COPYRIGHT USERS PLATFORM

Pearle* *Performing Arts Employers Associations League Europe*

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HOTREC
Hotels, Restaurants & Cafés in Europe

AER
Association Européenne des Radios

EICTA
building digital europe

ACT
Association des Télévisions Commerciales européennes
Association of Commercial Television in Europe

Time to Review Copyright Management in Europe

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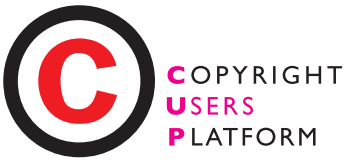
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1 INTRODUCTION

The European Commission has set out a clear strategic challenge for European industry: to create new, innovative services which can remain competitive in the global market and can create new jobs. This challenge requires all stakeholders to modernise their way of working if they are to realize the full potential of an Information Society rich in original, European content.

Creators of original works that are eligible for copyright protection enjoy an exclusive right to permit or prohibit any communication or making available to the public of these works. The rights of performing artists, producers of phonograms and broadcasters are entitled to a similar form of protection. Copyright protected works can only be communicated or made available to the public if and to the extent that, the rights-holders grant permission to do so. Rights-holders can exercise their rights either individually or collectively through a Collecting Society.

Collecting Societies' activities are therefore of direct concern to European copyright users and other organisations, each in its own specific sector. All users believe that more needs to be done to improve and modernise the collective management of copyright in the European Union. Failure to do so would prevent rights users from playing our full role in delivering the potential of the EU's strategy for more growth and jobs.

Following the publication of the Commission Communication on the Management of Copyright and Related Rights in the Internal Market in April 2004 (COM(2004)261 final), various organisations representing copyright users set up a forum to exchange information and views on the Commission document and its potential impact on collective rights management systems in the EU. These associations are: ACT, AER, ECCA, EBU, EICTA, HOTREC and PEARLE*. Under the name of the **Copyright Users Platform** (CUP) we would like to raise national and EU policy-makers' awareness of the need for reform of the collective management system.

In spite of the diversity of the industries involved, the complexity of the relationships of each of these sectors with rights-holders and collective rights management organisations, general consensus on the following points exists:

- Need to maintain, and where necessary, extend possibilities for one-stop-shop licensing;
- Need for good governance of Collecting Societies in order to increase the whole system's efficiency and transparency;
- Need for appropriate accountability and dispute resolution mechanisms where necessary.

In 2004, all involved organisations warmly welcomed the Commission Communication on the Management of Copyright and Related Rights in the Internal Market as a first encouraging step to improve and facilitate efficient collective management of rights in the European Union. As a follow-up to that Communication, DG MARKT's Copyright Unit published in October 2005 a Recommendation on the Management of On-line Music Rights. It stopped short of dealing with the fundamental and increasingly critical issues affecting copyright users, and a serious risk of new problems now exists.

This is why we decided to hold a Copyright Users Seminar in June 2006 and to produce a joint publication describing some of these risks. Unlike other events dominated by rights-holders and Collecting Societies, the Seminar is the first opportunity for rights users and their organisations to raise awareness and understanding of some of the urgent issues currently at stake.

This publication is intended to present, in a non-exhaustive manner, information on the rights that different users need and on our experiences in attempting to clear these rights.

This combined effort does not however preclude that differences in opinion on the views expressed among participating organisations may well exist particularly on the finer details of any suggestions for solutions or if it concerns the users' own internal relationships. If in doubt on one or another particular item, we encourage the reader to consult the relevant websites or directly contact the involved organisations.

2 THE USER'S POINT OF VIEW

ACT *Association of Commercial Television*

The Association of Commercial Television represents the business interests of commercial broadcasters and media groups active in 28 European territories including 21 EU Member States. Our member companies[1] operate nearly 300 pay-TV and free to air channels, and distribute nearly 1000 third-party channels and new services.

Respect for intellectual property rights is at the heart of commercial television. We are major rights holders in commissioned and acquired content. The notion of exclusivity, and a consensus that content can be re-used only against payment, underpin not only our business models but also, we suggest, the European Union's concept of a diverse, content-rich Information Society.

Alongside our role as rights holders, we are also mass users of others' rights. For example, the schedule of any European broadcaster would be unrecognisable without a range of music – not just in obvious programming such as a chart music show, or a band performing their new single on a talk show. But also a song played on the radio in a soap opera, or the track used as background for a montage of sporting incidents. Our schedules would be unappealing to viewers (and therefore commercially unsustainable) without this wide range of music. And, in keeping with our views on the importance of intellectual property, obviously composers are entitled to be paid for this use of their content.

The current model for administration of music rights in Europe is one of collective management, where composers are paid for the use of their material via a Collecting Society. Given the amount of music we play in our schedules, commercial broadcasters need a system of collective rights management (CRM).

But this does not mean that we are happy with every aspect of the current system. In particular, many European broadcasters have problems in their dealings with Collecting Societies due to societies' strong negotiation position as monopolies - the only entity in a particular country from which we can acquire the rights we need.

