefore introduce choice and competition at the level between right-holders and collective rights manager.

With Option 3, the collective rights manager's licensing authority would not be limited to clear copyright of his members in his home country. The CRM would be the right-holders' central management society throughout the EU. The reason for this is simple: Because this collective rights manager of choice clears only rights on behalf of its direct members he does not rely on reciprocal representation agreements for his repertoire. Therefore, there is no management society which, as the holder of a foreign repertoire, can limit the territorial authority of the licensor to clear the rights in its home territory only. In order to enable the management of copyright abroad, CRMs would no longer cooperate by virtue of reciprocal agreements between each other but would instead compete to attract a maximum of right-holders from across the EU that they then represent throughout the EU.

Option 3 is particularly interesting for authors whose work is exploited on a large scale across the EU. This is because direct membership in a CRM of choice would avoid that authors' royalties are subject to multiple deductions to cover the costs of other CRMs in various jurisdictions. Direct membership would reduce the deductions inherent in reciprocal arrangements and in so doing increase the authors' revenues.

But Option 3 is not only interesting for big right-holders. By allowing competition between CRMs as to the depth and breadth of the copyright management services they provide to right-holders, CRMs can distinguish themselves by offering different elements of the management services they provide for right-holders. Copyright management services could be differentiated in terms of, e.g., the method applied in monitoring use made of works (detailed monitoring of all occasions where works are used as opposed to surveys). Especially smaller right-holders will rely on accurate monitoring and distribution statistics and may not whish to opt for rights management based on surveys (which typically capture the use made of more popular works).

In Option 3, societies could also compete on parameters such as the speed in which royalties are remitted to right-holders or the level of detail in which a right-holder is informed of the different uses made of his protected works. These features are again particularly relevant for smaller right-holders. Option 3 may also stimulate CRMs to compete for right-holders in being more innovative as to the methods in which copyright fees are determined (flat fees as opposed to usage-specific fees or fees based on user's revenue). Option 3 would thus be best suited to reflect the increasing importance of the value and pricing that musical copyright has for all right-holders in musical works. With Option 3 right-holders could choose on the basis

of several parameters between these different models in line with their individual needs.

By providing incentives to compete for the business of right-holders Option 3 becomes the best model to harness digital technologies to the benefit of right-holders. This becomes relevant as digital technologies will empower all right-holders, big or small, as to increasingly scrutinise the cost and efficiency of collective rights management services.

Finally, Option 3 would allow CRMs to build up attractive genre-specific repertoires. The increasing diversity of online music services will create a demand for cross-border genre-specific licenses. Option 3 would give CRMs to specialise in line with this demand and compete for right-holders that complement their existing genre repertoires. This development would increase efficiency thereby making CRMs more attractive to right-holders and commercial users alike. For a series of customer groups with a specific demand, Option 3 presents an alternative for the standardised and uniform service currently offered under the reciprocal agreements. It would also present CRMs with the opportunity (previously denied) of developing niche markets or customers with specific demands either by virtue of the nature or the difference in their repertoire.

4. ANALYSIS OF IMPACTS

4.1. Legal Certainty

If the Commission were to choose the 'do nothing' option, there would be continued legal uncertainty for right-holders as to the non-discriminatory distribution of royalties and the conditions on which licences for online exploitation can be granted. Uncertainty as to licensing would have a detrimental effect on a variety of European-based online services that rely on attractive musical works for their business model to be successful.

Option 2 can provide some degree of legal certainty for commercial users exploiting copyright. Under this option, the commercial user can obtain, via a single transaction, access to the aggregate European repertoire held by EU CRMs for multi-territorial exploitation across the Community. But Option 2 would still leave the user exposed to the risk that certain rights and/or right-holders are not covered by the reciprocal agreements and that these right-holders could still sue for unauthorised exploitation of their copyright. This uncertainty results from the fact that not all of the EU CRMs have effectively entered into bilateral reciprocal representation agreements. Therefore, the seamless model of reciprocity that appears necessary to provide the optimum degree of legal certainty for commercial users (described at Section 1.1.2. of this Study) does not exist in practice.

Option 3 can provide a higher level of legal certainty for commercial users with respect to the scope of the repertoire licensed and with respect to the territory covered by a license:

– With respect to the exact scope of the repertoire licensed, every collective rights manager is able to guarantee the exact scope of its repertoire because right-holders are his direct members. He is thus also able to communicate the exact scope of his repertoire to the commercial user and be accountable for this scope. This gives users a high degree of legal certainty with respect to the repertoire covered by a license obtained from a CRM whose repertoire comprises its direct members;

– In addition, as Option 3 does not rely on reciprocal agreements for obtaining an attractive repertoire, the CRM's licensing authority is determined by individual membership contract. This avoids the inherent limits in the multi-territorial licensing authority of the CRM that derives its repertoire through reciprocal representation agreements. As most right-holders tend to mandate one CRM for the global management of their rights, a CRM of choice will in most instances have pan European licensing authority. This will give commercial users in the online environment the requisite level of legal certainty that a license will give them immunity against infringement action in any one of the European territories in which his online service can be accessed. As Option 3 combines absolute certainty as to the repertoire licensed (see above) with the contractual freedom to determine precisely the territorial scope of the license, it scores highest with respect to legal certainty.

4.2. Transparency/Governance

'Doing nothing' would leave in place an unsatisfactory status quo in which right-holders from other Member States do not know how their royalties are calculated and what levels of deduction are applied to royalties which are collected on their behalf in other territories within the system of reciprocal representation agreements. A failure to introduce a non-discriminatory and transparent system of how royalties are distributed would not give right-holders the opportunity to know what royalties have been collected on their behalf for use of their works and how royalties have been allocated to them in the CRMs' scheme of distribution.

Option 2 can provide a certain degree of transparency to right-holders and users alike. By virtue of the non-discrimination principle being applied to the distribution of royalties, right-holders can hope to obtain better information on how their works are monitored abroad and on how the royalties collected on their behalf are transferred to the management society in their home territory.

Option 3 can provide a still higher level of transparency for right-holders because the collective rights manager of their choice is accountable for all use made of works across the Community and for the redistribution of royalties in exact proportion to this use. If the right-holder is not satisfied with the functioning of the relationship he has the choice to seek Community-wide clearance services elsewhere, a strong incentive to carry out optimal and transparent clearance and royalty payment services.

Empowering right-holders to choose their collective rights manager would lead the latter, in order to attract or retain business, to adapt their business practices and become more efficient in relation to their management services. The case that was previously made in the *Commission Communication to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market*[41] for introducing transparency requirements, rules of good governance and accountability would now be achieved by the CRMs themselves without regulatory intervention.

[41] Collecting societies and their umbrella organisations, a wide range of right-holders and their umbrella organisations and a wide variety of users of copyright content, as well as manufacturers of information technology equipment submitted detailed comments in response to the Commission Communication of 16 March 2004.

