

# The battle for a unified media market

A common policy agenda for an efficient online media market is badly needed. Infrastructure players seem to be stuck between the interests of **rights holders** and **consumers**, as **politicians** maneuver to find the right balance. There is clearly a window of opportunity for influencing the system of rights clearance.

► **AS DIFFERENT** media converge, the market rules change. The question is: Who is in the driver's seat? The European Commission has strengthened the position of copyright holders and challenged it when wanting to improve the right to access content online across international borders.

The introduction of the Information Society Directive in 2001 strengthened both rights holders' copyrights and similar rights in the new digital environment. The directive's aim was to create a harmonized legal framework on copyright and related rights through increased legal certainty, and foster investment in creativity and innovation – including network infrastructure – while providing protection for intellectual property.

This directive was followed by the Enforcement Directive, which improved the rights holders' abilities to enforce their rights and act against illegal digital use. However, the Electronic Commerce Directive limits the responsibility of internet service providers, (ISPs), and their ability to enforce copyright in situations, such as identifying and acting against illegal downloaders. The European Court of Justice also had to take into account a preliminary ruling from Spain regarding the use of IP-numbers in a dispute between Telefónica and the Spanish music association Promusicae. The issue was whether copyright holders can claim IP-numbers from ISPs in case of infringements.

The resulting fragmented interpretation of Commission rules is also due to the "host defense" (protecting the secrecy of individual internet users' identities) in the Electronic Commerce Directive, and attempts to create a balance of interest between efficient enforcement tools and consumers' right to integrity and privacy.

The Commission published a recommendation in 2005 on management of online rights in musical work. The study introduced three options for music rights clearance: 1) Leave everything as it is. National collecting societies will manage rights with scope for foreign licensing subject to the availability of reciprocal agree-

ments with other national collecting societies or direct licensing from the rights holder. 2) Abolish the territorial restrictions for licensing rights within the EU so that each EU collecting society would be able to grant EU-wide licenses. 3) Enable copyright owners to assign exploitation rights to any collecting society within the EU that has the ability to grant licenses. The third option amounts to abolition of the "customer allocation clauses" in the reciprocal agreements between rights owners and collecting societies. The Commission favored option three, and the result of the recommendation was that copyright owners could – and have – assigned their online repertoire to the collecting society of their choice.

Following the recommendation, a variety of licensing initiatives and collecting society cooperations were announced, such as the creation of CELAS, a joint venture between the German collecting society GEMA and the MCPS-PRS. It was created specifically for the EU-wide online and mobile administration of the EMI Music Publishing repertoire. Another example is the cooperation between SACEM and Universal Music Publishing Group covering multi-territorial online and mobile uses.

## GETTING COLLECTING SOCIETIES ALIGNED

The recommendation affected the entire media industry, as the broadcasting and film industries use background music in their online content. The broadcasters argued for abolishing territorial restrictions. Prior to the recommendation, the German broadcaster RTL had filed a complaint to the Commission against GEMA, claiming its refusal to grant a community-wide license to RTL for its music-broadcasting activities was in breach of competition rules. In 2003, Music Choice Europe filed a complaint against the collecting societies' umbrella association, the International Confederation of Societies of Authors and Composers (CISAC), claiming the collecting societies' territorial model (i.e. that collecting societies only grant mandates to licenses within the domestic territory of another collecting



society) is in breach of the prohibition against anti-competitive agreements.

These cases were merged in the “CISAC case” against all European performance right-collecting societies. After a hearing in 2006 and a failed offer of “commitments” in 2007 by the collecting societies, the Commission ruled against all the European collecting societies in 2008, saying they had made concerted efforts to limit the territorial scope of reciprocal mandates to license each others’ rights to national borders. The Commission decision imposed certain compliance measures on the collecting societies and is currently under appeal before the European Court of First Instance.

Following the CISAC decision, the Dutch collecting society BUMA-STEMRA tried to issue a pan-European license to the US internet music service beatport.com. But a decision in August 2008 by a Dutch court approved a preliminary injunction prohibiting BUMA from granting any further licences beyond the Netherlands for the online sale of works administered by the UK Performing Rights Society (PRS). BUMA attempted to rely on the CISAC decision in its defense, but it was rejected by the judge, who said the CISAC decision did not invalidate the individual reciprocal representation agreements between societies, including its national territorial limitations.

The same broadcasters who initiated the

CISAC case are now facing a similar challenge in a UK case on the importation of decoders for satellite reception. The European Court of Justice is hearing a case on whether decoders can be imported freely across borders within the EU. In this case, an English pub owner imported decoders from Greece, and claimed that decoders legitimately obtained and imported into the UK do not contravene European law that prohibits receiving satellite TV signals using pirated decoder cards.

At the end of 2008, the Commission created a stakeholders discussion and cooperation platform – the “Content Online Platform.” Meetings were chaired by Viviane Reding, Commissioner for Information Society and the Media, and drew 77 high-level experts from different industry groups. The group included creators, rights holders, content providers, consumer associations, internet service providers and the telecommunication industry.

As a result of the Creative Content Online initiative, the Commission wanted to study the audiovisual industry. It assigned KEA European Affairs, a Brussels-based strategic consulting firm, to study multi-territory licensing for the online distribution of audiovisual works. The study, to be published in early 2010, will describe possible policy options to foster the development of multi-territory distribution mech-

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► anisms and business models for online distribution of audiovisual works. It will include analysis on the possible development of a system in which rights holders would be encouraged to grant a second multi-territory license. The KEA team has made many contacts with the audiovisual sector, but less with the telecom industry.