The CRM societies' monopoly status allows them to sustain practices which no longer reflect commercial reality. For example, many Collecting Societies charge the broadcaster a percentage of overall revenue – regardless of actual use. A broadcaster's revenue can fluctuate significantly – e.g., during a major football tournament - but the CRM will extract a "monopoly rent" on additional revenue, even if music was irrelevant in its creation.

As a general rule, policymakers ensure that monopolies and dominant positions are strictly regulated so as to guard against potential abuses. Yet this is frequently absent in the world of collective rights management, leading to serious distortions. For example, in one EU market, the local CRM society imposed a 40% tariff increase on its broadcaster client. The broadcaster had two options: to pay the new tariff, or to cease using music in its schedules. As the latter was hardly a realistic option, the broadcaster's only recourse was to legal action. Unfortunately the market in question, like many in Europe, provides for neither an independent tribunal nor for arbitration in cases such as this.

Nor are Collecting Societies under any obligation to apply financial transparency to their activities. Customers of CRM societies have no idea whether we are being charged what would be the market rate for these rights (were such a market to be created) or whether the fees

1 *Canal + has abstained from participating in preparing this article.*

we are charged cross-subsidise fees charged in other sectors, unreasonable overheads in the CRM society itself, or ill-defined cultural and social projects.

Improved financial information would help, but the most innovative way to modernise CRM in the interests of all stakeholders is for CRM societies to be able to license each others' rights. In such a system, a broadcaster could acquire the rights to play music in a given European territory from any of 25 CRM societies. A network of agreements between the societies would ensure that each could represent the "worldwide repertoire", i.e., could provide all music. Broadcasters would then be able to choose which society they deal with based on most favourable terms. This would introduce competition between societies – in terms of overheads, efficiency and service delivery. Crucially, the composers' revenue would not be affected.

Can the EU help? Although a 2004 Communication envisaged legislation to oblige Collecting Societies to adhere to principles of good governance such as transparency, accountability and efficiency, the Commission in 2005 appeared to abandon the idea of a Directive on collective management, looking only at the narrow issue of rights management for on-line music. Not only does this approach ignore issues of transparency and governance, but regulating (or rather, recommending to regulate) on a sector-by-sector approach is unrealistic in the modern media world, and contradicts the EU policy of technological neutrality. In today's media business, some CRM customers including some ACT member companies are moving away from a national, broadcast-driven business model to a future of distributing programming content across a range of different platforms, and to a variety of different territories. Yet the Commission's approach runs against this logic of convergence and instead creates two discrete legal environments, one for online usage and one for offline.

This new media environment will demand innovative solutions from the CRM societies if they are to provide an acceptable level of service to customers, and indeed to the ultimate beneficiaries of CRM activity, the authors. The EU can help – by creating for the whole industry a binding system of rights management where users can access music from the most efficient and transparent CRM.

AER *Association of European Radios*

Created in 1992, the Association of European Radios (AER) is a trade-association representing the interests of private and commercial radio broadcasters to the EU institutions. AER brings together 13 national private radio associations from 10 EU Member States plus Romania and Switzerland. Combined membership is of over 4.500 radio stations with an estimated 9.000+ (most of them SMEs) broadcasting free-to-air to millions of listeners across the EU25.

Radio stations are key intermediaries between music rights owners and the public. They provide income to rights owners and add value to music by broadcasting and promoting it. We estimate that currently radio broadcasters in the markets represented by AER pay approximately €323+ million per year for music rights.

The huge majority of commercial radios today still broadcast in analogue form to their local, regional (and sometimes national) audiences. Rights are negotiated with the Collecting Societies and - increasingly - music industry representatives generally by national commercial radio associations and sometimes directly by the broadcasters themselves. Fees are usually (but not exclusively) calculated on the basis of advertising revenue. If additional income is generated from using protected works in Internet, other simulcasting activities or new services such as webcasting, podcasting or on-demand, Collecting Societies automatically get their additional share.

Relationships between radio broadcasters and Collecting Societies have by and large been good-humoured and productive (with a few exceptions in the Nordic Countries[2] and the EU10). With the use of new distribution platforms, the migration from analogue to digital radio and piracy concerns linked to the development of digital technologies, inappropriate pressure is being put on radio broadcasters across the EU[3] to increase payments to Collecting Societies, pay additional "simulcasting fees" and/or to negotiate exclusive rights with the music industry, frequently at the expense of the end-user or listener.

While many of the problems which exist in the analogue world are yet to be resolved, the following examples in two of the most advanced EU countries in terms of introducing digital technologies illustrate some of the concerns confronting our industry.

