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Publication date

2013

Document Version

Submitted manuscript

Published in

European Intellectual Property Review

[Link to publication](#)

Citation for published version (APA):

Quintais, J. P. (2013). Proposal for a Directive on collective rights management and (some) multi-territorial licensing. *European Intellectual Property Review*, 35(2), 65-73.

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PROPOSAL FOR A DIRECTIVE ON
COLLECTIVE RIGHTS MANAGEMENT AND
(SOME) MULTI-TERRITORIAL LICENSING

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Amsterdam Law School Legal Studies Research Paper No. 2013-69

Institute for Information Law Research Paper No. 2013-09

Proposal for a Directive on Collective Rights Management and (some) Multi-territorial Licensing

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This is a pre-print. Final version published as:

João Pedro Quintais, “Proposal for a Directive on collective rights management and (some) multi-territorial licensing”, *European Intellectual Property Review* 2013-2, 65-73.

(please cite to the published version)

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Abstract: *This article provides a brief descriptive analysis of the recent proposal from the European Commission for a Directive on collective rights management and multi-territorial licensing. After setting the necessary background, it examines the proposal's main provisions, focusing on those establishing a governance and transparency framework for collecting societies and multi-territorial licensing for online uses of musical works.*

INTRODUCTION

On July 11 the European Commission published its first official draft of the Proposal for a Directive "on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market".¹ According to the Commission's Press Release, the Proposal's two complementary objectives are those of promoting "greater transparency and improved governance of collecting societies through strengthened reporting obligations and rightholders' control over their activities" (thus incentivizing the creation of superior services) and encouraging and facilitating "multi-territorial and multi-repertoire licensing of authors' rights in musical works for online uses in the EU/EEA."² This is intended to be a "minimum harmonization" legislative piece, thus allowing Member States to impose more demanding requirements on collecting societies or collective management organizations ("CMOs").³

The Proposal includes not only a draft version of the Directive (the "**draft Directive**"), but also the traditional Explanatory Memorandum and two Annexes on transparency related information for CMOs (Annex I) and explanatory documents to be provided by Member States accompanying the implementation (Annex II).⁴ The Commission also made available

¹ See European Commission, 'Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market', COM(2012) 372/2, 2012/0180 (COD) ["**Proposal**"].

² See European Commission, Press Release, 'Copyright: Commission proposes easier music licensing in the Single Market', IP/12/772, Brussels, 11.07.2012, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/772&format=HTML&aged=0&language=en&guiLanguage=EN> [Accessed Nov. 5, 2012].

³ See Proposal, *Annex II*, at 45.

⁴ See Proposal, at 43-46. In what concerns Annex II, Recital 44 provides that the transmission by Member States of documents accompanying the transposition measures and "explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments" is justified in the context of this proposed Directive.

MEMO/12/545⁵ with answers to *frequently asked questions* on this Proposal, as well as a lengthy Impact Assessment Analysis⁶ (together with an executive summary⁷). With laudable symmetry, the draft itself is composed of a 44 Recitals preamble and an identical number of articles, making it the longest existing Directive in the field of copyright, if approved in its current format.

This article intends to provide a brief descriptive analysis of the Proposal. Part I provides the necessary background to the Proposal. Part II examines its main provisions, with a special focus on those establishing a governance and transparency framework for CMOs and multi-territorial licensing (“MTL”) for online uses of musical works. Part III offers some concluding remarks.

BACKGROUND

The EU market is composed of 250 CMOs managing around 6 billion euro in every year, the majority of which is controlled by 70 authors' rights CMOs where 80% of income results from musical creations.⁸

Harmonization of collective rights management in the EU has been on the Commission's agenda as far back as 1995, being subject to consideration in the Green Paper Copyright and Related Rights in the Information Society.⁹ EU-wide activity in this field has been

⁵ European Commission, ‘Proposed Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions’, MEMO/12/545, Brussels, 11.07.2012, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/545&format=HTML&aged=0&language=EN&guiLanguage=fr> [Accessed Nov. 5, 2012] [“MEMO/12/545”].

⁶ Commission Staff Working Document, ‘Impact Assessment accompanying the Commission Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market’, COM(2012) 372 final, SWD(2012) 205 final, Brussels, 11.07.2012, available at: http://ec.europa.eu/internal_market/copyright/docs/management/impact_assesment-com-2012-3722_en.pdf [Accessed Nov. 5, 2012] [“Impact Assessment Analysis”].

⁷ Commission Staff Working Document, ‘Executive Summary of the Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market’, COM(2012)372 final, SWD(2012) 204 final, Brussels, 11.07.2012, available at http://ec.europa.eu/internal_market/copyright/docs/management/impact_assesment_resume-com-2012-3722_en.pdf [Accessed Nov. 5, 2012] [“Impact Assessment Analysis Executive Summary”].

⁸ See MEMO/12/545, at paras 5-6.

⁹ European Commission, ‘Copyright and Related Rights in the Information Society’, Green Paper, COM (95) 382 final, Brussels, 19.07.1995.

noteworthy ever since, with a community framework on collective rights management being discussed, inter alia, in the 2004 Community Framework Resolution,¹⁰ the 2004 Communication of the Management of Copyright,¹¹ the 2005 Study on Cross-border Collective Management of Copyright¹² and the 2005 Commission Work Programme.¹³

These documents bring to the forefront concerns with issues of transparency, efficiency, a functioning market for authors and users and, within the context of the single market, membership and MTL. The latter have been the focus of a body of Commission decisions testing the potential anticompetitive behaviour of CMOs under (now) arts. 101 and 102 TFEU¹⁴ – as exemplified in the *Santiago Agreement*¹⁵, *CISAC*¹⁶ and *IFPI Simulcasting*¹⁷ decisions –, as well as of several Commission and European Parliament documents, namely the (in)famous 2005 Online Music Recommendation¹⁸ and criticism thereof in European

¹⁰ European Parliament, Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights, (2002/2274(INI)), 15.01.2004.

