



EUROPEAN BROADCASTING UNION

Legal Department

UNION EUROPEENNE DE RADIO-TELEVISION

Département juridique

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**INITIAL EBU COMMENTS ON COMMISSION STAFF
WORKING DOCUMENT: STUDY ON A COMMUNITY INITIATIVE
ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT**

SUMMARY OF EBU REACTION

To remove practical obstacles to licensing of on-line cross-border music services, *including those provided by broadcasters*, EU action is required to achieve ***a true one-stop pan-European collective licensing system in terms of clearance, administration and payment, for both musical works and commercial phonograms.***

This requires *a legislative guarantee* that each music collecting society ("CRM") in each EU country (respectively representing rights in musical works or commercial phonograms) is capable of providing to users who so request a *pan-European blanket licence* (i.e. covering the whole EU) for the whole world repertoire. For broadcasters, this must cover *both* the on-line *and* off-line transmission platforms which they use.

The need for such an effective collective music licensing system implies that

- **Option 1 ("do nothing") is indeed not acceptable.**
- **Option 3** (giving individual right owners the possibility to mandate one collecting society of their choice for "EU-wide exploitation of their on-line rights", separately ("unbundled") from their off-line rights), **though favoured by the Commission Staff Working Document, does not present a viable alternative to the present system of reciprocal representation agreements among collecting societies.** Whereas inclusion of such a CRM-of-choice principle could perhaps benefit certain individual right owners, under Option 2 such benefits would remain merely theoretical in the absence of a comprehensive system of reciprocal agreements which cover on-line, as well as off-line, rights for the whole world repertoire, and which ensure that users have the possibility of one-stop-shop acquisition of the necessary rights.

- ***The starting-point for the required EU action should be Option 2***, which would "eliminate territorial restrictions and discriminatory provisions in the reciprocal representation agreements between collecting societies". However, this alone would not suffice, as it leaves the user exposed to unacceptable risks and does not address the major obstacle to the development of on-line services constituted by the continuing *lack* of collective administration of on-line on-demand (making available) rights in commercial phonograms. Moreover, major obstacles for on-line music services occur if either the world repertoire cannot be guaranteed or musical authors' ("*petits droits*") societies and record producers' societies do not adhere in practice to the same kind of licensing principles. That is why it is vital to ***guarantee the effective operation of pan-European collective blanket licensing via legislation***, in respect of both musical works and, notably, commercial phonograms (which involve rights of record producers *and* performers).

- ***Option 2*** must therefore be ***complemented*** by the following:
 - ❖ The necessary ***guarantee that the licence granted by any single music collecting society is indeed blanket with regard to the represented right owners***. This can be achieved either through the provision of a *legal presumption* that the organization has the power to administer the right in every work or phonogram covered by the blanket licence (i.e. for the world repertoire) or through the system of *extended collective licences* (to which specific reference is made in Recital 18 of Directive 2001/29/EC);
 - ❖ An express legislative confirmation that the licence covers not only the initial acts of on-line transmission or making available, but also any other act relevant under copyright or neighbouring rights, taking place anywhere within the EU territory, which *completes the intended effect* of those initial acts;
 - ❖ An express reference to the fact that, in calculating the equitable level of remuneration to be made to the single CRM, *due account has to be taken of the entire audience of the on-line service, wherever it may be*. This reference should be based on the directions given in Recital 17 of the 1993 Satellite/Cable Directive;
 - ❖ ***Mandatory collective management*** should be provided for licensing of the rights needed by broadcasters to enable the ***on-demand use of their radio or TV programmes*** incorporating recorded music from commercial phonograms *as an integral part thereof*. This is now indispensable since, in disregard of the legislator's expectation (Recital 26 of Directive 2001/29/EC), phonogram producers have still not provided the necessary mandates to the societies enabling collective management of such rights, nearly ten years after broadcasters requested such collective licensing;

- ❖ Ensuring effective collective rights management also implies ***proper supervision mechanisms***. The EBU refers in this connection to the detailed points made in its response of 24 June 2004 on the Commission's 2004 Communication on rights management, in support of the Commission's overall conclusion that the monitoring of collecting societies under competition law should be *complemented by a legislative framework on good governance*.
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MORE DETAILED COMMENTS