Simulcasting: radio stations are increasingly "simulcasting"[4] their services via a choice of platforms such as cable, satellite and the Internet in order to serve the entire population. Being able to choose among platforms does however not mean that listeners consume the content simultaneously. Nor does it mean that these programmes, usually targeted at local, regional or national audiences[5], are widely listened to outside of the radio station's terrestrial reach just because they are available over the Internet. The music industry however is increasingly trying to introduce a "country of reception" rule and impose "pay per play" to Internet simulcasting. This amounts to unsustainable double payments, possibly different territorial scopes and criteria for the same content – whether analogue, on-line, off-line or digital, and thus different legislations for the clearance of music rights. In the UK for example, in order to keep payments at reasonable levels in recent negotiations with PPL[6], commercial radio broadcasters had to agree to restrict Internet listeners' access to their radio stations to the UK market only, thus preventing non-UK based listeners from accessing these services. In Finland, since the early 2000's, Internet simulcasting of commercial and public service radio has been terminated because of unsolved tariff issues with GRAMEX[7]. Listeners in Finland thus are unable to listen to the radio over the Internet and listeners outside Finland are unable to keep in touch with their favourite radio stations "back home".

2 Currently in the Nordic countries, copyright payments represent an unduly large and unfair financial burden for commercial radio stations. Although cases have been brought to the courts in Finland and Denmark, the situation is slow to evolve. 3 Radio associations or individual broadcasters are increasingly taking their Collecting Societies to court over rates and tariffs which are well above the European average. 4 Simulcasting : process of simultaneously broadcasting the same content terrestrially and on other platforms such as the Internet. 5 By and large, listening outside of the radio's reach (for example via the Internet) is of little interest to the advertiser. 6 PPL : "Phonographic Performance Ltd". 7 Gramex: performing artists' related rights.

AER *Association of European Radios*

Digital radio: Radio's second revolution after FM will be its migration from analogue to digital transmission. We are at the very early stages of a process which, while exciting for listeners, is expensive and highly complex for the broadcasters who are painfully trying to stabilise their positions and defend revenues in order to pay for the technological and content investments required to "go digital". This change is taking place in an environment where competition from powerful new players and for advertising revenues is fierce. While the regulatory, technological, spectrum and marketing issues regarding switch-over to digital radio (and switch-off of analogue radio) are still unresolved, Collecting Societies are already blocking new developments. In Finland, both the public service broadcaster (Yleisradio) and commercial radios recently announced that they would not start broadcasting in the DVB-H (telecom-led technology for digital TV/radio) network if the Collecting Societies would demand an extra payment for the simulcast content in the new network.

Today, remaining free-to-air and being part of the Information Society for All are Radio's key challenges. Despite liberalisation in broadcasting and other sectors, the collective rights management system remains characterised by territorial restrictions, monopoly power, lack of transparency and efficiency, and, in some markets, lack of appropriate arbitration and/or conflict resolution systems. Most of the solutions will have to be found at national level but some will need a European approach, in particular:

- ***Transparency:*** there should be similar transparency and organisational levels required from Collecting Societies across the EU, in particular regarding the publication of tariffs (including split costs of both rights usage and administration by the Collecting Society), the licensing conditions, administrative requirements and the destination of monies received;
- ***Competition:*** a user should be allowed to purchase whatever rights he requires for whatever purpose wherever he wishes to exercise them from any Collecting Society in the EU against clear, published tariffs;
- ***Dispute resolution mechanisms*** should be enabled as appropriate in every Member State in order to prevent abuse of a dominant position by a Collecting Society;
- ***One-stop-shop*** for all music rights whether analogue or digital, on-line or off-line: the platform used is largely irrelevant and any proposal to achieve a true one-stop-shop for music rights (as is the intention of the On-line music Recommendation) must cover on-line, off-line as well as all digital platforms.

As important rights users, commercial radio broadcasters absolutely support the need for fair and equitable remuneration for rights owners and are committed to contribute to any move to increase the effectiveness, transparency and competitiveness of the collective rights management system. Although important questions must be answered, new technological developments should not encourage some rights holders to extract unjustifiable new revenues from radio broadcasters and thus prevent listeners from freely choosing their means of access to content of their choice from among today's and tomorrow's technological possibilities.

EBU *European Broadcasting Union*

The European Broadcasting Union (EBU) is the largest professional association of broadcasters in the world, representing 74 Active Members (public service broadcasters) in 54 countries in Europe, North Africa and the Middle East.

The copyright system entails reconciling the interests of right owners, users and the general public. Users need to be able to acquire and exploit rights in a simple and efficient manner, for the benefit not least of the right owners themselves. In particular, broadcasters must have the means to deal as efficiently as possible with the acquisition of a complex range of rights on a high volume basis. Therefore, collective management agreements must provide an efficient and cost-effective one-stop-shop rights clearance mechanism for broadcasters.

If copyright management is to be effective, if practical obstacles to the development of legitimate on-line services in Europe are to be overcome, action is now necessary to ensure:

- continued possibilities for licensing of the entire world musical repertoire on a one-stop-shop basis, guaranteed through legislation; with particular regard to phonograms, producers should be obliged to entrust their rights to Collecting Societies, so that the latter are in a position to grant licences in parallel with those of the authors' societies
- legal certainty, practicability and coherence regarding the applicable law, through specific confirmation that the "country-of-origin-of-the-transmission" copyright rule (expressly recognized in the EU Satellite/Cable Directive) also applies to on-line services
- that Collecting Societies - an indispensable tool for permitting the use of rights - cannot abuse their dominant position (good governance rules).