4.3. Culture/Creativity

If the option of doing nothing were chosen, the cultural and social dimension of collective management would remain exclusively national in perspective and outlook. This option would reinforce the perception that the cultural and social role played by CRMs is basically limited to the promotion of national cultures at national level. This would imply a degree of introspection that would not provide the necessary nurturing for the international arena which would allow local talent to flourish and become better known outside national borders. The lack of an international platform for local artists that the on-line environment would provide would be to the detriment of culture and creativity.

Thus, while the online provision of content becomes increasingly international in scope, the traditional funding of cultural and social activities remains purely national in outlook. But maintaining a purely national perspective on culture and creativity creates the following dilemma: while a collective rights manager will increasingly provide management services for non-domestic right-holders his cultural and social funding services will accrue to domestic members. His role will thus be split between providing an efficient management service on behalf for non-domestic right-holders and providing social and cultural promotion services only for its domestic members. This creates a conflict of interest as the purely national outlook of cultural and social funding sits ill with the CRMs' international service obligations.

With respect to licensing, doing nothing would leave untapped the potential introduced by online cross-border exploitation of copyright works. The availability of these works across borders has influenced consumers and the choice of cultural products available to them. Consumers' preferences, language and culture are now playing a significant role in forming supra-national linguistic areas of cultural exchange within Europe.

Doing nothing would make no contribution to fostering culture and creativity across Europe and would forfeit the opportunity presented by cross-border delivery of copyright works serving various cultures and minority audiences who have an interest in cross-border programming in various languages and who may reside in various parts of the EU.

On the other hand, both options 2 and 3 have the potential to increase the overall amount of revenues created by copyright licensing in the online environment and thus "enlarge the pie" to be distributed to all right-holders across the EU. Better cross-border licensing would make available a larger variety of cross-border programming for the various language and cultural communities across Europe, wherever they reside. CRMS may therefore engage in (1) a diversified sponsorship policy across more than one Member State showcasing domestic talent; (2) finding new audiences for various sectors of creation, notably in difficult fields like contemporary music as opposed to limiting it to national audiences only (3) cultural events featuring domestic content with an international platform; (5) financial support for musical and audiovisual productions on a national and international level. This, in turn, will increase royalties for right-holders and awareness for cultural activities at a European level.

4.4. Trade flows

The do nothing option would leave in place the status quo where copyright is often exploited in other Member States without the commensurate transfer of royalties back to the non-domestic right-holders. Such a system reduces the attractiveness of cross-order collective licensing for the right-holders whose copyright is exploited abroad for the following reasons:

– First, if creators from other Member States do not perceive the collective management of their rights in other territories as a fair deal, the viability of collective management of copyright across national borders and the ensuing cross-border financial transfers are imperilled. In an ever more integrated Internal Market, creators are not necessarily always domestic residents and the managers that run collective rights societies need to take the relevance of non-domestic creative input into account;

– Second, digital technologies have empowered right-holders to directly control the licensing and royalty payment process with the use of "digital rights management systems" (DRMs). Especially with respect to online exploitation proprietors of copyright might soon have, technology permitting, the possibility to exploit their online rights on an individual basis. If collective management of copyright takes into account this emerging European dimension, in ways that direct licensing inherently does, there will be real choices for right holders to license on a collective basis and for collective rights managers to attract new revenue streams based on the service, efficiency and accountability they are able to offer;

– Third, the unavailability of efficient licensing for new forms of online exploitation that allows for a particular form of copyright to be commercially exploited throughout the EU is detrimental to the successful roll-out of a variety of cross-border online services – sacrificing huge potential for European growth and prosperity.

Option 2, should reciprocity be properly administered between the management society and the affiliate societies, there might be an increase in cross-border royalties between the Member States in which these societies are located. A strict application of the principle that royalties must be distributed without discrimination to domestic and foreign right-holders alike will increase royalties being distributed to foreign right-holders.

With respect to licensing, option 2 would eliminate the two forms of territorial restrictions that govern the current reciprocal arrangements:

– First, it would extend the affiliate society's authority to license the management society's repertoire beyond its home territory and thus grant a licence that also covers the management society's territory;

– Second, it would remove the customer allocation clause making it possible for the affiliate society to grant licences also to commercial users whose economic residence it not within their home territory. Eliminating these forms of territorial restrictions will foster cross-border trade in collective online rights management in the Community.

Option 3 would increase trade flows beyond those achieved in option 2. This is because trade flows will no longer depend on the proper functioning of reciprocal representation agreements but on the direct relationship between right-holders and the CRMs of their choice. Again, the possibility to terminate this relationship and seek EU-wide clearance services elsewhere is a powerful stimulant for the collective rights manager to provide optimum services and thus maximise cross-border trade flows. Above all, fewer more efficient societies will distribute more to their members or the members will move to another society which will be benefit right-holders generally.

4.5. Innovation and growth

Doing nothing will make collective cross-border exploitation of copyright a less attractive business option for non-domestic right-holders and thus stifle provision of new cross-border online services.

Should the do nothing option be chosen, we would expect the marketplace to achieve a limited form of multi-territorial licensing – most likely a multi-territorial licence would be made available for online exploitation but there would be no choice as to the collective rights manager who would provide this licence. However, this customer allocation clause, whereby multi-territorial licences would only be given for online exploitation and by the collective rights manager in the territory where the licensee has its “economic residence” is not in line with the freedom to provide services cross-borders. Therefore, the most likely scenario is that there will be no multi-territorial licence available for online service providers – who would again have to clear their rights in 25 jurisdictions across the Community.

Option 2 would stimulate the roll-out of new online services because the requisite Community-wide licence would be available at a single access point to be freely chosen by the commercial user. For commercial users arguably option 2 would introduce the single access point in a way in which big multinational commercial users could benefit.

However, obtaining the multi-repertoire and multi-territorial licence at a single entry point by enhancing the network of reciprocal representation agreements among CRMs would be costly and detrimental to right-holders. Given that royalties are channelled via both the affiliate and the management society, the cost of maintaining the web of reciprocity would be burdensome and corresponding deductions would be made by both the affiliate and the management society, before the right-holders are paid.

There would be a limited effect on the status quo for right-holders who, due to the reciprocal arrangements, would have a strong incentive not to join a CRM outside their home territory.

Option 3 would also stimulate the roll-out of new online services because it will facilitate management of rights by concentrating the licensing process to a few transactions as opposed to potentially 25 licensing transactions in all Community territories. But Option 3 would not achieve the single access point for all European repertoire for all European territories because the European repertoire will be split among a small number of CRMs.

On the other hand, as all right-holders receive royalties from their collective rights manager of choice in line with actual use made of their works, option 3 will maximise the incentive to create.

4.6. Competition

The basic difference between options 2 and 3 is that option 3 would introduce competition in the relationship between right-holder and collective rights manager while option 2 would introduce competition at the level of commercial users.

In Option 3, CRMs would have to compete among themselves to attract right-holders, while in Option 2 CRMs would compete to attract the business of commercial users. Option 3 can therefore be referred to as the “right-holders option” while option 2 is more favourable to commercial users.

With option 2, the elimination of the two forms of territorial restrictions that govern the current reciprocal agreements appears at first sight to introduce more competition.