¹¹ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'The Management of Copyright and Related Rights in the Internal Market', COM (2004) 261 final, Brussels, 16.04.2004.

¹² Commission Staff Working Document, Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Brussels, 07.07.2005.

¹³ Commission of the European Communities, Commission Work Programme for 2005 - Communication from the President in agreement with Vice-President Wallström, COM (2005) 15 final, Brussels, 26.01.2005.

¹⁴ Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008, 2008 O.J. (C 115) 47 ["TFEU"].

¹⁵ European Commission, Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 – BUMA and COMP/C2/39151 SABAM (Santiago Agreement – COMP/C2/38126), O.J. C. 200/11 of 17 Aug. 2005, <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:200:0011:0012:EN:PDF>>, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_38126 [Accessed Nov. 5, 2012] ["*Santiago Agreement*"].

¹⁶ Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement regarding Case COMP/C2/38.698 – CISAC ["*CISAC*"]. The Commission's decision in *CISAC* concerned a concerted practice by CMOs in connection with CISAC's model for reciprocal representation agreements, related with the imposition thereon (or the de facto application) of membership restrictions in connection with the conditions of management and licensing of authors' public performance rights of musical works. At the time of this writing, an application for annulment of the *CISAC* decision was still pending before the General Court.

¹⁷ Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 — IFPI "Simulcasting") ["*IFPI Simulcasting*"].

¹⁸ Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, 21/10/2005 [hereinafter "**2005 Online Music Recommendation**"]. See also Commission Report on the Monitoring of the 2005 Music Online Recommendation (Feb. 7, 2008), available at http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf [Accessed Nov. 5, 2012].

Parliament Resolutions of March 2007¹⁹ and September 2008^{20, 21}. The Recommendation in particular is mentioned several times throughout the Proposal, with the Explanatory Memorandum reminding its non-binding nature and classifying its voluntary implementation as "unsatisfactory".²²

The balance of the above decisions and documents points toward a concern to secure effective cross border licensing of (mostly musical) works and the inability of the CMO market thus far to efficiently implement MTL. Following what seems to be a coherent policy direction, the Commission identified this as a main area requiring EU action in 2009²³ and has repeatedly mentioned (in the IPR Strategy²⁴, the Communication on a Single Market Act,²⁵ the Green Paper on Online Distribution of Audiovisual Works,²⁶ and the Communication on E-commerce and Online Services²⁷) that it would propose legislative action to create a collective rights management framework enabling MTL on a pan-European level.

¹⁹ See European Parliament, Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), P6_TA(2007)0064, 2007, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0064&language=EN> [Accessed Nov. 5, 2012].

²⁰ See European Parliament, Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, P6_TA(2008)0462, 2008, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN> [Accessed Nov. 5, 2012].

²¹ For a detailed analysis of these background references and collective management in the EU, see L. Guibault & S.J. van Gompel, 'Collective Management in the European Union', in *Collective Management of Copyright and Related Rights*, edited by Daniel Gervais (The Hague: Kluwer law International, 2010): 117-152. See also G. Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management', *Columbia Journal of Law & the Arts* (2011): 757-808.

²² See Proposal, *Explanatory Memorandum*, at 4. Recital 5 also emphasizes the Recommendation's non-binding nature, concluding "it has been unevenly followed". Recital 23 goes in the same direction, noting that "due to its voluntary nature, [the Recommendation] has not been sufficient to encourage the widespread multi-territorial licensing of online rights in musical works and to address the specific demands of multi-territorial licensing".

²³ Commission Final Report on the Content Online Platform (May 2009), at 3, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf [Accessed Nov. 5, 2012].

²⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a Single Market for Intellectual Property Rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, at 10-11 and 23-24, COM(2011) 287 final (May 24, 2011).

²⁵ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, on Single Market Act, Twelve levers to boost growth and strengthen confidence, 'Working together to create new growth', at 9, COM(2011) 206 final (April 13, 2011).

²⁶ See Commission Green paper on the online distribution of Audiovisual works in the European Union: opportunities and challenges towards a single digital market, at 4 and 12, Brussels, COM (2011) 427 final (July 13, 2011).

²⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – A coherent framework for building trust in the Digital Single Market for e-commerce and online services, at 6-7, COM(2011) 942 (Jan. 11, 2011).

This Proposal constitutes such legislative action, being a complement to Directive 2006/123/EC on services in the internal market,²⁸ considering that CMOs are providers of collective management services.²⁹ Although the existing *acquis* contains scattered provisions on collective management,³⁰ this would be the first Directive providing a framework for the operation of CMOs. From a competence standpoint, the Proposal is based on Articles 50(2)(g), 53 and 62 TFEU as facilitating the free provision of services.³¹

ANALYSIS OF THE PROPOSAL

Overview

The draft Directive is best understood if read in the context of its dual objective of (1) governance/transparency and (2) MTL, as most of its structure and provisions are aimed at providing solutions at both these levels.³² To be sure, the Commission’s policy options resulting from an impact assessment analysis and implemented in the draft Directive to achieve both objectives are different:³³

- For objective (1), the Proposal seeks to implement a governance and transparency framework, as opposed to retaining the status quo, seeking better enforcement or codification of existing principles;

²⁸ Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006.

²⁹ See Proposal, *Explanatory Memorandum*, at 4-5. It merits pointing out, in this regard, that Member States will be subject to the application of arts. 9 (limiting their ability to restrict the access to or exercise of a service activity) and 16 (establishing the right of providers to provide services in a Member State other than that in which they are established) of Directive 2006/123/EC.