One-stop-shop licences from one Collecting Society for the whole world music repertoire, for both off-line and on-line use, must continue to be possible

In accordance with EU policies, EU broadcasters seek to ensure that their viewers and listeners have access to a wide range of programmes on all available alternative off-line and on-line transmission platforms, both simultaneously (therefore including Internet simulcasting) and on-demand (i.e. on a "time-shifted" basis, for those who missed the scheduled time). Individual broadcasters use up to 180,000 pieces of music - including recorded music from commercial phonograms - within their programmes every week. An essential requirement for such mass use of music, involving a huge number of right owners, has always been (since the early days of broadcasting) the one-stop-shop non-exclusive blanket licensing arrangements with one single licensor Collecting Society covering the whole world repertoire for the respective category of protected material which it represents. This possibility in turn relies on the network of reciprocal representation agreements between the Collecting Societies in countries around the world.

Following the Commission's Recommendation of October 2005, if certain right owners now decide to entrust the representation of their on-line rights to a sole Collecting Society on a exclusive basis for worldwide exploitation, no Collecting Society would any longer be in a position to represent the whole world repertoire for any kind of on-line service. The absence of any comprehensive

system of reciprocal representation agreements covering the worldwide repertoire would lead to each broadcaster having to enter into a multitude of separate contracts to clear rights, potentially with at least 50 different Collecting Societies in the various different EU Member States alone! This is not only completely impracticable, but contrary to general Commission policy of facilitating the licensing of rights for media services in Europe.

Thus, in order to ensure a viable system and legal security regarding scope of repertoire held by a Collecting Society, there should be an irrebuttable legal presumption that any single Collecting Society in any country, for the category of protected material - musical works or phonograms, respectively - which it represents, has the power to grant the comprehensive non-exclusive blanket licence required by broadcasters (i.e. for the world repertoire) for all musical works/phonograms entrusted to collective management in that or any other country. As indicated above, the legislative guarantee must apply to both off-line and on-line (including on-demand) uses by broadcasters.

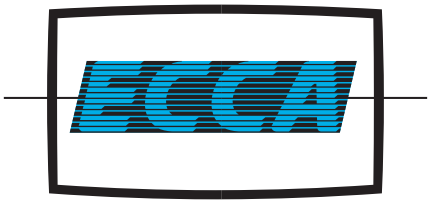
Legal certainty for legitimate users requires legal coherence and practicability

The Recommendation appears to be based on the - mistaken - legal assumption that the applicable law for any type of on-line service is not just that of the country where the relevant physical act takes place but, rather, the laws of all the countries, anywhere in the world, where the service can be received (simulcasting) or from where it can be accessed (on-demand). Just as in the case of traditional broadcasting (where in particular short-wave radio broadcasts have always crossed many frontiers), and as expressly recognized, in conformity with international law, by the EU Sat/Cab Directive and the Council of Europe Satellite Convention for the case of satellite broadcasting (where the signal can also be simultaneously received in a large number of countries), the applicable law for Internet streaming/simulcasting/making available can only be where the relevant physical act of communication/making available takes place. If the single act of communication/making available were to be subject to the cumulative application of the laws of all countries of potential reception/access, legitimate on-line services would never even take off, since their operation would be conditional on the provider clearing rights in every country around the world.

A legislative framework on good governance is still necessary

For broadcasters and other mass users of musical works and commercial phonograms, in the digital environment it is more important than ever for the collective rights management system to succeed in providing the vital one-stop-shop licences on an efficient and cost-effective basis. As envisaged by the Commission in 2004, the pivotal role of Collecting Societies requires support in the form of an EU legislative framework on good governance.

ECCA *European Cable Communications Association*



The European Cable Communications Association (ECCA) is an association of cable operators and their national associations active in Europe. Its main objective is to foster co-operation between cable operators and to promote and represent their interests at European and international level. ECCA members have more than 55 million subscribers and provides a full range of video, telephony and broadband Internet retail products based on privately financed and operated Hybrid-fibre-coaxial (HFC) cable networks.

The retransmission of broadcast channels via cable is a relevant act under copyright law. For this reason, permission has to be obtained from all rightsholders for the distribution of broadcast channels via cable (broadcasters and all the third parties holding rights in works or performances that are used by the broadcasters in their channels). Each of those rightsholders has a veto right, which means that if any one of them refuses to grant permission for cable distribution, one or more channels cannot be distributed.

Under the Satellite and Cable Directive, individual rightsholders can only exercise their rights collectively (through a collective management organization). A useful exception is made for broadcasters. They are given the option to exercise rights individually in regard to cable retransmission.