But dismantling the two forms of territorial restrictions, while leaving in place the membership limitations contained in the underlying reciprocal arrangements, introduces a "static" service. A static service freezes competition among CRMs. The following considerations are relevant in this respect:

– Removing the territorial restriction and customer allocation clauses would give all 25 potential entry points the unlimited ability to grant multi-repertoire licences that, in addition, covers all 25 national territories;

– There would be no variation as to the multi-repertoire and multi-territory service offered by the 25 competing CRMs. Indeed, all the elements of the underlying rights management service remain static. This is because right-holders, under the current system of reciprocity, must remain members of their respective management societies and these management societies, in turn, would remain "locked-in" into the network of reciprocal agreements;

– As the elements of the underlying rights management service remain static, commercial users will have no incentive to switch to another collective rights manager because the service provided by all 25 potential entry points would remain forever identical;

– In these circumstances, this static network of reciprocal agreements will, in due course, confer monopoly power onto the affiliate societies' that commercial users have initially chosen as their single access point and freeze competition at that level. In addition, once the affiliate societies and their commercial users have an established course of dealing by putting in place mutually interoperable electronic monitoring and payment systems, there is the additional risk of "lock-in" at the commercial users' level.

Option 3, by giving right-holders the possibility to freely choose and move among CRMs, would create the competitive discipline that forces CRMs to compete among themselves for right-holders and negotiate advantageous royalties on their behalf. If their services were either inefficient or too expensive, right-holders would move to another rights manager. This level of competitive threat would counteract any tendency toward monopoly at the Community level.

4.7. Vertical integration of the media

Vertical integration in the media industry is expected to evolve into an increasing threat to the collective power of right-holders and their ability to maximise their revenue, especially in the online environment. There is a greater degree of vertical integration in the media industry than in the collective management of copyright. Vertical integration in the media industry allows certain suppliers, and not others, to benefit from joint operations or group agreements. In particular, small and medium sized enterprises *e.g.*, the so-called independents in the music industry or the smaller commercial users might find that they continue to operate under market conditions which do not enable them to compete on a level playing field. The

worrying degree of vertical integration was confirmed by the European Parliament in its report of 11 December 2003.[42]

If 'do nothing' option powerful pan-European users will strengthen their bargaining power and diminish the online revenue that should accrue to right-holders.

The 'do nothing' option achieves nothing in counterbalancing vertical concentration in the media sector. There would be unequal bargaining power between smaller collecting societies, especially in the new Member States, and major commercial users. This might lead to pressure to deflate online royalty rates for particular national markets (so called "race to the bottom"). This option thus entails a serious risk that sufficient royalties will not be generated in order to allow right-holders to receive royalties which corresponds to actual use made of their works.

Option 2 would do little to counterbalance the disequilibrium between international media conglomerates and national CRMs. On the contrary, Option 2 would enhance cross-border management of copyright by introducing multi-territorial licences with a free choice of access point. It introduces competition at the level of the commercial user and thus enhances the users' bargaining power further.

Option 3, on the other hand, would increase competition on the level of and in favour of the right-holders. By doing this, it will also lead to the emergence of limited amount of (three or four) powerful CRMs for online licensing who effectively defend right-holders interest vis-à-vis powerful commercial users at a pan-European level. Option 3 would be best suited to increase right-holders negotiating power and full participation in the increased royalty cake. This is because a powerful collective rights manager representing a significant repertoire will be in a strong position to negotiate royalties on behalf of its members and thus ensure that right-holders participate in the increased royalty cake.

Option 3 would give the collective rights manager more negotiating clout vis-à-vis big and powerful commercial users. As opposed to option 2, the collective rights manager would be the only source for the repertoire that he has managed to attract. This affords him considerable negotiating power because the commercial user has no other source to obtain this repertoire in a collective manner. This gives the collective rights manager – especially the society that has accumulated an attractive repertoire – a strong position in order to increase the royalty flows for its members.

Option 3 would therefore be an efficient means to balance the strong position of vertically integrated media conglomerates. Option 3 would allow central EU-wide collective rights societies, who have managed to attract a marketable repertoire, to negotiate licences from a position of equality. Predominantly national structures of collective rights management must be integrated and become more European in scope. With Option 3, right-holders cross the EU would obtain a strong collective voice on a European level.

A national system of copyright management for online use of protected works prevents benefits from economies of scale and eliminates incentives for cross-border management to be more efficient and less costly. Therefore, Option 3 would foster greater integration, at least among CRMs that manage the online rights of communication to the public and the "making

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[42] Report by the EP on a Community framework for collecting societies for authors' rights, 11 December 2003, recital 15.

available" right as harmonised by the 2001 Copyright Directive. Option 3 would foster integration among CRMs and allows successful CRMs to provide a united front vis-à-vis the pan-European media industry at European level.

4.8. Employment

Preserving the status quo forfeits the business opportunities that would be provided by the more efficient cross-border provision of legitimate online services. This would leave untapped the potential to create employment in online service provision and the copyright-dependent electronic infrastructure industries.

Option 2 has the potential to foster new and attractive forms of cross-border copyright licensing. This has the potential to create employment opportunities with service providers/equipment manufacturers that supply the technological infrastructure to exploit copyright across borders.

The same is true for option 3. Both options appear neutral with respect to employment with collective rights management societies themselves because both models require that the works of approximately 1.4 million right-holders are administered across Europe – whether through reciprocal representation or directly by a collective rights manager of the right-holders choice.

However, if CRMs would have to compete for right-holders they would have to restructure their businesses and become more efficient. This process of streamlining existing business models would necessarily lead to new employment opportunities, either in-house or through outsourcing. There would be a net benefit for the information technology, and accounting industries.

4.9. Consumers/prices

With the do nothing option, there would be little or nothing to stimulate the provision of new services and correct the inadequacies in the current system of licensing. At the very least, the lack of multi-territorial licensing without a single access point of choice will forfeit new opportunities for services and do little for consumer choice.

Option 2 would most likely achieve little in terms of pricing pressure on licences taken out by commercial users. This is because these licences will be governed by the tariffs applicable in the country where the copy-right protected work is accessible to the end consumer and possible competition with respect to administrative cost is a small part of a multi-repertoire and multi-territorial licence. On the other hand, a more efficient way of multi-territorial licensing will create new opportunities for services and enhance consumer choice.

Option 3 would allow for premium content to be priced higher because it gives the collective rights manager who has attracted such content a very strong bargaining position vis-à-vis commercial users.

4.10. Impacts outside the EU

Doing nothing will have no impact outside the EU.

Introducing enhanced royalty flow across national borders and introducing better multi-territorial licensing might lead to right-holders from third countries, especially under Option 3, electing to have their rights managed by EU based CRMs.

4.11. Impact on specific groups

4.11.1. Very large CRMs

Doing nothing will not entail financial expenditure on CRMs, but will lessen attractiveness of their business model and give rise to their substitution by other forms of cross-border management (e.g., individual clearance by means of DRMs). If new forms of online exploitation will not be collectively licensed, there will ultimately be less revenue to be generated through collective management of copyright.

