

ception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public”.¹⁹⁵

Art. 9 makes it clear that CMOs manage the right to grant or refuse authorization to a cable operator for cable retransmission, even if a rights holder has not transferred the management of his rights to a CMO. In this case, the CMO which manages rights of the same category is deemed mandated to manage his rights; if more than one of such CMOs exists, then the rights holder may freely choose that which is mandated to manage his rights.¹⁹⁶

Art. 10 contains an exception to this rule for cable retransmission of rights of broadcasting organizations (in respect of their own transmissions) on the grounds that these are less numerous, hence making individual rights management possible.¹⁹⁷

Finally, because the resale right is a mere right of remuneration,¹⁹⁸ art. 6(2) Resale Right Directive¹⁹⁹ provides for a “residual right” and allows for compulsory or optional collective management of the royalty.²⁰⁰

B. Mass online uses and multi-territorial licensing

The emergence of mass individual uses on the Internet, such as P2P, has brought about a reshaping of the copyright landscape, making it apparent that, short of expelling users from the Internet (e.g., through graduated response systems), there is no effective way to prevent file-sharing.²⁰¹

Moreover, quashing P2P uses will not translate into increased economic welfare to rights holders, quite the opposite, as the “copyright industry does well historically when it focuses on maximizing authorized use”.²⁰²

Therefore, for mass online uses, E.U. policy should use copyright to fulfill its goal of market facilitator, organizing access to works by bringing P2P uses under the umbrella of a licensing and remuneration system, respecting the interests of

195 Art. 1(3) Satellite and Cable Directive.

196 See art. 9(1) and (2).

197 See Ficsor, *supra* note 178, at 46.

198 See art. 14^{ter} Berne Convention.

199 Art. 6(2) reads: “Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.”.

200 See Ficsor, *supra* note 178, at 48 (sustaining that art. 6(2) of this Directive confirms the validity of a restrictive interpretation as to the application of mandatory collective management).

201 See Gervais 2010, *supra* note 162, at 16.

202 *Id.*

creators, right holders and users; absent a non-foreseeable technological revolution, collective management seems the most adequate tool for this purpose.²⁰³

By helping users to internalize copyright rules, as opposed to pushing them towards deviant practices, this is the solution most attuned with the aforementioned market organization goal and that which provides the most workable model (within the copyright system) to cover and monetize massive Internet uses, particularly if based on “multi-territorial licensing”.²⁰⁴

This concept refers to the possibility of users contracting multiple territorial licenses required to secure Internet wide flow of works. It has the potential to remove significant obstacles to rights clearance processes, allowing CMOs to bridge the gap between content providers’ fear of infringement liability and their commercial dependence on “millennial”-type of users.²⁰⁵

Within the E.U., the major milestones of CMOs’ pursuit of multi-territorial licensing are the Santiago Agreement, the *CISAC Decision*,²⁰⁶ *IFPI Simulcasting*²⁰⁷ and the Online Music Recommendation (which gave rise in Germany to the *MyVideo Case*).²⁰⁸ For a better understanding of the same, **Annexes V, VI and VII** provide a depiction and brief overview of the collective rights management models proposed, respectively, under the Santiago Agreement, *IFPI Simulcasting* and the Online Music Recommendation, with the latter including also a representation of the *MyVideo Case*.²⁰⁹ Some additional considerations on the same are also relevant for our purposes.

Following efforts to adjust to technological development, such as that of CISAC’s Sydney Addendum in the field of broadcasting, five CMOs (BMI, BUMA, GEMA, PRS and SACEM) attempted to develop a new licensing model—under the form an amendment to existing CISAC type model contracts—, adopted in 2001 in Santiago, Chile.

The Santiago Agreement was a multi-territorial and multi-repertoire non-exclusive agreement intended to facilitate licensing for works and sound recordings on the Internet, covering authors’ rights of online communication to the public and

203 In a similar sense, *see id.* at 28.

204 *Id.* at 27-28.

205 See Woods, *supra* note 171, at 110-114 (where the author defines “millennials” as “younger new users that tend to focus on convenience and interactivity as opposed to ownership”).

206 Commission Decision of Jul. 16, 2008 relating to a proceeding under art. 81 of the EC Treaty and art. 53 of the EEA Agreement regarding Case COMP/C2/38.698 – CISAC, 2003 O.J. (L 107) [*Cisac Decision*].

