



Brussels, 8 February 2011
101VDH10

POSITION PAPER ON CERTAIN ASPECTS OF COLLECTIVE MANAGEMENT OF COPYRIGHT IN THE SINGLE EUROPEAN DIGITAL MUSIC MARKET

GESAC is the European Grouping of Societies of Authors and Composers and represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the rights and remuneration of close to 500,000 creators across a range of sectors (music, audiovisual, literary and visual and graphic arts) and music publishers.

The activity of GESAC's members, as well as that of the rights holders they represent, is apt to be profoundly affected by any initiative on collective management of authors' rights in the digital market. Therefore, GESAC wishes to outline the current situation and running issues regarding the licensing of music for digital uses (1), highlight the role of authors' societies in the development of the digital market, and how this role is fundamental to deliver the objective of a modern licensing system (2) and give its thinking on the principles upon which an EU legal framework capable of efficiently fostering the development of the licensing system in the digital market should be based (3).

This paper focuses on the collective management of music rights, as it is GESAC's understanding that the Commission initiative may be limited to this field. However, some of the principles apply equally to other creative fields, and GESAC's members include societies, which manage rights other than music rights,

1. The issues at stake

GESAC agrees with the Commission's statement in its Communication on a Digital Agenda for Europe that “*the creation of attractive online content and services and its free circulation inside the EU and across its borders are fundamental to stimulate the virtuous cycle of demand.*”

However, the analysis of the current situation - and specifically the allegation that the EU is lagging way behind the US in the uptake of digital services, and that one of the main obstacles for the uptake of the EU market is the EU's territorially organized copyright licensing

practices - is based on inaccurate or incomplete assertions and information.

The actual situation is different, and an accurate assessment of it needs to take the following factors into account:

○ *The EU and US digital markets compared*

In 2009, the European digital market for music was valued at over € 605 million and the American market at € 1.4 billion.¹

However, this gap is set to narrow in the coming years as the EU market continues to grow while the US market matures. Significantly, in the first half of 2010, the European digital market grew by 22% while that of the US was up by only 4%.²

Additionally, many reasons completely unrelated to any difference in rights holders' licensing practices explain the differential developments of the EU and US markets, in particular:

- the US has a higher Internet penetration per capita than the EU;
- the US has a longer tradition of catalogue distance sales due to the more suburban lifestyle of its society which has facilitated the uptake of online services;
- the collapse of the physical music market in the US has driven consumers to purchase online by default. The detailed comparison of the revenue streams calculated per capita shows that in fact, the UK's per capita revenue (\$18.92) for physical music is more than twice the size of the US revenue (\$8.32), despite the US's higher per capita disposable income;
- the US is a single market where people speak the same language and every US service has the potential to be exploited with the corresponding economies of scale, compared to the EU with its 27 Member States, 23 official languages and as many cultural specificities;
- Europe has a higher taxation level (in the US, many States apply a 0% sales tax to online services, and those which do apply one do so at a rate around 5-8%, whereas EU online services are subject to VAT rates of between 15% and 25%).

It also bears pointing out that the vast majority of US online revenue (almost 90% for some major record labels) is derived from iTunes, which is also licensed and available in most European countries, including all major markets.

○ *Obstacles to the development of the EU digital market unrelated to music licensing*

The main obstacle to the development of legal pan-European digital music services is online piracy. The current levels of online piracy are actually a major disincentive to the development of legal digital content services. The fact is that competition from illegal

¹ IFPI, The Recording Industry in Numbers 2010.

² IFPI, The Recording Industry in Numbers 2010.

services offering the same product for free is too great an obstacle for many operators, particularly small stakeholders, to embark on risky cross-border or pan-European ventures. Due to difficulties in making legal services viable in some countries where piracy is too high, online music providers choose not to enter these markets.

Moreover, there are various other obstacles to the development of cross-border and pan-European digital music services which are unrelated to music licensing, including for example, the lack of payment mechanisms for young people³, the lack of consumer trust in cross-border contracts and remedies, the lack of tax harmonization, the attachment of European citizens to the local culture, etc.

The fact that some online music services are not available in one country or another may also be the result of a decision made by the undertaking responsible for the service, mainly for commercial reasons unrelated to licensing issues. For example, licensing issues cannot be offered as an explanation for iTunes' non-availability in some Eastern European countries as Apple has never applied to authors' societies for any licence enabling it to establish iTunes in those EU Member States. The same goes for Spotify, which has chosen to limit certain features of its service to some very specific EU markets without seeking licences to operate in others.

Likewise, the fact that consumers cannot access certain services outside their country of residence is not normally a licensing issue. Spotify, for example, limits its free version to certain countries, but although premium customers have to be resident in a country where Spotify operates in order to create an account, they can nevertheless access Spotify's service from anywhere in Europe.

Furthermore, it must be emphasized that the unmet consumer cross-border demand concerns a tiny fraction of the market, and it would be useful to conduct a study showing exactly what percentage and which type of consumers are concerned by this issue, and the countries concerned.