Option 2 might entail initial one-off costs (software, audit function) to better ensure the non-discriminatory distribution of royalties. While the removal of representation agreements that exclude the exchange of royalties (B-type agreements) may lead initially to less revenue retained by the affiliated society, but this loss should be compensated by the additional revenue to be earned if society can become licensor of choice for increasing set of online licences. But maintaining a web of 300 bilateral reciprocal representation agreements will incur cost to CRMs who operate in this network.

Option 3 will, of course, have the most significant impact on CRMs. It could lead to specialisation among CRMs who compete on the attractiveness of their genre-specific repertoire. Those CRMs who have an attractive core repertoire and who manage to attract new right-holders will be CRMs of choice for the licensing of musical repertoire online. Repertoire specialisation will streamline the online licensing process and especially the process of distribution of royalties to rights-holders who are all direct members and thus make these large CRMs' attractive partners for right-holders. Their size and the uniqueness of their repertoire will also increase their bargaining powers vis-à-vis commercial users.

4.11.2. Large or medium size CRMs

Doing nothing will not entail financial expenditure on CRMs.

As reciprocal agreements ensure that any collective rights manager could be the access point of choice, Option 2 will provide new business opportunities for smaller but efficient collective rights managers in smaller Member States.

Option 3 might have an impact on the online licensing activities of smaller CRMs with a limited domestic repertoire and therefore depend on reciprocal agreements in order to license the aggregate repertoire of European CRMs.

According to a 2004 study carried out by Capgemini for the Dutch CRMs BUMA/STEMRA[43] show that domestic repertoire (defined as the repertoire that is performed or sold as mechanical recording in the country of origin of the composer, author or publisher) plays a rather marginal role in smaller Member States like Austria (10% of sales), Portugal (13%), Belgium, (14%), the Netherlands (17%) and Ireland (19%). The study does not reveal reasons for this phenomenon but speculates that the openness of these countries to other culture and the fact that their neighbouring countries speak the same language may play a role in explaining the low percentages that domestic repertoire accounts for when looking at record sales (no data for performances was available). In addition, the percentage of domestic

[43] Music in Europe: Sound or Silence? Study of domestic music repertoire and the impact of cultural policies of collecting societies in the EU 25 Cap Gemini, Utrecht, 2004.

repertoire in recording sold declined most significantly between 1998 and 2002 in the exact same countries that already show the lowest domestic repertoire: Portugal (-18%), the Netherlands (-10%), Ireland (-7%), Belgium (-6%) and Austria (-5%).

While this research is not conclusive on the relative strength of CRMs domiciled in these Member States, it does reveal the risk that CRMs in smaller Member States may not be able to develop an active role in the area of online licensing of musical works. This does not exclude, however, that an efficient manager could establish an excellent reputation with right-holders across Europe and is therefore able to attract significant online licensing business, even if his original “home base” is rather limited. Moreover, CRMs are structured in different ways. In some Member States, a single CRM administers the different rights in musical works (usually mechanical and public performance rights), but the prevailing model in most Member States is that different rights are administered by different CRMs (See Annex 1). As the competition introduced by Option 3 would lead to right-holders increasingly scrutinising the costs of CRMs, it may be expected that Option 3 would also foster consolidation of the rights administered into one CRM, as there are economies of scope and scale to be developed by doing so.

In addition, smaller CRM may merge their online activities with those of larger rivals or become that latter’s agents, while continuing their traditional offline activities as before. This implies that smaller collecting societies would retain their role in the offline environment in relation to the aggregate repertoire that continues to be available to them through the network of reciprocal representation agreements.

With respect to online exploitation of copyright, smaller CRMs will not disappear. The current system of reciprocal representation agreements among CRMs makes the smaller ones extremely dependent on cross-licensing the very large CRMs more attractive repertoire. Without the reciprocal arrangements, the smaller CRMs have no attractive repertoire on which to compete. On the other hand, the very large CRMs do not make use of the smaller CRMs' repertoire to offer an attractive service to online customers.

As the bulk of the smaller CRMs business consists in licensing the larger ones repertoire, the bulk of their income also has to be remitted back to the large ones and the authors attached to them. This is detrimental to the local repertoire of the smaller CRMs, as most of the revenue earned in licensing cannot be deployed to develop local talent because it needs to be remitted back to the very large CRMs.

Option 3 would give all CRMs a chance to compete for members irrespective of their nationality or domicile. This would empower CRMs that do not have a strong domestic repertoire but, on account of their efficiency, can attract right-holders from other jurisdictions. This would be consistent with a recent trend that some of the smaller CRMs have managed to attract major record labels mandating them to administer Community-wide licensing arrangements (SABAM, the local Belgian collecting society, licenses the Universal repertoire across the EU). In addition, smaller CRMS which do not attract the membership for the provision of on-line exploitation might find new roles in providing services on behalf of the CRMs to which a right-holder has entrusted his online rights. These CRMs could act as agents in relation to each of the service elements that comprise the collective management of copyright.

4.11.3. Right-holders

If nothing is done, foreign right-holders will lose confidence and trust in the cross-border management of copyright and will seek alternative means to commercially exploit their works across the entire Community. This will reduce revenue of CRMs and potentially endanger their viability.

As Option 1 would do nothing to counterbalance vertical concentration in the media sector bargaining power between smaller collecting societies, especially in the new Member States, and major commercial users would be unequal. This might lead to pressure to deflate online royalty rates for particular national markets (so called "race to the bottom"). This option thus entails a serious risk that sufficient royalties will not be generated in order allow right-holders to receive royalties commensurate with actual use made of their works.

In light of the increasing international scope of the repertoire exploited in the different Member States, doing nothing to improve cross-border distribution of royalties may no longer provide non-domestic right-holders with the optimum incentive to create.

In the long term, Option 2 would do little to maximise online revenue for right-holders and in the end even commercial users would also lose out. The reason for this is two-fold.

First, removing the customer allocation clause introduces competition among 25 CRMs to sell one identical service ("intra brand competition") – licensing, monitoring and collection of royalties for their aggregate repertoire. This form of competition where CRMs compete to provide the same service (i.e. they all license the same repertoire, namely the aggregate EU repertoire as assembled by means of reciprocity) will leave 25 CRMs, some of them very small societies, competing for the pan-European licensing business across Europe. Smaller societies may have less bargaining power vis-à-vis large commercial users and commercial users will exploit this to obtain lower tariffs at the cheapest entry point for the aggregate repertoire.

Second, in an attempt to secure the business of commercial users, competition on the basis of the administrative fees might then lead to pressure on the tariffs, thereby creating the risk that these too are depressed. This might lead to a downwards spiral and a net loss to right-holders, especially those whose repertoire is represented by smaller societies by virtue of the reciprocal representation agreements.

Second, the prospect of retaliation would then arise whereby larger CRMs would withdraw their repertoire from the reciprocal representation agreements, if smaller rivals attempt to attract business by applying tariffs which do not represent the market value of the larger societies' repertoire, placing pressure on the entire system of bilateral reciprocal representation agreements.