³⁰ See: art. 5 (3) and (4) Directive 92/100/EEC, of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 1992, as republished and amended by Directive 2006/115/EC of 12 December 2006 (codified version), OJ L 376/28, 2006, [**Rental and Lending Directive**], allowing for the possibility that Member States impose mandatory collective management; art. 9 Council Directive 93/83/EEC, of 27 September 1993 on the coordination of certain rules concerning copyrights and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/16, 1993 [**Satellite and Cable Directive**], imposing mandatory collective management for cable retransmission, as well as rules for concentration of rights in CMOs’ repertoires; art. 6(2) Directive 2001/84/EC, of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, 2001 O.J. (L 272/32), providing for a “residual right” and allowing for compulsory or optional collective management of the royalty; and art. 3 Satellite and Cable Directive, containing the outline of an extended collective licensing system between CMOs and broadcasting organizations.

³¹ See Proposal, *Explanatory Memorandum*, at 7.

³² See MEMO/12/545, at point 11, identifying a third objective – “to create conditions that can expand the legal offer of online music” –, which however seems to be integrated in the broader goal of facilitating MTL.

³³ See Proposal, *Explanatory Memorandum*, at 6-7.

- For objective (2), the Proposal adopts what it terms as an “European Licensing Passport” for MTL purposes.³⁴

The latter option comes at the expense of alternatives such as *parallel direct licensing* or a combination of *extended collective licensing and the country of origin principle*.³⁵ It is the Commission’s hope that this choice will “foster the voluntary repertoire aggregation for online uses of musical works at EU level and the licensing of rights through multi-territorial licensing infrastructures... [laying] down common rules for all collective licensors throughout the EU and... [creating] competitive pressure on societies to develop more efficient licensing practices”.³⁶

It should also be noted that, under the guise of the principle of proportionality enshrined in art. 5(4) TEU³⁷, the proposed rules are somewhat limited vis-à-vis the above identified objectives.³⁸ Whilst from the governance/transparency perspective, the draft mostly codifies ECJ/CJEU competition case-law and Commission decisions (e.g. *Tournier*,³⁹ *Lucazeau*⁴⁰ and *CISAC*), from the MTL perspective, its scope is narrowed to the collective management of author’s rights in musical works, as this was understood to be the only area giving rise to difficulties requiring legislative intervention.⁴¹ Structurally, the draft Directive is organized into five Titles, containing *general provisions* (I), *rules on CMOs* (II), *MTL* (III), *enforcement measures* (IV), and *reporting and final provisions* (V).

³⁴ For detailed description of the Policy options, see Impact Assessment Analysis, at 33-53.

³⁵ On extended collective licensing in Europe, see: T. Koskinen-Olsson, ‘Collective Management in the Nordic Countries’, in *Collective Management of Copyright and Related Rights*, edited by Daniel Gervais (The Hague: Kluwer law International, 2010): 283-306; T. Riis & J. Schovsbo, ‘Extended Collective Licenses and the Nordic Experience: It’s a Hybrid but is it a Volvo or a Lemon?’, *Columbia Journal of Law & the Arts* 33 (2010): 471-498; and A. Strowel, ‘The European “Extended Collective Licensing” Model’, *Columbia Journal of Law & the Arts* 34 (2011): 665-669.

³⁶ See Proposal, *Explanatory Memorandum*, at 6-7.

³⁷ Consolidated Version of the Treaty on the European Union, Mar. 30, 2010, 2010 OJ (C 83)01.

³⁸ See Proposal, *Explanatory Memorandum*, at 8, and Recital 42 of the draft Directive.

³⁹ ECJ, Case 395/87, *Tournier*, [1989] ECR 2521.

⁴⁰ ECJ, Joint Cases 110/88, 241/88 and 242/88, *Lucazeau v. SACEM*, [1989] ECR 2811.

⁴¹ See Proposal, *Explanatory Memorandum*, at 3 and 8. See also MEMO/12/545, at points 9, 14 and 22, pointing out that both record producers (who often own the rights of performers) and music publishers generally manage their rights individually, being authors (e.g. composers or lyricists) that typically use CMOs, which would justify the limited scope of the proposed legislative intervention.

Subject matter, scope and provisions on collecting societies

Title I provides a set of thirteen definitions and an indication of the subject matter and scope. The draft Directive applies to management activities of all CMOs established in the EU (irrespective of sector of activity) but, in what concerns MTL, its scope of application is much narrower, being limited to online licensing of musical works by author’s rights’ CMOs involving at least the territory of two Member States.⁴²

In an attempt to accommodate different national approaches, the definition of “collecting society” is extremely broad, there being no requirements of prior authorization or legal form.⁴³ Arguably this could lead to the qualification as collecting societies of some centralised management organisations that manage online rights of more than one right holder and operate under membership structures.⁴⁴ Such understanding has the potential to raise implementation issues, namely in those countries that currently impose stricter formal requirements and supervision on CMOs, causing the legal status of these organizations to be questionable.⁴⁵ Excluded from such qualification are however “independent rights management service providers who act as agents for rightsholders for the management of their rights on a commercial basis and in which rightsholders do not exercise membership rights”.⁴⁶ The reason for the latter exclusion is that these service providers do not give rise to the problems the Proposal is aimed at solving, namely due to the absence of a membership structure.⁴⁷

Title II⁴⁸ is of horizontal application to all CMOs (and umbrella CMO associations), containing organisational and transparency framework rules governing their relationship with (i) members, (ii) other CMOs and (iii) (commercial) users.⁴⁹

⁴² See arts. 1, 2 and 3(k) of the draft Directive.

⁴³ See art. 3(a) of the draft Directive.

⁴⁴ For an analysis of these online music services under EU law, see Mazziotti, *supra* note 21, at 770-775 (noting initiatives in the field, such as CELAS, PAECOL, PEL, PEDL, IMPEL and, at the regional level, ARMONIA).

⁴⁵ See Guibault & von Gompel, *supra* note 21, at 125-30. See also Mazziotti, *supra* note 21, at 781-783.