Lastly, while the possibility of contention over the amount of remuneration to be paid by the service to the authors' society may occasionally arise, this is more to do with a traditional conflict of interests, which needs to be resolved by appropriate means and is nothing to do with how the structure of rights' licensing is organized.

- *Multi-territory licensing is a reality*

Multi-territory - including pan-European - licences are readily available and granted by authors' societies for their repertoire. SIAE, for example, has granted 8 multi-territory licences since 2008, and is currently negotiating five more. SACEM has granted 10 pan-European licences since 2008. SGAE, too, has granted 10 multi-territory licences.

Moreover, many services are purely national and various repertoires, notably those of small countries, have a primarily national audience. Multi-territory licences are of no use in either case. So, several GESAC members, in particular societies operating in small countries, report having received not a single request for cross-border licences for their repertoire.

³ In certain markets (e.g.: South Korea), young consumers can use smartphones for online payments. This and other non-credit card related mechanisms need to be further developed in Europe.

In fact, the problem resides more in repertoire fragmentation.

The European Commission's non-clearance of the Santiago and Barcelona agreements,⁴ the withdrawal of the major publishers' rights in their so-called Anglo-American repertoire from the societies' network of reciprocal representation agreements in the framework of the 2005 Recommendation,⁵ and the effect of the CISAC decision of 16 July 2008 have created a situation where authors' societies are no longer in a position to offer multi-territory **AND** multi-repertoire licences, as requested by some international online services.

2. The benefits of collective rights management

The usefulness and legitimacy of collective rights management is acknowledged in the legal systems of all EU Member States and by the European legislator in the copyright directives.

Collective rights management has always proved to be adaptable to technological developments and new types of use. In the digital world, collective rights management is able to offer unparalleled benefits, which include:

- easier access to musical works: collective rights management allows for an extensive repertoire to be cleared through a single or small number of points of entry with complete legal certainty;
- avoiding high transaction costs: this is particularly true for the management of rights with a high volume of works and owners, and uses, particularly when each individual use is a low value use. Also, collective management allows rights holders and users alike to benefit from the scale economies of bundling;
- licences granted on a non-discriminatory and non-exclusive basis: the negative impact of media concentration is offset by the equal access to works given to all users;
- genuine protection of rights holders: authors' societies do not act in their own interest, but in the collective interest of their members, to whom they have a fiduciary duty, as underlined by the European Composer and Songwriter Alliance (ECSA), the organization that links together the European federations of composers and songwriters;⁶
- protection of cultural diversity: collective rights management ensures that authors are treated on a non-discriminatory basis, by enabling the smallest and least popular repertoires to access the market and by playing an important role in the promotion of local repertoires in the Member States;

⁴ The Santiago and Barcelona Agreements enabled authors' societies to grant online music providers whose economic residence was in their national territories of operation a licence covering the world repertoire for world-wide exploitations.

⁵ Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

⁶ ECSA's position paper on collective rights management is available at: <http://www.composeralliance.org/wp-content/uploads/2010/09/ecsa-position-paper-on-collective-rights-management.pdf>

- *accurate distribution of receipts*: major investments in advanced technologies have enabled fine-tuned and reliable management to be provided, especially the "micro-management" and "nano-distribution" which are necessary in the online environment where, for example, millions of downloads of hundreds of thousands of works, with sometimes up to a score of copyright holders for each work, have to be processed in order to finally distribute only minimal amounts of a few eurocents to the rights holders;
- *control and supervision*: this control is exercised by public authorities and by authors' societies' members.

For all the above reasons, authors' societies are a key element in the development of a European Digital Single Market and any future legislative initiative must create the conditions for collective management societies to pursue their vocation in appropriate conditions.

3. What a collective rights management initiative should provide

A collective rights management initiative should deliver the following objectives:

- o *Preserve the existing balance between flexible and exclusive entrustment of rights*

Rights holders in Europe benefit from great flexibility in the administration of their rights.

They can manage these rights themselves, or have all or certain categories of their rights administered by one or more authors' societies depending on the territorial scope they choose for their entrustment.⁷ Rights holders who have entrusted all or some categories of their rights to an authors' society, can also withdraw part or all of these rights to manage them themselves or to entrust them to another society.⁸

GESAC supports the right for rights holders to be granted this high level of flexibility.

However, once a rights holder has chosen to entrust the management of a category of rights to an authors' society, such entrustment should be exclusive, i.e., the rights holder should no longer be able to license these rights in parallel.

Such exclusivity is a necessity:

- for the protection of authors and composers as it (i) conditions the bargaining power authors' societies need to preserve the value of works and (ii) prevents some users, when negotiating licenses with authors' societies, from negotiating in

⁷ In fact, a number of categories of rights, the so-called GEMA categories, were established by two Commission decisions in 1971 and 1972 (Commission Decision 71/224/EC of 2 June 1971 and Commission Decision 72/268/EC of 6 July 1972), which were adapted in 2006 to the online environment by the GESAC-ICMP Common Declaration. The GESAC-ICMP Common Declaration is available at:

http://www.gesac.org/eng/positions/download/ICMPGESACDeclaration_final_EN_070706.pdf

⁸ Certain Member States, for example Belgium, have explicitly included this principle in their legislation on collective rights management.

parallel with individual authors, who are then forced to accept take-it-or-leave-it offers with lower rates or conditions detrimental to them. Exclusivity is essential as it guarantees authors their independence and freedom.