In the short term, in such circumstances, it would be commercial users that benefit from lower tariffs and right-holders that would lose out. But diminishing royalties would lessen the incentive to create new musical works within an industry that already faces other threats such as from piracy and declining sales in the offline environment. This could spell even more rapid decline than at present and commercial users and consumers could be faced with a repertoire that is dominated by the "back catalogue" but which contains no new vibrant musical talent.

Option 2 would enhance cross-border distribution of royalties by introducing non-discrimination between domestic and non-domestic right-holders. This option would require the removal of all agreements that do not provide for direct payment across borders between the affiliate and the management society. It would also require that distinctions between categories of rights-holders need to be phased out as these distinctions discriminate indirectly against categories of right-holders which represent mostly non-domestic interests (e.g., publishers in any given country usually represent between 70-80% non-domestic works).

Option 3 would enhance cross-border distribution in a more effective manner by the simple fact that every collective rights manager owes royalties to the all the members it has managed to attract, independent of where these members are resident. Direct membership creates a fiduciary duty as between the collective rights manage and its direct members.

Successful CRMs will therefore transfer a considerable amount of the royalties collected across the Community to right-holders domiciled across the entire Community. In addition, option 3 is more effective than option 2 because it eliminates all administrative costs inherent in channelling non-domestic right-holders royalties through the affiliate society. In this respect, option 3 is the option that relies most on the fundamental freedom to provide licensing services across the Community to right-holders across the Community.

According to Option 3 right-holders will only deal with one collective rights manager who is directly accountable to them for the online exploitation of their musical works across the Community. This is the best option to increase right-holders trust in the functioning of collective rights management because this option avoids the “middleman” in the cross-border clearance of copyright and thus there is no more distinction between domestic and non-domestic right-holders.

Option 3 would be especially attractive to authors of musical whose work is exploited on a Community-wide scale. For these authors there is little incentive to choose the local CRM because their work, which is exploited in several territories, under Option 2 would be subject to multiple deductions for the administrative cost of other CRMs in the network of reciprocal arrangements. This would diminish the royalties that these authors would receive. In contrast, Option 3, by allowing international authors to opt for direct membership in a CRM of their choice, would increase the amount of revenue received by reducing the amounts lost to multiple deductions within the reciprocal representation network.

Right-holders will also benefit from the considerable bargaining power that their collective rights manager enjoys vis-à-vis commercial users and thus Option 3 will arguably be the most efficient tool to maximise the online revenue stream for right-holders across the Community.

4.11.4. Online content providers

Under a ‘do nothing’ approach present attitudes on multi-territorial licensing will not change. to change. This potentially means that commercial users will have to clear online rights with 25 territorial CRMs. Edima, the organisation representing online music providers, estimates that the direct cost of negotiating one single licence amounts to €9.500 (which comprises 20 internal man hours, external legal advice and travel expenses). As mechanical rights and public performance rights in most Member States require separate clearance, the overall cost of the two requisite licences per Member State would amount to almost € 19.000. As clearance is required in all 25 EU territories, the cost of obtaining the necessary 50 copyright licenses would amount to €475.000. On the basis that a profit of €0.10 can be achieved per

download, the online music provider would have to sell 4.75 million downloads merely to recover the cost associated with obtaining the requisite copyright licenses.

This status quo, in these circumstances, may well prevent the emergence of new online music services and will increase the wealth gap that exists in this area vis-à-vis the US. The necessity to clear the multi-repertoire licence necessary for the online provision of services 25 times will not prevent the dissemination of content online, but this content will be available illegally for free and cause great losses to owners of copyright or neighbouring rights. As many forms of online exploitation will, as a result not be remunerated, the "royalty cake" will stagnate and even shrink.

A do nothing approach can also result in differential treatment between traditional broadcasters and the new breed of online content providers. With respect to licensing and rights management, traditional broadcasters and online content providers are in fundamentally different positions. Online content providers, as they start from scratch, will need to develop a EU- or EEA-wide business model in order to achieve the economies of scale and the customer-base that a start-up business needs to compete. This is not the case for traditional broadcasters who have established business models along territorial lines.

Option 2 would only be a viable way to introduce Community-wide licensing if all CRMs that are currently linked by reciprocal representation agreements were to agree that the affiliate society's authority to clear the repertoire it has received by virtue of reciprocal agreements extends beyond its home territory. This would involve a major reform of the current model agreements that govern reciprocity. As mentioned above, these agreements currently only allow the affiliate society to clear the repertoire of the management society in its own home territory. In addition, even if the affiliate's licensing authority extends beyond one territory, the authority of the affiliate society is limited to serving only customers whose economic residence is in his territory.

Option 3 would increase competition on the level of the right-holders and will lead to the emergence of powerful CRMs who effectively defend right-holders interest vis-à-vis powerful commercial users at a pan-European level. While commercial users might have to clear the global repertoire with three or four instead of one licensor, option 3 would be better suited to increase right-holders full participation in the increased royalty cake. This is because a powerful collective rights manager representing a significant repertoire will be in a strong position to negotiate royalties on behalf of its members and thus ensure that right-holders participate in the increased royalty cake.

5. MONITORING AND EVALUATION

Monitoring and evaluation will be conducted in line with the policy objectives as identified above.

The *monitoring* could develop along three strands:

> (i) The first concentrates on the short-term, starting right after the adoption of the proposal. It focuses on the sheer implementation of the proposal, i.e. amendments of rules, contract clauses etc;

(ii) The second mid-term strand focuses on direct effects like the number of new multi-territorial licences issued at a given point in time which should be clearly identifiable after about two years;

(iii) The last strand tries to aims on monitoring the overall economic and social impacts of the proposal “on the ground” in the mid- to long-term.

An effective monitoring of the proposal would have to rely on the cooperation of CRM societies and require some effort in distinguishing between national and cross-border activities in their reporting. Once such a reporting has been established it should be possible to effectively monitor the effects of the proposal over time.

A first comprehensive *evaluation* could then take place about three or four years after the adoption of the proposal. The objective would be to get a clear picture of the situation in order to decide whether additional or different measures were necessary. The evaluation would be based on the information and data produced by the monitoring complemented by additional information about the sector and the general context like the technological development.

5.1. Improved accessibility of creative output especially to online content providers

We propose to monitor improved accessibility of copyright-protected musical works to online content providers by monitoring attainment of the following four operational objectives.

5.1.1. A licensing policy of CRMs societies that is in line with the demand of online content providers

Success in enhancing cross-border licensing for commercial users is measurable if all clauses in reciprocal representation agreements that hinder cross-border licensing are eliminated and if, as a consequence, the amount of cross-border licences awarded to legitimate online music service providers increases by 2009 as compared to 2005.

Indicators:

- Share of model agreements of umbrella organisations that have been amended accordingly;
- Share of restrictive clauses in reciprocal agreements that have been eliminated;
- Increase in the number of cross-border licences compared to 2005.