⁴⁶ See Recital 4 of the draft Directive.

⁴⁷ *Id.*

⁴⁸ Title II is divided into five chapters: Membership and organization of collecting societies (1); Management of rights revenue (2); Management of rights on behalf of other collecting societies (3); Relations with users (4); Transparency and reporting (5).

⁴⁹ Users are defined in art. 3(i) of the draft Directive as natural or legal persons carrying out restricted acts and not acting in the capacity of a consumer.

Relationship with members

In what concerns relationship with members⁵⁰, the Proposal sets forth a general principle of good faith for CMOs⁵¹, minimum standards in what concerns rights of members (including freedom of choice of CMOs within the EU and of withdrawal with 6 months prior notice, as well as express written consent for each right fragment license)⁵², membership rules (refusals must be based on objective and publicized criteria, and representation and participation must be guaranteed)⁵³, general meeting powers⁵⁴, the supervision and control of management by a specific (but merely internal) body⁵⁵, as well as obligations of the effective managers of CMOs.⁵⁶ It should be noted that the Proposal does not detract from the general default rule of full individual management, a point stressed in its Recital 9 and illustrated with the possibility that individual rights holders allow for non-commercial uses of their works, e.g. through private ordering models such as Creative Commons.⁵⁷

It is likely that the above rules impact current CMOs practices around Europe, such as those requiring that membership is made dependent upon a rights holder entrusting all its rights to a CMO or preventing him or her from individually managing his or her rights, e.g. through making available certain works under a creative commons license, even if for non-

⁵⁰ Under art. 3(c), a member of a CMO can be rights holders or entities representing rights holders. Given that art. 1(b)'s definition of “rightholder” covers any natural person or (non-CMO) legal entity that either holds a relevant right or is entitled to a share of the rights revenue under an exploitation agreement, it follows that foreign authors are potentially covered by the scope of the draft Directive.

⁵¹ See art. 4 of the draft Directive.

⁵² See art. 5 of the draft Directive. Recital 9 emphasizes the freedom of choice of CMOs by rights holders in what regards management of rights (e.g. public performance or broadcasting) or categories of rights (e.g. interactive communication to the public). This freedom should thus imply effective flexibility, meaning that CMOs should facilitate its exercise. It is still not clear how the “express consent” requirement will apply in the context of the collection and management of equitable remuneration rights, namely vis-à-vis its articulation with mandatory collective management and extended collective licensing.

⁵³ See art. 6 of the draft Directive. Recital 10 specifically identifies publishers as a category of rights holders entitled to membership on objective and non-discriminatory terms, by virtue of their agreements on the exploitation of rights.

⁵⁴ See art. 7 of the draft Directive.

⁵⁵ See art. 8 of the draft Directive.

⁵⁶ See art. 9 of the draft Directive.

⁵⁷ See Recital 9, *in fine* of the draft Directive. For a description of the Creative Commons licensing platform, see <http://creativecommons.org/> [Accessed Nov. 5, 2012].

commercial uses.⁵⁸ On the first, the draft Directive's obligation that rights holders are entitled to authorise a CMO "to manage the rights, categories of rights or types of works and other subject matter of their choice" can be interpreted as preventing such broad CMO membership clauses, favouring instead a more flexible approach.⁵⁹ On the second, although the wording of the draft Directive seems to leave room for the exclusion of individual management as a membership requirement, insofar as that exclusion operates solely in what regards the *right, category of right or type of work/subject matter* entrusted to the CMO, Recital 9 – by expressly mentioning individual management and "non-commercial uses" – can be interpreted as an indication to CMOs that such flexibility should be provided to their members.⁶⁰ This interpretation would be coherent with the general principle that CMOs "act in the best interest of their members and do not impose on rightholders whose rights they manage any obligations which are not objectively necessary for the protection of the rights and interests of these rightholders".⁶¹

Further provisions on financial management prescribe a general duty of diligence in the collection and management of rights revenue by, e.g., imposing its clear separation from other CMOs income sources.⁶² The draft contains specific rules on deductions for management fees and social, cultural or educational services,⁶³ as well as on the hot topic of distribution of amounts due to rights holders.⁶⁴ In general, CMOs have an obligation of regular and diligent distribution and payment (including equal treatment of all categories of rights holders), no later than 12 months from the end of the financial year of collection; this rule is subject to a limited exception for cases where the identification and location of rights holders is not possible, which however does not affect the latter's right to claim such amounts from the CMOs.⁶⁵ Undistributed amounts can only be used after a 5 year "grace period" and pursuant to a general meeting or supervisory body decision.⁶⁶ However, the length of the grace period, the low threshold for identification and location obligations and its unclear

⁵⁸ For a basic explanation of the workings of Creative Commons licenses, including its "Attribution-NonCommercial" (CC BY-NC) license, see <http://creativecommons.org/licenses/?lang=en> [Accessed Nov. 5, 2012].

⁵⁹ See art. 5(2) of the draft Directive, as well as Recital 9.

⁶⁰ See Recital 9 of the draft Directive.

⁶¹ Art. 4 of the draft Directive.

⁶² See art. 10 of the draft Directive.

⁶³ See art. 11 of the draft Directive.

⁶⁴ See art. 12 of the draft Directive.

⁶⁵ See arts. 12(2) and (3), as well 7(5)(b) of the draft Directive.