Although copyright fees paid by cable operators only account for a small fraction of total copyright payments, current copyright regimes are increasingly an impediment to the provision of state of the art and pan-European broadcasting and cable services. This is due, in part, to the regimes having **numerous relationships**, especially pertaining to the transmission of international broadcaster channels, the **fragmentation of rights** depending on different features and platforms (e.g. digital vs. analog, on-demand) and **regulations that tend to favor** satellite and DSL operators. As a consequence, cable operators experience the following difficulties:

- In the absence of a central copyright clearance approach, European broadcasters and the emerging international cable operators must negotiate with numerous copyright Collecting Societies in order to create an attractive cross-border offering.
- Cable operators planning to introduce interactive TV elements by means of their own IPTV platform must negotiate yet another suite of copyright agreements. Especially complex is the copyright situation for time-shift services that are positioned between linear broadcasting and on-demand.
- Some copyright Collecting Societies try to impose an arbitrary and uncontrolled increase in copyright fees on cable operators.
- Collecting Societies are unwilling to take account of the market value of the rights they represent; they maintain that those rights have an autonomous value (i.e., not a value which is derived from the value of the channel in which those rights are used).
- In certain countries, rightsholders even try to hinder the introduction of innovative content products by not granting necessary rights, for example in the area of video on-demand, or by postponing respective agreements.

The following examples illustrate various market inefficiencies that arise from current copyright regulation for cable operators:

'High transaction costs' resulting from the necessary negotiation of copyrights for various content formats (e.g. analog, digital, pay, on-demand) with numerous parties.

'Double payments' due to the lack of transparency and

the attempt by cable operators to nevertheless cover all necessary rights.

'Growing cost pressure' from ever increasing copyright payments resulting in decreased competitiveness of cable versus DTT or TV over DSL and the potential reduction of investment into the roll out of new services.

'Reduced ability' to invest in new services due to the insecurity of cable operators especially with regard to content access needed for innovative services as well as cross-border channel offerings.

'Delays in' the cross-border roll out of new services thus delaying the i2010 initiative as well as "TV without frontiers" both striving to create a seamless European information society.

In addition to the general copyright management problems facing cable operators, the **business models have also started to change**. Traditionally, broadcasters financed their programmes by selling advertising time in their channels which are then distributed free to air via satellite, terrestrial transmitters or cable networks. With the advent of digital TV broadcasters increasingly offer special interest channels which cannot be fully financed by selling advertising time due to the limited number of viewers. Instead, they finance their channels by selling them to content distributors running a distribution platform who in turn offer these channels usually within larger packages on a subscription basis to consumers.
For the distribution of their channels, broadcasters conclude deals with operators of all kinds of electronic communications networks: cable, satellite and DTT operators but also DSL, UMTS and Wimax operators.
With the business models of cable, satellite, DTT and DSL operators increasingly converging, ECCA considers that the current cable (and satellite) specific **retransmission regime is outdated** or has to be substituted by a more technologically neutral approach.

ECCA suggests the following way forward to overcome the above-identified inefficiencies: **Cable operators as well as those broadcasters who choose to offer a fully cleared channel to cable operators, should be able to negotiate agreements regarding the usage of any copyrights with one single Collecting Society of their choice.** Each of those Collecting Societies should be brought into a position whereby they can mutually grant each other the right to represent each others rights or repertoire. This could be done through **reciprocal representation agreements** between the Collecting Societies in countries around the world. **As a result, competition would be introduced among Collecting Societies, double rights transfers (and consequently, double payments) would be avoided and both copyright holders and rights users will gain from the efficiencies realized by copyright Collecting Societies.**

EICTA

The European Information and Communications Technology and Consumer Electronics Industries Association

EICTA, founded in 1999 is the voice of the European digital technology industry, which includes large and small companies in the Information and Communications Technology and Consumer Electronics Industry sectors. It is composed of 56 major multinational companies and 36 national associations from 27 European countries. In all, EICTA represents more than 10,000 companies all over Europe with more than 2 million employees and over EUR 1,000 billion in revenues.

Copyright protection for the development of content

Copyright protection is a significant driving force behind innovation and the creation of content in Europe. The future competitiveness of the European content industry and related industries that help the consumer access content will to a large extent depend on well functioning and efficient copyright management systems. These systems, which in theory can be individual, collective or a combination of both, are intended to remunerate right-holders, such as creators and artists, by respectively charging the consumer.

The relationship between Copyright Levies and Digital Rights Management (DRM) solutions

Copyright levies imposed, in most of the EU Member States[8], on all kinds of equipment/media which may potentially be used by the consumer to private-copy content, are collected by the middleman of Collecting Societies. They are supposed to transmit these funds to right holders as compensation for legal private copying. All consumers ultimately pay the levy when purchasing equipment/media, irrespective of how they intend to use it. Levies seem to be a very high price to pay for what little the consumer receives in return: simply, private non commercial copying of content that he/she has already purchased. Furthermore, levy-systems often appear to be nothing more than the second best solution to right-holders who, if given the choice, would much rather directly charge the consumer for the use and copying of content. They would therefore avoid suffering from friction losses, in-transparency and uncertainty about their revenues. Unfortunately, there is a threat however that levies will be extended further to all kinds of digital equipment without prior consideration of alternatives and without full assessment of the consequences.