5.1.2. Enhancement of transparency of CRM societies

Success of this policy objective can also be measured if, as a consequence of increased competition among CRMs, the latter’s transparency, accountability, royalty distribution and the quality of enforcement improves. This can be measured by surveying right-holders and monitoring, for example, the quality of CRMs websites and other publications.

Indicators:

- Opinion survey on the transparency and accountability of CRMs, the efficiency of royalty distribution and the quality of the enforcement of rights;
- Relationship between overhead costs and royalties collected;

- Relationship between royalties collected and royalties distributed.

5.1.3. Improved clearance of copyright protected works across the EU

Attainment of this objective is both measurable and verifiable if legitimate online music services create revenue in 2009 that exceeds the revenue created by legitimate services in 2005. Revenue from legitimate online music can be measured on the basis of CRMs annual accounts, which should list all revenue generated from legitimate online exploitation of musical works separately. Most rights manager already at present identify the different forms of exploitation, *e.g.*, public performance income vs. broadcasting and dubbing income in the PPL annual report.

Indicators:

- Share of revenues from legitimate online music services in total revenues of CRM societies;

- Relationship between the revenues from legitimate online music services collected by CRM societies and those collected directly by right holders via DRM etc.

5.1.4. A significant increase in the availability of multi-territorial licences for online content providers

A licensing policy that is in line with the ubiquity of the online environment can be measured if the number of online music service providers that operate with a multi-territorial licence increases between 2005 and 2009. Another way of measuring success in reaching this policy objective would be a corresponding reduction of online music service providers that continue to operate on the basis of mono-territorial licences. In practice, these phenomena can be measured by making regular enquiries with the industry associations of online service providers between 2005 and 2009.

Indicators:

- Increase in the number of multi-territorial licences issued;

- Share of multi-territorial licences in the total number of licences issued to online content providers.

5.2. Full participation of right-holders in the revenue stream generated by more efficient cross-border exploitation of copyright

We propose to monitor whether right-holders are able to enjoy copyright protection wherever such rights are exploited under licence, independent of modes of use or national borders, by monitoring attainment of the following three operational objectives.

5.2.1. Freedom for right-holders to choose the best placed CRM and to switch between CRMs

Success in enhancing use made of the basic Treaty freedom to seek out the most suitable collective rights management service throughout the EU can be measured if authors with an international following increasingly choose their collecting society for the management of their online music rights independent of domicile or nationality. Indicators for success would

be data on authors that actually change CRM for the online exploitation of their rights in musical works.

Indicator:

- Number of right-holders that have switched to another CRM society.

5.2.2. Enhancement of transparency and accountability of CRM societies, equitable royalty distribution and enforcement of rights

Success of this policy objective can also be measured if, as a consequence of increased competition among CRMs, the latter's transparency, accountability, royalty distribution and the quality of enforcement improves. This can be measured by surveying right-holders and monitoring the quality of CRMs websites and other publications.

Indicators:

- See 5.1.2. above;
- Share of statutes that have been amended in order to abolish e.g. discrimination of non-domestic right holders.

5.2.3. Distribution of royalties collected on behalf of right-holders in territories other than their home territory to right-holders directly and without discrimination on the grounds of residence, nationality, or category of membership

A more effective cross-border distribution of royalties can be measured by continuing the monitoring of the evolution as described in the table under Section 1.4.2. and comparing royalties distributed to non-domestic societies (as a % of royalties collected) with the relative importance of the non-domestic repertoire. If the gap between the two percentages narrows between 2005 and 2009, this policy objective has been met.

Indicator:

- Share of royalties distributed to foreign right-holders in the total of royalties distributed relative to the share of non-domestic repertoire in the CRM society's repertoire.

6. RESULTS OF STAKEHOLDER CONSULTATION

This Study has been drawn up making use of the data available to the Commission. It is based on three sources: (1) a stakeholders consultation launched on 16 April 2004 (Commission Communication to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market, COM (2004) 261 final);[44] (2) the answers submitted by Member States in response to a Commission questionnaire and (3) in-house research undertaken by the European

[44] Collecting societies and their umbrella organisations, a wide range of right-holders and their umbrella organisations and a wide variety of users of copyright content, as well as manufacturers of information technology equipment submitted detailed comments in response to the Commission Communication of 16 March 2004.

Commission. No external study was commissioned specifically in order to prepare this Study, although studies on collective management of copyright were commissioned earlier.

It should be noted that the lack of transparency in the governance of collective rights management made it difficult to obtain quantitative data on revenue distribution within a collective right management society, cross-border revenue flows and the deductions made by the societies. The figures cited in this Study derive from the answers submitted by Member States—answers which were often not exhaustive and can therefore provide a sketchy image at best.

The stakeholders' consultation has revealed that Community action would be most welcome with respect to the cross-border management of copyright. Right-holders and their representatives focus on the cross-border distribution of royalties, while commercial users focus on the licensing process. Many submissions point out that the two issues are linked.

6.1. Cross-border distribution of royalties

The most important issue for right-holders whose rights are administered in another Member State is that they receive the royalties collected in another territory on their behalf. GIART,[45] points out that for performers' rights, the reciprocal representation agreements do not contain the obligation to distribute royalties collected on behalf of non-domestic performers back to the management society. A system whereby the affiliated society keep royalties collected on behalf of non-domestic performers and distributes it to its own members is seen as a major obstacle to the functioning of the Internal Market. In addition, AISGE,[46] on behalf of right-holders audiovisual performances in Spain, points out that performers are treated differently depending on the country where their work is exploited. Some CRMs distribute royalties in another Member State, while others do not.

BECS, the British Equity Collecting Society, which represents UK audio-visual performers, regrets the fact that CRMs refuse to enter into reciprocal representation agreements that ensure a proper flow of royalties back to BECS's members (BECS, p. 2). BECS believes that type B agreements are prejudicial to the interests if its members and should be discontinued. On the other hand, AEPO and ARTIS, the European performers' collecting societies' representation, submits that type B reciprocity agreements may be necessary for a transitional period in cases where right-holders and specific uses cannot be identified easily. AEPO and ARTIS also think that type B agreements are helpful in fostering the start-up of new CRMs.[47] AER, the European trade body representing private and commercial radio operators (commercial users) favours proper agreements that monies raised by CRMs should find their way back to the right-holders responsible for the broadcast.[48]

In this context, GIART points out that a non-discriminatory functioning of the reciprocal representation agreements was the *conditio sine qua non* for the further development of Community-wide licensing.[49]

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45 International Organisation of Performing Artists' Collecting Societies GIART, p. 4.
46 AISGE, p. 2.
47 AEPO/ARTIS, p. 4.
48 AER, p. 5.
49 GIART, p. 2.

According to PPL, the UK collecting society for performers and record companies, a properly functioning internal market in the sector of collective management of copyright requires that right-holders from anywhere in Europe receive public performance royalties that are in line with their actual airplay (PPL/VPL, p. 4). PPL is critical of the current situation where not all CRMs are accountable to non-domestic right-holders.