⁶⁶ *Id.*

articulation with the general meeting provisions may give rise to problems of the very nature the Proposal is attempting to solve.⁶⁷

Relationship with other Collecting Societies

In the context of representation agreements, the draft Directive provides for an obligation of non-discriminatory treatment in relation to covered non-member rights holders⁶⁸, as well as for a formal requirement of express consent of the counterparty CMOs for any deductions other than management fees on said non-member’s rights revenue.⁶⁹

Relationship with users

Negotiations with users shall be based on the principle of good faith and on objective criteria, with tariffs for exclusive rights having to reflect both the economic trade value of the rights and the service provided.⁷⁰ The “economic trade value” standard is also to be observed by CMOs in establishing the license fee/tariff when national law does not establish the applicable amount for rights of remuneration (e.g. under certain provisions of the Rental and Lending Directive⁷¹) or compensation (e.g. fair compensation for reproductions for private use under art. 5(2)(b) of the Information Society Directive⁷²). Here, however, it is important to emphasize that the standard requires a flexible enough interpretation to accommodate the

⁶⁷ See MEMO/12/545, at point 9: “...the functioning of some collecting societies has raised concerns as to their transparency, governance and the handling of revenues collected on behalf of rights holders. Cases of risky investment by certain collecting societies of royalties that should have gone to rightholders highlighted the lack of oversight and influence of rightholders on the activities of a number of collecting societies, contributing to irregularities in their financial management and investment decisions”

⁶⁸ See art. 13 of the draft Directive.

⁶⁹ See art. 14 and Recital 17 of the draft Directive.

⁷⁰ See art. 15 and Recital 18 of the draft Directive. It will be interesting to observe how this “economic trade value” standard will be interpreted in situations where the economic online use is considered to be indivisible, such as occurred in Germany in the District Court Decision *MyVideo Broadband S.R.L. v CELAS GmbH*, LG Jun. 25, 2009. See Mazziotti, supra note 21, at 782-83. The District Court of Munich invalidated the license system set up by CELAS for use of content on the internet, considering that German Law does not allow for a partition of the rights (such as mechanical reproduction and making available), when their economic online use is indivisible, as such severability would lead to legal uncertainty for online users. The decision was upheld by the Munich Court of Appeals (*CELAS GmbH v. MyVideo Broadband S.R.L.*, OLG, Apr. 20, 2010) and the case is currently on appeal to the German Federal Court of Justice. *Id.*, at 783. It is arguable that, where economic indivisibility of the use is found, tariffs based on objective criteria should be lower than where two rights fragments (e.g. reproduction and making available) are deemed divisible.

⁷¹ See arts. 3(6), 5, 6, 8(2) and 11 of the Rental and Lending Directive.

⁷² Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10 [“**Information Society Directive**”].

conceptual differences (recognized by the CJEU) between rights of (equitable) remuneration, based on the value of the relevant use in in trade⁷³, and harm-based rights of fair compensation.⁷⁴

Horizontal obligations on transparency and reporting

The Proposal further contains a chapter on transparency and reporting that imposes on CMOs minimum levels of disclosure vis-à-vis rights holders,⁷⁵ other CMOs⁷⁶ and users,⁷⁷ as well as minimum public disclosure information, including an annual transparency report, which must contain the information listed in Annex I.⁷⁸

MTL of Musical Works to Author’s Collecting Societies

Title III of the draft Directive constitutes an “absolute novelty from a regulatory perspective”, as no similar legislation can be found in any Member State.⁷⁹ By definition, MTL requires at least two Member State territories and relates to author’s online rights in musical works, which include the rights of reproduction and communication to the public/making available, as set forth in arts. 2 and 3 of the Information Society Directive.⁸⁰ This scope covers a wide range of online services, from music download and streaming services, to those “providing access to films or games where music is an important element”, which require a license per online use of each right fragment.⁸¹ It does not cover non-online uses of musical works, such as those occurring in cable or satellite transmission.

⁷³ See, concerning art. 8(2) of the Rental and Lending Directive, ECJ, Case C-245/00, *SENA v NOS*, [2003] ECR I-1251, paras. 36-37, and ECJ, C-92/04, *Lagardère*, [2005] ECR I-7199, para. 50.

⁷⁴ See Recitals 35 and 38 of the information Society Directive. See also CJEU, Case C-467/08, *Padawan*, [2010] ECR I-0000, para. 39-42, and CJEU, C-462/09, *Stichting de Thuiskopie* [2011] ECR I-0000, para. 24.

⁷⁵ See arts. 16 and 18 draft Directive.

⁷⁶ See arts. 17 and 18 of the draft Directive.

⁷⁷ See art. 18 of the draft Directive.

⁷⁸ See art. 19 (on disclosure of information to the public) and 20 (on the annual transparency report), as well as Recitals 19 and 20 draft Directive.

⁷⁹ See Proposal, *Annex II*, at 45. For an overview on the topic of collective management and MTL, see T. Woods, ‘Multi-territorial Licensing and the Evolving Role of Collective Management Organizations’, in *Collective Management of Copyright and Related Rights*, edited by Daniel Gervais (The Hague: Kluwer Law International, 2010): 105-133.

⁸⁰ See Recital 21 of the draft Directive.

⁸¹ *Id.*, further explaining some of the complexities involved in the management of these fragments, by exemplifying with cases of multiple ownership of the same work where different rights holders have entrusted their rights to different CMOs.

When providing MTL services, authors rights’ CMOs (or their subsidiaries created for this purpose⁸²) must fulfil a series of conditions detailed in the Proposal, which generally relate to their capacity to process these licenses (e.g. efficient and transparent electronic systems of identification, monitoring, invoicing, collecting and distributing amounts), to provide relevant and accurate updated information, reporting/invoicing and payment.⁸³ Most these obligations come coupled with (internal) control and correction procedures.⁸⁴

In what concerns payments, it is not clear whether the art. 26 obligation to distribute amounts to rights holders “accurately and without delay after the actual use of the work is reported” translates into a real difference (read: a much shorter payment term) from the general “regular and diligent” standard of art. 12 (applying to all CMOs).⁸⁵ The significant difference in wording seems to indicate so, but it is possible to envision alternative interpretations and business practices leading to similar payment terms, to the detriment of rights holders. In fact, Annex I (concerning information to be provided in the annual transparency report), when listing the “[f]inancial information on amounts due to rightholders” only indicates the need to provide a comprehensive description of the reasons for the delay in carrying out the distribution and payments within the deadline in art. 12(1), there being no reference made to art. 26. In other words, no shorter deadline seems to be imposed. Some clarification on these provisions would therefore be welcomed.