Content owners and distributors claim such a system would jeopardize exclusivity and national diversity, as broadcasters and producers fear a mandatory licensing solution to multi-territorial distribution. KEA acknowledges the rights market for audiovisual content differs from that for music because it is based upon exclusive territorial licenses. However, KEA still needs to examine solutions to the online multi-territorial dilemma, and assess current and future challenges for a distribution business model in the next five to 10 years. It will also analyze the economic impact for the EU audiovisual industry, the market and the different stakeholders in member states, as well as the cultural consequences for consumers.

Regardless of one’s political agenda on the distribution of content, it is important to make contact with KEA. There is clearly a window of opportunity now to influence the system of rights clearance.

#### **INCREASED RIGHTS FRAGMENTATION**

The clear result of the Commission’s actions is the rights that music users need to secure have become more fragmented than before. A music user could previously obtain all rights from a single outlet in each country. This has led to much uncertainty about how to launch a legitimate music downloading service in Europe. There is some hope in the music industry that pan-European cooperation between the collecting societies will allow this to happen.

Despite the Commission’s efforts at harmonization, national interpretations of the EU regulation differ. Take for example the notion of private copying. Some member states impose no levies, while others have levies only on “classic” entertainment devices such as digital video recorders. Levies in other countries are imposed even for general IT equipment such as PCs, servers, hard discs and mobile phones.

The private copying exemption can be

used to launch on-demand services such as online digital video recorders or downloading services. In Germany, the Federal Constitutional Court recently decided that online digital video recording services can be technically structured in a manner falling under the private copying exemption, but are nevertheless usually not legal without a right holder’s consent, because such services concern the exclusive right of public re-transmission of the right holders.

Enforcement rules and the host defense for ISPs are another example in which practices vary between states. Some member states, such as Germany, place a high responsibility on ISPs and infrastructure providers, while others such as the UK are more liberal by applying the host defense for ISPs more strictly.

Reding has said that her first and most important priority for the Digital Europe project – an EU effort to improve the business environment for the information and communications technology and consumer electronics sector – is to make it easier and more attractive to access digital content.

Reding also said she wants to make various online content issues a major policy focus, filling broadband pipes with accessible, legal content. She indicated her support for substantial reforms, in order to facilitate healthy online content in the best interest of the consumer. On the balance between the consumers and right holders, she said: “Both sides are right. The drama is that after long and often fruitless battles, both camps have now dug themselves into their positions, without any signs of opening from either side.”

#### **COLLECTIVE ADMINISTRATION – A WAY FORWARD**

Most infrastructure and platform providers favor a simple, harmonized solution and a “one stop shop” for mixed entertainment and media content distribution. This can be done by central rights holders giving global and comprehensive licenses in the form of mandatory collective management or – as in the Nordic countries – with an “extended collective licensing” by law.

The extended collective licensing scheme was used in the Cable and Satellite Directive, which introduced a collective administration for cross-border distribution of

broadcast signals. The same licensing scheme is used in Denmark for video on demand services. The broadcasting industry is lobbying for a functioning national rights clearance system rather than jeopardizing the territoriality and exclusivity of content in their respective market or territory.

And the industry seems to be in stark conflict with politicians, consumer associations and internet liberals who argue the entire content industry should be overruled by either consumers paying a flat fee directly to collecting societies, or paying even higher levies on devices and storage media. To many stakeholders these solutions would “kill” the legal online business models. Thus, the buy-in side of the industry wants a collective administration, and an easy uniform rights acquisition system, but no flat-tax like payment from end users that would exclude infrastructure, and platform providers and resellers.

Another point of contention is the level of payments. The commercial users, ISPs and electronic manufacturers in the media and telecom sectors claim platform neutrality. When households turn digital with services like triple play, the rights costs could, according to these stakeholders, lose proportion. Should the payment triple if the household members can access content on three different platforms – cable, broadband and mobile? Or should consumption be the decisive criteria for payment? The rights holders claim mere access to their work is worth paying for, while commercial users and distributors argue for payment by consumption.

The level of payments to collecting societies has been subject to a number of disputes within the EU. One example is a case between the Swedish collecting society Stim and TV4/Kanal 5, in which the broadcasters claimed Stim’s use of a royalty tariff did not correspond to actual use of music in broadcasts. The case was sent to the European Court of Justice, which handed down a preliminary ruling that did not object to the tariff, provided it was based on transparent and non-discriminatory criteria.

The Commission is continuing its efforts to balance copyright, exclusivity, territoriality and the single market.

Content distribution is affected by many fields of interest: copyright, the notion of private copying as an exemption to copyright, administration of both multi-territorial and national rights clearance, level of payments and its application to multiple devices, competition law, privacy and enforcement of rights.

It remains to be seen how and with what

tools the Commission, national regulators and the courts will balance copyright in the new digital environment. It is important for all stakeholders in the audiovisual industry to follow and influence the KEA study.

It is clear everyone in the industry wants to improve the conditions for online distribution of content. The challenge is that it must be done at the lowest possible risk for everyone involved. The balance of interests is nothing new but the conditions of the online market (including piracy) make it more complicated than ever. ●

**Footnotes**

• Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

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**Harmonized rules are crucial to media industry growth**

- Previously all music rights could be obtained from a single outlet in each country, this is not the case anymore. This has created even more uncertainty about how to launch a legitimate media downloading service in Europe.
- The EU is making efforts to harmonize, but results are contradictory.
- A key policy question remains to be answered; whether consumers should pay for actual consumption or mere potential consumption.
- Collective licensing schemes would facilitate harmonization but needs to take into account the rights holders interests to control their rights.
- Harmonization of rules for private copying is important and should be technology/platform neutral.