6.2. Community-wide licensing

GESAC, the European grouping of 34 collective rights management societies, argues that the heterogeneous nature of European copyright prevents the establishment of a single model for a single EU-wide licence (GESAC, p. 4). Community-wide licensing models should be developed by the market and be adapted to the different rights in question and the different right-holders involved. Community-wide licences for online exploitation for the different forms of copyright should always be given by the collective rights manager in the territory where the online operator has its economic residence (GESAC, p. 5).

AEPO and ARTIS, the performers' collecting societies representation, argues that the present CISAC agreements as set forth in the Santiago agreement are the only feasible means to achieve Community-wide licensing, the IFPI/Simulcast agreement would not be feasible for performers' rights collecting societies (AEPO/ARTIS, p. 3).

AER, a trade association of private/commercial radio broadcasters from nine EU Member States, favours a single Community-wide licence granted by a single collective rights manager in a single transaction for exploitation of the rights granted throughout Europe (AER, p. 3). AER calls for the freedom to buy this licence from any collective rights manager. AER also favours cross-border competition between CRMs, even if the licence sought covers a national territory only (AER, p.3). Footprint Music Ltd., representing various European cross-border television channels, argues in favour of a single EU licence along the lines of the Simulcasting agreement, because this model would favour competition between CRMs and tariff levels that reflect market forces. This solution would also avoid further regulatory intervention in the setting and surveillance of tariffs. MTV Networks Europe also speaks out in favour of a Community-wide licence because the ensuing competition among CRMs would lead to market-based tariffs rendering unnecessary further regulatory intervention (MTV, p. 5). Also PPL/VPL, the UK collecting societies for performers, record companies and music video producers, are in favour of Community-wide licences, as long as the value of copyright is not undermined – which implies that the tariff should be based on the rates applicable in the country of exploitation (PPL/VPL, p. 5).

The Music Publishers Association (MPA), which represents over 90% of British Music publishers, argues in favour of a Community-wide licence along the lines of the Simulcasting agreement, as long as the tariff applicable in the country of exploitation governs the royalties to be collected for right-holders. The MPA points to the example of "European Central Licensing Agreements (ECLs) as an offline model for online Community-wide licensing. ECLs have allowed record companies to obtain licences necessary to manufacture and sell CDs and other audio products throughout the EU from a single collective rights manager (MPA, p. 10). MPA is, however, against competition and free choice with respect to this single licensor, as this would permit users to engage in "perpetual negotiations" with several competing CRMs allowing them to avoid entering into a licence agreement with any of them (MPA, p. 10).

Certain Online content providers, in confidential submissions, favour a Community-wide licence for the online distribution of content including the freedom to choose the licensor irrespective of the territorial location of the online service provider. They submit that the need to clear copyright on a national basis has stunted the growth of the European digital media market. These operators also believe that the Santiago and Barcelona agreements, by not granting customers the choice of licensor for online licences, divide the market among CRMs by allocating customers by an economic residence test.

EICTA, on behalf of producers of IT equipment calls for Community-wide online licences as the only way to increase European uptake in online music and video services. According to EICTA, any EU proposal should introduce a scheme whereby online providers could procure a Community-wide licence from any collective rights manager in the EU for all the rights currently offered collectively in the EU (EICTA, p. 6). Only competition between CRMs would solve the current inefficiencies that impede successful online licensing.

7. COMMISSION PROPOSAL AND JUSTIFICATION

7.1. What is the final policy choice and why was it chosen?

In the long-term, we believe that Option 3 offers the most effective model of cross-border management of copyright. However, this Study recommends that, in the first instance, this option should be adopted for rights clearance for online music.

With respect to cross-border licensing, allowing right-holders to choose a collecting society outside their national territories for the EU-wide licensing of the use made of his works, creates a competitive environment for cross-border management of copyright and considerably enhances right-holders' earning potential (the "royalty cake").

With respect to cross-border distribution of royalties, the right-holders' freedom to choose any collecting society in the EU will be a powerful incentive for these societies to provide optimal services to all its right-holders, irrespective of their location – thereby enhancing cross-border royalty payments.

In addition, all categories of rights-holders, including *e.g.*, music publishers should have the right to become members of any CRMs of their choice because most of the works they represent are non-domestic. Right-holders representing non-domestic repertoire play a crucial role in the cross-border distribution of royalties and their representation in the different CRMs should reflect the economic value of the non-domestic rights they represent. All categories of rights-holders, especially those that represent works of right-holders from other Member States, should have a say in how royalties collected on their behalf are distributed that is commensurate to the economic value of the rights they represent.

But right-holders should also remain free, even after the exercise of their initial choice, to withdraw their rights and choose another collective rights manager best suited for the exploitation of their works. In addition, all CRMs, whether linked by reciprocal agreements or not, should be free to accept right-holder from other Member States and other CRMs as their members.

It follows that in these circumstances, in the light of the exclusive nature of the mandate that is traditionally granted by right-holders to CRMs, that Option 3 could only be sustainable if

right-holders are able to withdraw part of their rights ("unbundling"), as a minimum the rights linked to online exploitation, within a reasonable notice period.

We therefore proposes a series of principles that Member States would have to adhere to in order not to stifle the emergence of Option 3 as a competitive model for the cross-border management of copyright works.

7.1.1. Cross-border online licensing

We believe that Option 3 can be implemented as the model for cross-border licensing of music in the online environment on a short to medium term basis. With respect to cross-border licensing, the right-holders' choice to select a collecting society anywhere in the Community to licence the different uses made of his works across the EU, lifts the territorial restriction in the reciprocal representation agreement. Therefore, there would be no obstacle to an EU-wide licence being granted for his works, if that is what the market requires and right-holders want.

Option 3 would avoid the pitfalls inherent in organising multi-territorial licensing through a network of reciprocal arrangements. As far as online exploitation of copyright works is concerned, this option would allow right-holders to take their rights outside the scope of traditional reciprocal agreements and freely chose the body that would manage the online exploitation of their rights.

Making CRMs compete for right-holders for the online management of their rights would also introduce an element of competition in the relationship between rights managers and right-holders that did not exist in the offline environment. Competition at the right-holders level appears helpful in creating more efficient management of the online forms of copyright exploitation.

7.1.2. Cross-border distribution of royalties

With respect to cross-border distribution of online royalties, the right-holders' freedom to choose any CRM in the EU, will be a powerful incentive for collecting societies to provide optimal services to all its right-holders, irrespective of their location – thereby enhancing cross-border royalty payments. Therefore, Option 3 would be the option of choice for the non-discriminatory distribution of royalties that were generated online by international exploitation of copyright.

Option 3 is a superior tool for the non-discriminatory distribution of royalties because royalty flows would no longer depend on the proper functioning of a network of reciprocal representation agreements but on the fiduciary relationship between right-holders across the Community and the collective rights manager of their choice. The freedom to take out the online forms of exploitation and freely choose a collective rights manager across the Community will be a powerful stimulant for CRMs to optimise the level of quality in the cross-border services he provides and this enhance the distribution of royalty flows.

With respect to cross-border distribution of offline royalties, we believe that Option 3 will also be the most sustainable long-term model. But as offline exploitation remains national in scope (offline licensing is therefore not addressed), it would not be realistic that the transfer to a system based on direct membership will be immediate.