207 Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under art. 8 of the EC Treaty and Art. 53 of the EEA Agreement regarding Case COMP/C2/38.014, 2003 O.J. (L 107) [*IFPI Simulcasting*].

208 Landgericht München [District Court of Munich] Jul. 25, 2009, No. 7 O 4139/08 – MyVideo Broadband S.R.L. v CELAS GmbH (Ger.) [*MyVideo Case*].

209 See Annex V: Santiago Agreement Model, Annex VI: IFPI Simulcasting Model, and Annex VII: The Online Music Recommendation Model, Celas and MyVideo.

making available (in reference to music downloading or streaming).²¹⁰ It did not encompass the reproduction²¹¹ or simulcasting²¹² rights in these works, and was drafted as a template for bilateral agreements between CMOs to provide worldwide licenses through representation schemes.²¹³

On the grounds that it contained anti-competitive provisions causing and preserving territorial exclusivity for local CMOs, this agreement was objected to by the Commission, eventually leading to its expiry and non-renewal at end of 2004.²¹⁴

In *IFPI Simulcasting* the reciprocal agreement under analysis provided for licensing of related rights for simulcasting of phonograms, i.e., the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals.²¹⁵ Simulcasting constituted a novelty insofar as it encompassed transmission over several territories. This agreement was defined as “experimental” until 2004, and essentially stated that each participating CMO could issue multi-territorial licenses for online users established in their Member State.²¹⁶

The Commission objected and put the agreement under the test of art. 101 TFEU. Although it considered that the agreement unjustifiably partitioned markets on the online environment, thus preventing the cross-border provision of services,²¹⁷ and caused a lack of transparency and competition in pricing,²¹⁸ the Commission concluded that the agreement gave rise to a new product—a broad multi-territorial and multi-repertoire simulcasting single license—, which facilitated rights clearance for broadcasters with benefits for consumers on the point of access.²¹⁹ As such, it qualified the restriction as indispensable under art. 101(3)(a) TFEU and granted an individual exemption until the end of 2004, at which date the agreement expired.²²⁰

As for the 2005 Online Music Recommendation, it is a non-binding document directed at Member States and CMOs, inviting them to promote a regulatory environment for legitimate online music services.²²¹ It contains provisions that apply

210 See Woods, *supra* note 171, at 116.

211 Covered by the BIEM/Barcelona Agreement.

212 Covered by the IFPI Simulcasting Agreement.

213 See Woods, *supra* note 171, at 117.

214 *Id.* at 117 (noting that the Commission’s main concern was with the “economic residency clause”, as it facilitated territorial licensing market exclusivity.).

215 See *IFPI Simulcasting*, at para 2.

216 *Id.* at paras 14 et seq.

217 *Id.* at paras 61 and seq.

218 *Id.* at paras 67 et seq.

219 *Id.* at paras 84 et seq.

220 See *IFPI Simulcasting*, at paras 96 et seq.

221 See Online Music Recommendation, arts. 2 (which does not establish any deadlines in this context) and 16 (not establishing any sanctions for non-compliance).

either solely to Member States or jointly to Member States, CMOs and other “economic operators”.²²²

This Recommendation was subject to widespread criticism for falling short of the Communication on Management of Copyright and applying solely to the online environment, thus carrying potential legal certainty problems.²²³ The European Parliament in particular criticized the Recommendation’s lack of democratic legitimacy and the need for it to be involved in the legislative process of the initiative of creative content online, where multi-territorial licensing is identified as a main area for E.U. intervention.²²⁴

Despite the criticism, the Recommendation does follow up on the Study CBCM 2005 by establishing that rights holders can select a CMO of their choice to manage their E.U.-wide rights.²²⁵ However, it does not effectively address the need for “blanket licensing”, as several E.U.-wide multi-territorial licenses might still be required to address users’ needs.²²⁶ Consequently, there is a risk that users might opt for the simpler solution of acquiring licenses only for the most popular repertoires, leading to further concentration and decreased presence of local repertoires online.²²⁷

This concentration effect has already been noted with the move of some CMOs and music publishers to present online aggregated offers,²²⁸ with the result that some major music publishers have withdrawn their online rights from all other CMOs in the E.U. not party to those deals.²²⁹

CELAS is a particularly good example, as it recently gave rise in Germany to the *MyVideo Case*.²³⁰ CELAS is a company jointly owned by MCPS, PRS and GEMA, and boasts being the “first organization of its kind to offer pan-European licenses for its repertoire, including Anglo-American repertoire from the world’s largest music publisher, EMI”.²³¹ The German company MyVideo “provides an

222 The Online Music Recommendation contains, *inter alia*, provisions on the relationship between right holders, CMOs and commercial users (arts. 3 to 9), equitable distribution and deductions (arts. 10 to 12), non-discrimination and representation (art. 13) and accountability (art. 14).