Digital Rights Management (DRM) systems enable consumers to pay on demand for the precise content used and for its purpose (viewing, copying etc.). DRM solutions are already on offer and will develop further as they are the solution of the future, being the most efficient in supporting the direct transaction between rights-holders and consumers. Issues about privacy and interoperability, which are sometimes raised in this context, are not more worrying then with the introduction of any other types of new innovative technology. These are concerns that are being addressed. Interoperability of DRM systems are important to achieve the critical mass to win over consumers and create economies of scale. On the other hand, proprietary platforms may be needed to some extent to enable innovators to recoup their investment and might also be helpful to stimulate alternative offerings, competition, and lead to better products for lower prices. DRMs can contain PET (privacy enhancing technology) and have to comply with privacy legislation. Consequently, concerns about privacy and interoperability cease to be major issues in other parts of the world where the deployment of DRM technology is more advanced[9].

8 *UK, Ireland and Luxembourg work with a narrow private copying exception and impose no levies.* **9** *The protection of copyrighted material with the use of DRM technology should remain optional and certain players in the content delivery chain may choose not to use it.*

EICTA

The European Information and Communications Technology and Consumer Electronics Industries Association

The interim stage; phase-out of levies

Based on the above-mentioned reasons and on the decisions taken with the adoption of the EU Copyright Directive, levies have to be phased-out in areas where DRM technology becomes available and to the extent it can substitute levies.

In practice however, the contrary is happening: levies have expanded onto ever more products, which are not even used (or primarily used) to make private copies and they are being claimed on further forms of equipment, such as multifunctional devices, PCs, etc.

Finally, levies have to reflect the actual harm caused to right holders by private copying. It is highly unlikely, if not impossible that the amounts of levies currently claimed by Collecting Societies (sometimes up to 100% of the purchase price of the equipment) are limited to compensate the actual harm caused.

Lack of coherence between the law and the actual practice; consequences

The current levy systems cause legal and economic uncertainty, significant market distortions and unfair competition. Due to these uncertainties, affected equipment and media companies need to keep substantial financial reserves. This money is at least momentarily lost, instead of being invested in research and development or in other useful activities that would make European industry more competitive. Digital technology equipment is much more expensive for consumers than it should be. In many occasions, the consumers are not only paying double (for the content and due to the levies on the media) but they are also overcharged, since levies do not reflect the damage caused to right holders and do not take into account the availability of DRMs.

Policy conclusions

There is an urgent need to bring levy systems in-line with the EU Copyright Directive. The Internal Market Directorate General of the European Commission is currently considering a Community initiative to reform the Copyright Levies systems in the Member States. The initiative is most likely to take the form of a Recommendation, which will be adopted in September 2006, after inter-service consultation in June/July 2006. EICTA welcomes this approach and strongly encourages all political and legislative forces at EU and Member State level to support the Commission with this exercise.

HOTREC *Hotels, Restaurants and Cafés in Europe*

HOTREC is the trade association of hotels, restaurants and cafés in the European Union. We bring together national hospitality associations from 23 countries across Europe. The European hospitality industry is made up of one and a half million enterprises, most of which are small in terms of workforce and turnover. In all, they employ more than 7.5 million workers. HOTREC's mission is to promote the interests of hospitality enterprises vis-à-vis the European institutions with regard to all issues which impact on their activities.

Copyright is one of these issues since hospitality establishments usually offer some form of music to their customers. A restaurant or hotel plays background music on a CD player, a TV or radio set; a bar might have a juke box; a discothèque a DJ; and a café a live band. In each case, the hospitality establishment owes royalties to the creators and performers of the music – authors, composers, artists, etc – on the basis of an agreement concluded with these right holders' respective Collecting Societies.

While hospitality enterprises help right holders by advertising their music, they also draw benefit from the music as it creates ambience and attracts customers. Right holders thus deserve remuneration. It also makes sense for both right holders and hospitality enterprises not to deal directly with each other but via Collecting Societies, which saves both time and money.

However, even though collecting bodies are indispensable to music users, there is a deep sense of discontentment in the hospitality industry as to the way collective rights management is practised. The following concerns are frequently raised by the hospitality industry in most European countries:

Transparency – Hospitality enterprises are often at a loss of understanding the link between the music tariffs set by the Collecting Society and the benefit to the establishment. As Collecting Societies demand a fee which gives users access to the entire world repertoire, hospitality enterprises end up paying for a large number of works that they do not use. "Blanket fees" are certainly useful in many cases but enterprises should also enjoy the possibility of purchasing the right to use selected parts of the music repertoire.

There is also an issue of insufficient transparency in relation to the composition of the music tariff. Hospitality enterprises are generally unable to determine which part of the tariff is made up of royalties to the right holders and which part is due for the administrative cost of running the Collecting Society.

The music tariffs tend to be much higher in the hospitality industry than in other, comparable sectors which also make use of music, e.g. shops, barber saloons, or fashion stores. In Norway, restaurants pay almost up to four times as much in royalties as shops do. The Collecting Societies fail to justify the differences in tariffs with regard to objective criteria.

In addition, hospitality enterprises commonly have to negotiate tariffs with different Collecting Societies depending on the rights in question (copyright for authors/composers and related rights for performers/producers). Sometimes, as in Spain, a restaurant or hotel might have to deal with as many as four Collecting Societies. A one-stop-shop would be desirable to reduce the administrative burden for the individual enterprise.