One of the main issues identified in the above mentioned EU case law and official documents has been the artificial partitioning of markets on a territorial basis. MTL is envisioned as the solution to this problem, at least in what concerns the market for author’s online rights in musical works. However, nothing in the Proposal prevents CMOs from concluding reciprocal representation agreements to grant national licenses, not only for their own repertoire, but also for other CMOs repertoires.⁸⁶ As such, this draft Directive does not really impose MTL

⁸² See art. 31 of the draft Directive, stating that most MTL rules “apply to entities owned, in whole or in part” by a CMO, which also provide MTL for online rights in musical works. Recital 33 identifies the “interest of the online market” as a justification for the application of such obligation to subsidiaries.

⁸³ See arts. 22-26, as well as Recitals 25-27 of the draft Directive.

⁸⁴ See arts. 22-26 of the draft Directive.

⁸⁵ It should be noted that, although Recital 27 of the draft Directive mentions that “collecting societies should be required to invoice service providers and to distribute amounts due to rightholders without delay”, no further guidance is provided in this respect.

⁸⁶ See Proposal, *Explanatory Memorandum*, at 10, stating this clearly.

but merely enables it, facilitating the aggregation of repertoires “for the benefit of music service providers who want to offer a service as complete as possible across Europe and for the benefit of cultural diversity and consumers at large”.⁸⁷

But how does it work? For a CMO not wishing to engage directly in MTL, there are 2 alternatives.

The first is to outsource these services⁸⁸, which however will not affect its liability towards any of the parties involved in the licensing scheme.⁸⁹

The second is to conclude a representation agreement with another CMO mandating it to conclude MTL agreements for the first’s repertoire on a non-exclusive basis and on non-discriminatory management terms.⁹⁰ It is also possible that CMOs not granting or offering MTL to request another CMO meeting the legal requirements to enter into such a representation agreement; if the requested CMO is already engaged in comparable MTL agreements with other CMOs it will have an obligation to conclude such an agreement.⁹¹ A

⁸⁷ See Proposal, *Explanatory Memorandum*, at 10. Recital 24 of the draft Directive recognizes this much, referring that “it is essential to create conditions conducive to the most effective licensing practices by collecting societies, in an increasingly crossborder context” by providing “a set of rules coordinating basic conditions for the provision by collecting societies of multi-territorial collective licensing of authors’ online rights in musical works”, i.e. a “framework for facilitating the voluntary aggregation of music repertoire and thus reducing the number of licences a user needs to operate a multi-territorial service”.

⁸⁸ An example of outsourcing is provided in MEMO/12/545, at point 15, and it pertains to the possibility of a CMO outsourcing “the back-office function to a different company which would e.g. operate the electronic database” for said CMO.

⁸⁹ See art. 27 of the draft Directive. Recital 28 further notes the need for outsourcing practices to comply with the data protection obligations as set out in art. 17 of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995 [the “**Data Protection Directive**”]. Further personal data concerns can be found in other recitals of the draft Directive, such as Recital 38 (which clarifies that “unique identifiers which allow for the indirect identification of a person should be treated as personal data within the meaning of point (a) of Article 2” of the Data Protection Directive), Recital 39 (on the data subject’s right to obtain from the controller the rectification, erasure or blocking of unduly processed data), and Recital 40 (on the competencies of national data protection authorities).

⁹⁰ See art. 28 and Recital 29 of the draft Directive, with the latter referring that CMOs “not willing to or... not able to grant multi-territorial licences directly in their own music repertoire should be encouraged to mandate other collecting societies voluntarily with the task of managing their repertoire under non-discriminatory terms”. On the justification for the non-exclusive nature of the license, the same Recital mentions that exclusivity in MTL agreements would be restrictive not only to users’ freedom of choice of licenses but also to CMOs’ choice concerning “administration services for their repertoire on a multi-territorial basis”.

⁹¹ See art. 29 of the draft Directive. Both the article and especially Recital 31 clarify this obligation to contract applies solely: (i) “if the request is limited to the online right or categories of online rights which [*the requested CMO*] represents”; and (ii) only to CMOs “which aggregate repertoire”. Conversely, it will not apply to CMOs: (i) “which provide multi-territorial licences for their own repertoire only”, and/or (ii) “which merely aggregate

requested CMO in this position would thus be a “passport entity” to which other non-MTL CMOs would have a “right to tag on repertoire”.⁹²

Whatever the scenario, and unless the contracting CMOs agree otherwise, distribution of payments to rights holders is made by the mandated/requested CMO, while the related information is provided to the mandating/requesting CMO, which will then pass it on to its members.⁹³ This is intended to speed up the payment process, although it may give rise to significant difficulties in practice in cases of challenges by rights holders of amounts paid.⁹⁴

Perhaps the most MTL-enabling provision is art. 30, which adds a veritable safeguard in this respect. It is stated that if a CMO does not grant or offer MTL in its repertoire or concludes reciprocal MTL agreements until 1 year after the Directive’s implementation, then rights holders that had previously authorized that CMO to manage the relevant uses shall be entitled to either (i) grant MTL licenses themselves, or (ii) allow another CMO or third party to do it on their behalf.⁹⁵ This is without prejudice of the original CMO being able to license those uses for its national territory, unless the rights holder terminates the contractual relationship. In other words, this article allows for a unilateral modification of the contract for MTL uses, preventing a national repertoire lock-in concerning these uses without the rights holders having to withdraw their rights from the CMO.⁹⁶ Whether it is a balanced or effective safeguard – in light of its excessive dependence on rights holders initiative – or even if it substantially adds anything to the standard situation where withdrawal or termination are usually available to members, remains to be seen.