223 See Guibault & Gompel, *supra* note 7, at 156.

224 See EP Resolution OMR, at Whereas A-C, EP Resolution CCBM, at paras 3-6, and Creative Content Online Communication.

225 See Online Music Recommendation, art. 3, and EP Resolution CCBM, at paras 1-2.

226 See Annex VII, Fig. VII.1. (“The Online Music Recommendation and CELAS Model (multi-territorial & single repertoire; no one-stop shop”).

227 See Guibault & Gompel, *supra* note 7, at 160.

228 See OMR Monitoring Report, at 5 et seq. (identifying a series of E.U.-wide licensing platforms that have been announced or formed, such as Alliance Digital, ARMONIA, CELAS, PEDL and SACEM-UMPG).

229 See Guibault & Gompel, *supra* note 7, at 161-162 (noting that local CMOs may suffer a significant economic impact from this move, under the form of lost royalties, with negative effects for the creation of local works and cultural diversity).

230 See Annex VII, Fig. VII.2. (“MyVideo Case”).

231 See <http://www.celas.eu> (last visited Jan. 31, 2012).

ad-financed website in German (myvideo.de) that, just like Youtube, enables the streaming of user-provided video content over the internet”.²³²

The *MyVideo Case* concerns the potential infringement by MyVideo of mechanical reproduction rights for online uses of the EMI repertoire administered by CELAS.²³³ The latter did not invoke infringement of the making available rights because these were managed by national CMOs, such as GEMA.²³⁴ 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.²³⁵ This case is currently on appeal to the German Federal Court of Justice (*Bundesgerichtshof*).

The above mentioned “collective management milestones” have been complemented by a body of jurisprudence developed by the ECJ and Commission testing the potential anticompetitive behavior of CMOs under (now) arts. 101 and 102 TFEU, as well as by several Commission and European Parliament documents,²³⁶ all of which translate the concern to secure effective cross border licensing of works and the inability of the CMO market thus far to efficiently implement multi-territorial licensing.²³⁷

Notwithstanding, this system remains a goal of the Commission, which not only identified it as a main area requiring E.U. action in 2009,²³⁸ but also set a timeframe for proposing legislative action—currently expected to come out in 2012—, to create a collective rights management framework enabling multi-territorial licensing on a pan-European level.²³⁹

This proposal, together with the decisions of the General Court in *CISAC Decision* and the German Federal Court of Justice in the *MyVideo Case* will provide

232 See M. von Albrecht & J.N. Ullrich, *Munich District Court Holds Pan-European Copyright Licensing Model of Joint Venture CELAS Invalid* (2009), http://www.klglates.com/files/Publication/7f1d2609-940e-470e-a22e-23116314b599/Presentation/PublicationAttachment/b6762a28-143f-4681-9f3c-5492d20d4752/Alert_TMT_CELAS.pdf (last visited Jan. 31, 2012).

233 *Id.*

234 For an overview of GEMA’s activities see www.gema.de, (last visited Jan. 31, 2012).

235 See Albrecht & Ullrich, *supra* note 233 (concluding that CELAS has no right to prohibit reproductions of the EMI repertoire for online uses in Germany).

236 E.g., the Community Framework Resolution, Communication of the Management of Copyright, Commission Work Programme 2005, Study CBCM 2005, IPR Strategy, the Green Paper on Online Distribution of Audiovisual Works and the EP Resolution Cinema in the Digital Era.

237 See Guibault & Gompel, *supra* note 7, at 135-137 and 149. As these documents mostly address Competition law issues their analysis is beyond the scope of this book.

238 See Final Report Content Online Platform, at 3.

239 See IPR Strategy, at 10-11 and 23-24, Green Paper on Online Distribution of Audiovisual Works, at 4 and 12, and Communication on E-commerce and Online Services, at 6-7.

the “shape of things to come” in the field of online collective rights management, and thus the basic structure governing P2P uses in this context, which to be sure will be based on multi-territorial licensing.²⁴⁰

240 See Guibault & Gompel, *supra* note 7, at 166-167.