Monopoly power – Although Collecting Societies dispose of a monopoly to manage the rights in their respective members' creative works, they should not be entitled to impose any form of conditions on the users. The sys-

tem can only be legitimate if the interests of the users are also taken into account. It could be questioned, however, whether Collecting Societies exercise their monopoly power in an even-handed way. Recently, in the UK, the collecting body for neighbouring rights unilaterally announced a 300-400 percent hike in tariffs to pubs and restaurants following the introduction of a new broadcast royalty right. The increase entered into force automatically, in spite of the concerns expressed by the UK hospitality industry, and was only subsequently referred by the government to the copyright tribunal.

Similarly, Swedish hotels were faced with a 100 percent increase in the average rate due to the Collecting Society for neighbouring rights. The outcome of the dispute is now being decided in a court.

It is difficult to imagine that tariff increases of the magnitude referred to in the examples above would be possible in a normal business relationship. There is clearly evidence to suggest that collecting bodies are tempted to misuse their monopoly position.

Regulatory oversight and dispute resolution – Given the monopoly position of Collecting Societies, there is a need for better reviewing their behaviour. In many countries, however, the responsible government department is perceived as being largely biased toward the Collecting Societies. More attention should be paid to the balanced composition of competent regulatory bodies.
In many EU countries, a general court procedure is used for ruling on copyright disputes. Given the often complex nature of such cases, it would be preferable to establish specialised dispute settlement bodies such as the UK copyright tribunal, and which should be publicly financed.

The above is by no means an exhaustive list of the concerns of the European hospitality industry in relation to Collecting Societies. It is time to take action – at European and at national level – to bring more balance to the relationship between Collecting Societies and users.

PEARLE* *Performing Arts Employers Associations League Europe*

Pearle* *Performing Arts Employers Associations League Europe*

PEARLE is the European employers federation representing the interests of over 3,500 performing arts enterprises, encompassing theatres, theatre production companies, opera houses, ballet and dance companies, orchestras and music ensembles, performing arts venues, festivals and other professional organisations in the performing arts in Europe.

The performing arts industry: a particular sector

In the performing arts industry a cultural enterprise can be both rights holder and user: it may own rights in the case of, for example, producing a performance or a concert or performance when it is recorded; however, in most cases a performing arts organisation acts as user or payer of copyright and related rights whereby it must obtain clearance for a range of rights in order to produce a performance or to put on a show.

The particularity of our sector is primarily one of the live performance for a live audience. Every year thousands of performances take place in the member states of the European Union and millions of people enjoy live entertainment, more so than the annual attendances to football games! The central place is the stage. It is there that works of art such as music, singing, drama, dance, and others take place.

In addition to the performances for a live audience, works of art find their way to the private consumer who can enjoy the performances anywhere in the world using modern technology (broadcasted or recorded media).

Extreme complexity in rights clearance in the performing arts sector

Today the strict divisions between various art forms within the sector is blurred. For example, orchestras mix a concert with a film projection, visual artists hire dancers to perform in the creative process of a video art piece, opera or theatre stage directors re-interpret libretti or texts etc. This process has increased the complexity and number of rights to be cleared.

Primary authors' rights have to be paid to the creators or their heirs (composers, writers, authors, choreographers, designers, visual artists) and related rights must be paid to the performers (musicians, singers, dancers, actors, and other performing artists).

Additionally, authors' rights must be cleared with music and texts publishers for the rental of the scores or texts, and also often with the music or film industry or, in the case of recordings, with broadcasters.

A great number of different stakeholders are thus involved whereby the producer has to go through a time-consuming, complex and diverse process of dealing with different rights holders with whom copyright and related rights are to be cleared before the production can be staged.

Given the fact that copyright is still to be cleared at national level (because of the territoriality principle of the collective management of rights), the whole process may start again when a performing arts company goes on tour with its production in Europe or the rest of the world. Therefore, this process has to be repeated for each country where the company goes on tour.

Difficulties and problems

Tariffs: Performing arts organisations report that every year they are confronted with an increase in the tariffs imposed by the collecting bodies and publishers based on biased decisions. This puts the organiser of live events in a very difficult position: aside from the rising costs for clearing intellectual property rights, the overall cost of a

production is increasing (labour costs, health and safety regulation requiring additional investments, escalating marketing costs due to competition). Meanwhile, public funding does not increase at the same rate as the rising costs for arts organisations, and hence makes it difficult for them to attain goals imposed by the ministries of culture to develop a policy of higher audience participation to achieve cultural participation by maintaining the price level of tickets. In spite of the aim of organisers to offer as many people as possible the chance to experience a live performance, the ever increasing tariffs imposed by the collecting management bodies lower either the possible profit margins (if any) or absorb a percentage of the amount of public funding received by the performing arts enterprise. Only in a few countries in Europe can performing arts federations negotiate tariffs with Collecting Societies or with publishers, this is for example the case in Germany and in Sweden. In other countries there is no room for negotiation at all or it can only be enforced when a court case is initiated as per in the UK or the Netherlands.