One of the most ambiguous provisions in the Proposal can be found in art. 32, according to which CMOs providing MTL

“shall not be required to use as a precedent for other types of services licensing terms agreed with an online music service provider, when the online music service provider

rights in the same works for the purpose of being able to license jointly both reproduction and communication to the public rights in such works”.

⁹² See Impact Assessment Analysis Executive Summary, at 5-6. See also Impact Assessment Analysis, at 42-44 and 162-165.

⁹³ See art. 26(4) of the draft Directive.

⁹⁴ On the Commission’s intention with this provisions, see Proposal, *Explanatory Memorandum*, at 10.

⁹⁵ See art. 30 of the draft Directive.

⁹⁶ See Recital 32 of the draft Directive and MEMO/12/545, at point 15.

is providing a new type of service which has been available to the public for less than three years.”

The Explanatory Memorandum⁹⁷ and Recital 34 clarify that this is intended to provide a degree of flexibility which will encourage granting of (more favourable) licenses to “innovative online services”⁹⁸, without the licensing terms being considered as a precedent for other licenses.⁹⁹ To put it differently, whatever terms are agreed in this context can be derogated from for the purposes of the objective criteria – such as the *economic trade value* – to be taken into account under art. 15 when establishing tariffs for exclusive rights vis-à-vis services publicly available for more than three years.¹⁰⁰ As for the three years threshold for considering a service innovative, neither the Proposal nor the Impact Assessment Analysis contain a justification for such timeframe.

Finally, the Proposal contains one significant exception to the MTL regime in art. 33, applying to voluntary collective MTL of the online communication to the public or making available rights in musical works used by broadcasters in their radio and television programmes.¹⁰¹ The justification for this special treatment is set out in Recital 35 and seems to be connected with the standard offline practices of broadcasting organizations, which traditionally entail obtaining a license for musical works from CMOs limited to their own broadcasts of programs.¹⁰² Consequently, the Proposal’s exception is perceived as facilitating the online licensing of music rights for “purposes of simultaneous and delayed transmission online of television and radio broadcasts”.¹⁰³

With this objective in mind, this exception covers interactive and non-interactive uses (i.e. more than mere simulcasting¹⁰⁴), “as well as any online material produced by the broadcaster

⁹⁷ See Proposal, *Explanatory Memorandum*, at 11.

⁹⁸ On concerns with innovative online services, see also MEMO/12/545, point 9.

⁹⁹ The objective of facilitating the development of new online services is also mentioned in Recital 29 of the draft Directive.

¹⁰⁰ This understanding seems in line with the last sentence of Recital 34 of the draft Directive: “...collecting societies should have the flexibility required to provide individualised and innovative licences, without the risk of their being used as a precedent for determining the terms of other different types of licences”.

¹⁰¹ See art. 33 of the draft Directive.

¹⁰² See Recital 35 of the draft Directive.

¹⁰³ *Id.*

¹⁰⁴ See *IFPI Simulcasting*, at 2 & n.6, where it is stated that the parties to that case define Simulcasting as the “simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single

which is ancillary to the initial broadcast of its radio or television programme”.¹⁰⁵ Recital 35 provides valuable interpretative assistance here.

- On the one hand, it clarifies that these ancillary materials are to be understood as limited to “material having a clear and subordinate relationship to the original broadcast produced for purposes such as supplementing, previewing or reviewing that television or radio programme”.¹⁰⁶
- In a similarly restrictive fashion, references to interactive uses and delayed transmission – which can be construed as acts of making available (and thus distinguishable from the communication to the public nature of broadcasting and simulcasting) should be interpreted restrictively; in that sense, it is mentioned that this exception “should be limited to what is necessary to allow access to television or radio programmes online”, and that it “should not operate so as to distort competition with other services which give consumers access to individual musical or audiovisual works online, or lead to restrictive practices, such as market or customer sharing, in breach” of competition law.¹⁰⁷

Although the Recital tries to operate such a restrictive interpretation, some doubts remain as to its interpretative value, given the broad wording of art. 33. To be sure, there is a potential for legal uncertainty here, which should perhaps be addressed in during the Proposal’s review process as opposed to opening the door for diverse national implementations and future CJEU referrals.

On the whole, the exception provided for in art. 33 narrows the scope of application of the MTL model, as it does not include broadcaster’s use of musical works in their programmes (and ancillary materials). Furthermore, MTL agreements under this exception are to be subject (as currently happens) to the external control of competition law (arts. 101 and 102 TFEU).¹⁰⁸

channel and free-to-air broadcasts of radio and/or TV signals, in compliance with the respective regulations on provision of broadcasting services”.

¹⁰⁵ See art. 33 of the draft Directive.

¹⁰⁶ See Recital 35 of the draft Directive.

¹⁰⁷ *Id.*

¹⁰⁸ See art. 33 of the draft Directive, which makes specific reference to this external control mechanism. See also Recital 43, according to which the “provisions of this Directive are without prejudice to the application of competition law rules, and any other relevant law in other areas including confidentiality, trade secrets, privacy,

Enforcement Measures

The Proposal contains a three-pronged approach to dispute resolution involving CMOs: (i) disputes with members or rights holders are subject to an internal resolution mechanism;¹⁰⁹ (ii) disputes with users are subject to either judicial control or an independent and impartial body;¹¹⁰ (iii) specific MTL disputes can be submitted to an independent and impartial body.¹¹¹ In all cases decisions are subject to judicial control.¹¹²

Member States are directed to create complaints mechanisms and procedures vis-à-vis the obligations set forth in the Proposal¹¹³, as well administrative sanctions.¹¹⁴ There are several provisions demanding for the existence of supervising authorities in each Member State, for purposes of complaints procedures, sanctions and monitoring of MTL practices; however, the Proposal does not require that these are separate and independent authorities solely dedicated to CMO supervision.