The EBU welcomes the initiative of the Commission to take action to facilitate and ensure effective collective rights management for the purposes of promoting licensing of legitimate "on-line"¹ cross-border music services across the European Union. However, if this very valid objective is to be achieved, **Option 2 is the sole possible starting-point, which must be complemented by various legislative guarantees.**

An appropriate solution for achieving the desired objectives can be attained only by addressing certain fundamentally important elements which are at present missing in the Commission's working paper. These are explained under the following headings:

- the various different types of "on-line music services" as well as the precise meaning of the expression "multi-territorial licensing" for such services (A);
- real obstacles which impede agreements, covering both off-line and on-line transmission, between music collecting societies and broadcasters (B);
- conclusions for the best approach for a solution (C).

However, before going into detail, a short explanation is required as to why Option 3, favoured by the Commission, cannot in fact present a viable alternative.

Option 3 would give individual right owners the possibility to mandate one collecting society of their choice for "EU-wide exploitation of their on-line rights", separately ("unbundled") from their off-line rights, thus rendering superfluous - in the Commission's assumption - the existing reciprocal representation agreements among collecting societies.

From the point of view of the Commission, such a solution would have advantages for **right owners**. However, these advantages are merely theoretical as long as the **users** (including the broadcasters) are not advantaged at the same time by such an innovation. For users, the essential requirement is the possibility of one-stop-shop acquisition of the necessary rights, both in terms of scope (world repertoire) and territory (the EU territory). Whereas Option 3 would provide a perfect solution with regard to the **territory**, it would in no way ensure that a given collecting society chosen by a given right owner for central management of **his** or **her** rights throughout the EU could also grant EU-wide licences with regard to all the other EU and non-EU right owners, i.e. the **world repertoire**. To stay within the EU, if author X from Belgium chooses a (or the) CRM in France for the purposes of EU-wide licensing and author Y from Belgium or Hungary chooses a (or the) CRM in Italy, then neither CRM would be in a position to grant a broadcaster or other user a licence covering the works of both authors.

¹ Although the expression "on-line" is commonly used to describe Internet exploitation, in fact *wireless* means are increasingly being used for the purposes of technical connections over the Internet.

Therefore, reciprocal arrangements among CRMs remain indispensable, also on an EU level. As a consequence, whereas Option 3 could perhaps lead to an improvement of the position of certain individual authors (and the inclusion of such a CRM-of-choice principle might therefore be considered for that very purpose), Option 3 could in no way remove the perceived shortcomings of the present collective management system with regard to on-line music services.² In particular, the continuing *lack* of collective administration of on-line on-demand (making available) rights in commercial phonograms has proved to be the major obstacle to the development of on-line services in Europe.

Therefore Option 3 cannot provide a viable solution.

A. Precise context and meaning of "cross-border music service" licensing

A.1. Various types of "on-line music services"

On reading the Commission's Study, the first overall impression is that the (on-line) *sale of individual records (songs or albums)* is essentially the type of service which the Commission has in mind when suggesting its preferred option. This impression is based on the Commission's stated premise that "a commercial user requires a licence from each and every relevant collective rights manager in each territory of the EU in which the work is accessible". Indeed, to the extent that this premise may be correct, it would be so only in relation to *on-line sales* of recorded music.

However, the Commission's Study indicates that its proposals relate in fact to *any music service* provided on the Internet, including simulcasting, webcasting and on-demand services. Thus, it should be irrelevant whether these services are offered by on-line sales companies, webcasters or broadcasters in the EU. This also implies that the proposals must cover services where music is either the (sole) feature of the service or merely one integrated background element of a varied broadcast programme service.

Moreover, the Commission's proposals in its Working Paper puts *all types of Internet-related* on-line music collective rights administration in one basket. Such a generalization is not in keeping with the approach either of international copyright and related rights treaties, or with the current discussions in the context of the Television without Frontiers Directive. In particular, neither the copyright/related rights treaties nor the latter policy discussions on linear and non-linear services make a separation between the treatment of traditional broadcasting on the one hand and streaming (Internet simulcasting or webcasting) on the other.