Transparency and efficiency: the clearance of author rights and related rights is enacted by a very broad range of Collecting Societies, varying from member state to member state, and as explained above – given the complexity of the creation of a performance - one may need to contact sometimes more than 10 different collective rights management bodies, who each collect money for a different type of rights holder and who each have their own calculation methods for the tariffs which depend on a panoply of criteria, such as number of seats, surface area, ticket prices, free tickets for sponsors, time (in hours, minutes, seconds), box office income, artists' fee, type of performance (high art or low art), publicly funded or commercial performing arts enterprises, minimum rates for small scale productions or for performances with lower box office income than the minimum etc.

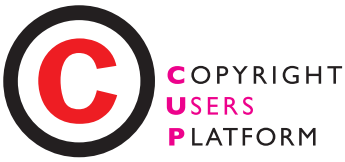
This illustrates not only the complexity of it all, but it also underscores the administrative workload involved for cultural enterprises and it puts a producer or venue in an extremely difficult position for calculating its budget for a production, as there is no clarity in the calculation of rights or the tariffs related to one or other author. In many cases this results in unpleasant surprises bringing the costs for a production above the estimate.

Monopoly and arbitration or dispute resolution systems: In a 21st century market environment it is clear that the monopolistic behaviour of Collecting Societies is a hindrance to the development of content. In order to allow economic growth, negotiations should be considered. The biased decisions from management societies hinder this growth; they limit the artistic creativity and the development of new forms of creative content. Moreover the lack of flexible working arbitration systems as an alternative or solution to the lengthy tribunals procedures, even in those member states where specialised copyright tribunals exist, is a hindrance for users in the performing arts sector who wish to fully exploit their creative product.

Suggestions concerning the management of copyright and related rights

Given the above-mentioned obstacles and burdens related to the full exploitation of content in the performing arts sector, PEARLE's view is that it is worth considering a legislative framework for the management of rights in a broader European context, in particularly to promote mobility in a true internal market based on following principles:

- **negotiating powers** for users on the tariffs both with Collecting Societies, publishers, in the film and recording industry
- **transparency and efficiency** with regard to the calculation of tariffs, the list of authors represented and distribution of the income collected from users to the rights holders
- **transparency** with regard to the term of the license, the domain of application of the rights concerned, the territory where the rights might be exploited
- a regulation which provides for an **external control mechanism** by independent government-controlled bodies on the functioning of Collecting Societies
- **arbitration mechanisms** which are compatible throughout Europe
- **a simplification of the administrative obligations** for the demand of the wide range of rights which are to be cleared by, for example, a **one-stop-shop**, on condition that there is transparency, negotiating powers on tariffs and clear distinction and information with regard to each of the rights to be cleared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3 CONCLUSIONS

For the first time, European organisations representing a varied spectrum of rights users have joined together to raise our concerns regarding an increasingly unbalanced rights management system, and to call on relevant authorities – whether national or European – to help by creating for all users a binding system of rights management characterised by transparency, efficiency, appropriate conflict resolution systems and good governance.

The organisations in the Copyright Users Platform (CUP) represent a relevant part of Europe's economy for copyright and related rights via which rights-holders and their heirs, Collecting Societies, record and film companies as well as publishers, earn a great deal of their income. The CUP calls on the Commission to consult these organisations as users in order to help find solutions for all involved in the copyright value system.

The CUP acknowledges the European Commission's recent efforts towards "solving" copyright problems which exist in the "on-line" world as a first step toward a cross-industry approach. But the "on-line" rights should not be treated differently from the "off-line" rights, and "technological neutrality" should be underlined as a key principle. The CUP therefore urges the European Commission to ensure that a level-playing field between different technologies and service offerings is guaranteed.

The ability to negotiate rights on an equal footing with Collecting Societies is considered as essential by users' organisations. We call for a one-stop-shop mechanism, based e.g. on non-exclusive blanket licensing arrangements with one single licensor Collecting Society covering the whole world repertoire for the respective category of offline and online protected material which it represents. This possibility in turn relies on the network of reciprocal representation agreements between the Collecting Societies in countries around the world. In this regard and with a view to improve the proper operation of the Internal Market for rights clearance, the EU should consider the elimination of territorial restrictions.

The creation of a one-stop-shop or central offices for rights clearance would respond to the urgent need for more transparency regarding transaction costs, avoiding the risk of double payments. And finally, appropriate dispute resolution mechanisms should also be put in place where necessary to prevent abuse of a dominant position by a Collecting Society.

All industries represented in the CUP agree that better regulation and more competition should help put the EU in a leading position to shape the global Information Society. To achieve this, Rights Users organisations urgently call on the European Commission and Member States to take stock of the problems their industries are confronted with and to ensure that in any further efforts to deal with collective rights management in Europe, the following points are taken into account:

- **Transparency;**
- **Efficiency;**
- **One-stop-shop;**
- **Dispute resolution mechanisms;**
- **Technological neutrality.**

The CUP is committed to find balanced solutions which protect the interests of the rights holders, including in the area of piracy, in order to respond more effectively and creatively to the market needs of the 21st century. The CUP looks forward to developing a constructive relationship with the relevant national and European authorities as well as with other stake-holders involved in any regulatory, legislative or policy framework relating to this issue.

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