CONCLUDING REMARKS

A Directive tackling the most pressing challenges on the collective management of online rights has been long overdue in the EU. The Commission’s Proposal is, as often happens in the field of copyright, a result of compromise between many stakeholders, or at least those with lobbying capacity. The draft text is a consequence of the Commission’s dual purpose approach. Rules on governance and transparency are extensive, but seem to mostly reflect existing decisions and guidelines at EU level. These are welcome additions to the *acquis*, but doubt remains as to whether the vagueness of some provisions will not come back to haunt the EU legislator, especially in what concerns distribution of amounts. Arguably the crown

access to documents, the law of contract and private international law relating to the conflict of laws and the jurisdiction of courts”.

¹⁰⁹ See art. 34 of the draft Directive.

¹¹⁰ See art. 35 of the draft Directive.

¹¹¹ See art. 36 of the draft Directive. See also MEMO/12/545, at point 25, noting that “a national ministry may undertake the monitoring function”.

¹¹² See also Recital 36 of the draft Directive on this three-pronged approach and Recital 41 mentioning that nothing in the proposed Directive should be understood as preventing “the parties from exercising their right of access to a tribunal as guaranteed in the Charter of Fundamental Rights of the European Union”.

¹¹³ See art. 37 and Recital 37 of the draft Directive.

¹¹⁴ See art. 38 of the draft Directive.

jewel of the proposal – its provisions on MTL – is however open to some criticism: its scope seems too narrow, as it applies solely to the online licensing of author's rights in musical works, excluding any such rights in broadcaster's own programs, as well as any related or neighbouring rights; the justification and wording on licensing terms applying to "innovative" online service providers is questionable; and payment terms to rights holders in the MTL context are unclear. Moreover, it is to be expected that significant provisions, such as those on scope (art. 2), rights of rights holders (art. 5), licensing terms (art. 15) and inter-CMO agreements for MTL (arts. 28-29), will be subject to intense discussion and lobbying during the legislative process, likely resulting in sub-optimal draft changes.

On the political side, some commentators have expressed concerns that this proposed reform is "doomed" from the start, given the identity of one of the rapporteurs, responsible for some "strong" remarks on the ACTA debate and viewed as one of the responsible parties for the significant watering down of the proposal for a Directive on orphan works.¹¹⁵ A few artists have already voiced their criticism, namely due to what they perceive are inadequate provisions to address the issue of timely and accurate distribution of amounts.¹¹⁶ Elsewhere in the Commission, Vice-President Neelie Kroes welcomed the Proposal with cautious optimism,¹¹⁷ pointing out the changes it might still suffer as a result of the legislative process and focusing instead on a "more general modernisation of copyright law", to include a review of the Information Society Directive this year and a proposal on copyright levies next year (a process currently under mediation).¹¹⁸

¹¹⁵ See Glyn Moody, 'Is The EU's Proposed Reform Of Music Licensing Doomed From The Start?', *Techdirt*, Fri, Jul 13th 2012 3:14am, available at <http://www.techdirt.com/articles/20120712/11333119676/is-eus-proposed-reform-music-licensing-doomed-start.shtml> [Accessed Nov. 5, 2012]. Moody argues that the appointment of French Christian Democrats' MEP Marielle Gallo – in his opinion a "copyright maximalist" – as one of the rapporteurs of the proposed Directive does not bode well for the success of the proposed Directive; he illustrates his point with criticism of Gallo's parallel role in the negotiations for a proposal for a Directive on orphan works. For a more detailed account of this author's position, see Glyn Moody, 'EU Directive On Orphan Works So Bad It Makes Things Worse', *Techdirt*, Thu, Jul 5th 2012 10:01pm, available at: <http://www.techdirt.com/articles/20120629/09204819536/eu-directive-orphan-works-so-bad-it-makes-things-worse.shtml> [Accessed Nov. 5, 2012].

¹¹⁶ See Reuters, 'EU copyright law plan angers Radiohead, Pink Floyd', Wed Jul 11, 2012 6:08pm IST, available at <http://in.reuters.com/article/2012/07/11/eu-copyright-idINL6E8IB3QK20120711> [Accessed Nov. 5, 2012].

¹¹⁷ See Neelie Kroes, 'Reforming copyright for the digital age: the Commission takes an important step forward', *Blog of Neelie KROES - Vice-President of the European Commission*, July 11th, 2012, available at <http://blogs.ec.europa.eu/neelie-kroes/copyright-licensing-reform/> [Accessed Nov. 5, 2012].

¹¹⁸ *Id.* On the announcement of the mediation process on private copying and reprography levies, see 'Mediation process begins on private copying and reprography levies', *Official page of EU Commissioner Michael Barnier*, 02/04/2012, available at http://ec.europa.eu/commission_2010-

Under the ordinary legislative procedure, the Proposal was submitted to the Parliament. The next step is for Parliament to deliver its position on first reading, which will be a result of discussions within the relevant parliamentary committee and a debate in plenary session, subject to simple majority.¹¹⁹

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[2014/barnier/headlines/speeches/2012/04/20120402_en.htm](http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm) [Accessed Nov. 5, 2012]. *See also*, António Vitorino, 'Statement by Mr. António Vitorino on the mediation process concerning private copying and reprography levies', available at http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20120402/statement_en.pdf [Accessed Nov. 5, 2012] (mentioning autumn 2012 as a tentative deadline for completion of the consultations process).

¹¹⁹ For the legal basis of this first reading, *see* art. 294(3) TFEU and Rules 35 through 59 (on general provisions, procedures in Committee and First reading in Plenary) of the European Parliament's Rules of Procedure.