- for an efficient and effective management in that it (i) provides certainty to the authors' society as to the extent of the repertoire and rights it is managing, and prevents legal uncertainty as to the scope of the licenses granted, overlaps in licensing and payments associated with the administrative burden derived from the correction (reimbursements or additional claims) of such overlaps, and (ii) avoids the administrative burden as well as the costs resulting from the need to keep records of which musical works are covered by the licences granted by a society and which musical works have been directly licensed by the rights holder himself, as well as from processing distributions that take into consideration each and every specific licence granted by individual rights holders.

It is therefore essential that authors' societies be allowed to request exclusive entrustment of rights from their members. This is strongly advocated by the authors themselves and notably by ECSA, which points to the risks for authors of preventing the exclusive entrustment of authors' rights to authors' societies. Furthermore, many users, especially public broadcasters, are calling for strong and efficient collective management, which can only be provided through exclusive entrustments of rights.⁹

- o *Promote competition to the benefit of rights holders rather than users*

Competition between collective management societies in their relations with rights holders is desirable as it incentivizes societies to offer the latter the most cost-efficient services, guaranteeing the maximum level of royalties at the lowest management cost.

However, authors' societies are totally opposed to the introduction of competition vis-à-vis users, i.e., a situation where more than one authors' society is allowed to grant licences for the same repertoire in the same territory or territories, thus allowing users to shop around for the best conditions for them, including tariffs, and giving rise to an undercutting war (race to the bottom) where rights holders' remuneration is concerned.

It is necessary at this point to rebut the argument advanced by some stakeholders that competition relating to the same repertoire would not necessarily bring royalties down and would concern only administration costs as users would opt for the society with the lowest management fees in order to benefit from cost savings in the amount of remuneration they have to pay. This argument disregards the fact that (i) administration costs are deducted from the remuneration distributed to the rights holder, and that any savings would therefore be to the benefit of the latter, thus reinforcing competition for rights holders, and not to the benefit of the user, (ii) it is in practice very difficult to prevent a society from making concessions to the benefit of users on the remunerations themselves if it wishes to attract users and capture markets.

⁹ GESAC develops in detail the negative consequences of non-exclusive entrustment of rights in a specific paper available at <http://www.gesac.org/eng/positions/download/038VDH10.pdf>.

Such competition would

- conflict with competition to the benefit of rights holders, implicit in which is that collecting societies are able to offer the best protection to creators;
- constitute an obstacle to the re-aggregation of repertoires, which requires that authors' societies and/or major publishers grant a mandate to other societies to licence their repertoire on their behalf - a mandate, which they would be reluctant to grant, should the value of copyright not be kept at the highest possible level.

○ Facilitate voluntary re-aggregation of repertoires

Authors' societies have until recently been able to conclude between themselves agreements allowing them to provide the world repertoire within a single licence for traditional uses (national in scope), as well as for new cross-border satellite¹⁰ and on-line¹¹ uses.

The collective rights management initiative should include measures that facilitate the making of voluntary agreements between stakeholders re-aggregating their repertoires in order to facilitate access to copyrighted works to the benefit of the users, and improve the efficiency of administration of the rights concerned to the benefit of all parties involved.

○ Protect cultural diversity

Cultural diversity is an essential element of European creativity and has to be guaranteed through the following elements:

- Protection of the value of copyright;
- Equal access of repertoires to the market;
- Protection of authors' societies' role in the promotion of local repertoires.

○ Governance and transparency

GESAC's members fully subscribe to the need for authors' societies to comply with rules of good governance and transparency.

They are often surprised, therefore, by allegations made as to their purported lack of commitment to these principles.

In fact, authors' societies have extensive experience in self-regulation of these matters with the GESAC-ICMP Common Declaration adopted in 2006, which contains various commitments designed to improve the functioning of collecting societies, and the CISAC Professional Rules adopted in 2007 and 2009, which set minimum quality standards on

¹⁰ By virtue of the Sydney Agreements, concluded in 1987, the signatory societies could grant broadcasters a license for the world repertoire covering the satellite's footprint.

¹¹ By virtue of the Santiago and the Barcelona Agreements concluded in 2000 and 2001, the signatory societies could grant worldwide licenses for the world repertoire to online music providers whose economic residence was in their national territory of operation.

governance and membership, transparency, licensing, collections, documentation and distribution.¹²

This shows that societies are willing to comply with transparency and governance criteria, and by so doing want to improve the trust of their members, users, governments and the public in general.

4. Concluding remarks

As collective cross-border management of rights is a very technical issue, GESAC is ready to provide whatever information may be needed to raise awareness of the different elements in play.

It is also ready to cooperate with the European institutions in the quest for the best possible framework for the development of a European Digital Single Market that adequately protects all rights holders and cultural diversity.

¹² These documents are available at:
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=18258>
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=18273>
<http://www.cisac.org/CisacPortal/consulterDocument.do?id=18271>