7.2. How will this policy choice be implemented?

In setting forth Option 3 as the preferable long-term rights management model for cross-border copyright exploitation, EU action would be based on the following core principles:

(1) Right-holders choice as to the online management society is based on the freedom to provide rights management services directly across borders. The freedom to provide cross-border management services by means of direct membership contracts will eliminate administrative costs inherent in channelling non-domestic right-holders royalties through reciprocal agreements between different societies;

(2) The principle that a right-holders' choice of a single EU rights manager should be exercised irrespective of residence or nationality of either the rights-manager or the right-holder;

(3) The principle that a collective rights society's repertoire and territorial licensing power would not derive from reciprocal agreements but from right-holder concluding contractual agreements directly with a society of their choice. Right-holders should be able to withdraw certain categories of rights (in particular categories of rights linked to online exploitation) from their national CRMs and transfer their administration to a single rights manager of their choice. For that to work, these online rights must be withdrawn from the scope of reciprocal agreements as well;

(4) The principle that the individual membership contract will allow the right-holder to precisely define the categories of rights administered and the territorial scope of the society's authority. As the licensing authority would derive from the individual membership contract, the collective rights manager of choice would not be limited to managing these rights in his home territory only, but throughout the EU;

(5) Individual membership contracts create a fiduciary duty between the collecting society and its members, obliging the former to distribute royalties in an equitable manner. The principle of equitable distribution obliges CRMs to treat domestic and non-domestic members alike with respect to all elements of the management service provided. The fiduciary duty enshrined in membership contracts is thus is a tool to maximise the royalties that accrue to right-holders;

(6) Membership cannot be refused to individual categories of right-holders who represent mainly non-domestic interests (e.g., music publishers). In addition, these right-holders should have a voice in how royalties are distributed that is that is commensurate to the economic value of the rights they represent;

(7) Non-discrimination as to the service provided and the fiduciary duty of the collective rights manager vis-à-vis its members introduces a culture of transparency and good governance as to how rights are collectively managed across EU borders.

7.3. Compatibility with international obligations

Introducing rules with respect to the better functioning of cross-border copyright management would comply with the Union's obligations under the relevant international conventions to which the Community and its Member States are party. The creation of improved standards for rights management would be compatible with copyright principles and norms at

international level. Respect for the territorial application of copyright protection does not preclude Community wide or cross-border licensing models. The aim would be to ensure that Community wide or cross-border licensing models are available, should the right-holder so choose and not restricted by agreement by CRMs.

There would not be any contravention of any of the Community's or Member States' own international obligations under the intellectual property treaties to which either the Community or the Member States are party. These are more specifically the Berne Convention (to which only the Member States are party and not the Community), the Rome Convention 1961, the WTO TRIPS 1994, the WPPT and the WCT 1996. The international conventions do not expressly address the issue of management of rights but the underlying premise is that of the exercise of exclusive rights based on individual rights management. The Berne Convention states that countries of the Berne Union may determine through legislation the conditions under which certain rights may be exercised[50]. This allows Union countries to effectively choose the method of management. The WIPO WCT and WPPT which were adopted in 1996 and which the Community has not yet ratified do not deal with the management of rights.

7.4. Have any accompanying measures to maximise positive impacts and minimise negative impacts been taken?

No specific measures have been taken to either maximise positive or minimise negative impacts. In order to increase the cultural awareness within the Union, it might be recommendable to consider opening up national social and cultural funds to right-holders in other Member States. This might foster the emergence of a true European cultural identity. Such considerations are, however, outside the scope of this Study.

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[50] Article 11bis and Article 13(1) of the Berne Convention provide for the possibility of limitations on certain exclusive rights

ANNEX 1: MAJOR EUROPEAN PERFORMANCE AND MECHANICAL RIGHTS SOCIETIES

COUNTRY	COLLECTING SOCIETY	RELEVANT COPYRIGHTS
Austria	AUSTRO-MECHANA (Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH.	Mechanical Rights
	AKM (Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger	Performance Rights
Belgium	SABAM (Société Belge des Auteurs)	Mechanical rights , performance rights
Cyprus	No public organisation	
Czech Republic	OSA (Ochranny Svaz Autorsky – Performing and Mechanical Rights Society of Composers, Authors and Publishers)	Mechanical and performing rights
Denmark	KODA (Selskabel & Forvatning af Internationale Kemponlstretfighederi Danmark)	Performance Rights
Estonia	EAU (Eesti Autorite Uhing)	Full repertoire
Finland	TEOSTO (Bureau International du Droit d'Auteur des Compositeurs Finlandais)	Performance Rights
France	SACEM (la Société des auteurs compositeurs et éditeurs de musique	Performance Rights
	SDRM (Société pour administration du droit des reproductions mécaniques des auteurs, compositeurs et éditeurs)	Mechanical Rights
Germany	GEMA (Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte)	Mechanical Rights; Performance rights
Greece	AEPI (Hellenic Copyright Society)	Mechanical Rights; Performance rights
Hungary	ARTISJUS – Hungarian Bureau for the Protection of Authors Rights	Mechanical and performing rights
Ireland	MOPSI (Mechanical Copyright Protection Society Ireland)	Mechanical Rights
	IMRO (Irish Music Rights Organization)	Performing Rights

Italy	SIAE (Società Italiano degli Autori ed Editori)	Mechanical rights; performance rights
Latvia	AKKA-LAA – Latvian Copyright Agency	Multi-repertoire
Lithuania	LATGA-(A) (Lietuvos Autoriu Teisiu Gynimo AsociacijosAgentura)	Multi-repertoire
Malta	KOPJAMALT (Maltese collecting Society)	Multi-repertoire
Netherlands	STEMRA (Stichting tot Exploitatie van Mechanische)	Mechanical Rights
	BUMA (Het Bureau voor Muziekauteursrecht)	Performance Rights
Nordic Countries	Nordisk Copyright Bureau	Mechanical Rights
Norway	Norsk Selskap for Forvaltningen av fremførings (TONO)	Performance Rights
Poland	ZAIKS (Zwiazek Autorow I Kompozytorow Scenicznych – Assocation of Authors and Stage Composers	Mechanical and Performing Rights
Portugal	SPA – Sociedade Portuguesa de Autores	Mechanical Rights ; Performance Rights
Slovakia	SOZA (Slovensky Ochranny Zvaz Autorsky – Slovak Society of Authors)	Mechanical and Performing rights
Slovenia	SAZAS Združenje skladateljev, avtorjev in založnikov za zascito avtorskih pravic Slovenije – The Society of Composers, Authors and Publishers of Slovenia	Mechanical and Performing Rights
Spain	SGAE (Sociedad General de Autores de España)	Mechanical Rights; Performance Rights
Sweden	STIM (Svenska Tonsättares Internationella Musikbyrá)	Performance Rights
United Kingdom	MCPS (Mechanical Copyrights Protection Society)	Mechanical Rights
	PRS (Performing Rights Society)	Performance Rights