² It might even encourage certain right owners to choose a non-EU CRM, e.g. in the USA, to manage the rights they have in the EU, which would only result in a higher trade deficit for the EU.

Furthermore, if any comparison with the US market for on-line music services can or should be made, then one cannot overlook the ongoing impediments to European broadcasters' cross-border music services created by the record industry, as reflected by the current lack of an appropriate mandate to the relevant collecting societies. For almost ten years now, the EBU has been requesting a proper solution on this particular issue. *Without an effective collective licensing scheme for EU broadcasters*, the (mainly US-dominated) record industry would be able to continue to block Internet webcasts and simulcasts of music recordings originating in EU countries, precluding EU broadcasters from carrying out many of their activities as (music) content providers over the Internet. For further details, see under B.2 below.

A.2 Broadcasters' on-line music services

In accordance with EU policies and, as far as EBU Members are concerned, as part of their public service remit, EU broadcasters seek to ensure that their viewers and listeners have access to a wide range of programmes and services on *all types of available transmission platforms*. Their activities *do not normally include on-line sale of the record industry's individual recordings*, but do involve use, within their programmes, of music from a huge number of (often very small) extracts from commercially published phonograms. For example, the BBC uses around 180,000 pieces of music within its broadcast services every week.

This means, notably, that the licence from (all) the music licensor collecting societies has to cover all the various off-line or on-line transmission platforms used by EU broadcasters. Otherwise, they cannot enable their audiences to choose the particular technical means for receiving the programme service *as it is being broadcast/transmitted to the general public* (i.e. including terrestrial or satellite broadcasting or Internet simulcasting).

Moreover, the services which EU broadcasters are expected to provide include the possibility for their audiences to be able to *listen to or view* their programmes at whatever specific time *after the broadcast*. Therefore, blanket licensing arrangements between broadcasters and the respective music collecting societies for musical works and commercial phonograms need to be available in order to cover also the offer/transmission activity for such *on-demand* services (which are completely different from on-line on-demand record sale operations).

A.3. Meaning of "multi-territorial" or "pan-European" licensing

The expression "multi-territorial licensing" is used by the Commission in its Study in a broad sense to cover a wide variety of situations where services originating in one EU country are "accessible" by people in one or more other EU country (and, indeed, further afield). It is clear that *due account* has to be taken of such people in the licensing arrangements (see below). However, depending on the nature of the particular

"cross-border" service, a further (separate) copyright-relevant "act" occurs in any country outside the originating country (i.e. outside the country of origin of the transmission) only if a *separate* reproduction or transmission takes place in that other country. In contrast to the case of on-line sales of individual recordings, there is no such separate "act" in simulcasting or webcasting in the sense of broadcasting via the Internet.

- **Centralized licensing** (covering separate copyright-relevant acts taking place outside the originating country)

On-line record sales may involve separate copyright-relevant *acts of reproduction* in each country where records are bought on-line, in addition to the act of "making available" of these records in the originating country. However, if the Commission's objectives to promote effective licensing of such on-line cross-border music services are to be achieved, it would seem indispensable to ensure that such service providers should be able to choose to clear all the legally relevant rights on a centralized basis. Each collecting society in each EU country must therefore be in a position to provide an EU-wide licence for such activities, irrespective of the countries where complementary individual acts relevant under copyright may take place.

The EBU has indeed drawn the Commission's attention already to other circumstances where practical experience has shown that centralized licensing, *at the choice of the original service provider*, may be indispensable to ensure viability of the operation as a general commercial whole.³

- **Pan-European licensing** (for mere transmission services on-line)

The copyright aspects of on-line (music) *transmission services*, which differ from on-line on-demand record sales, have not been sufficiently analyzed by the Commission's Study. Consequently, the Study fails to take due account of typical broadcasters' interests and needs. In particular, it must be realized that, at the time that the right of broadcasting/communication to the public was first introduced into the Berne Convention in 1928, it was already clear, and specified in the Conference records, that the only legally relevant *act* under copyright law is the *transmission*; these Records also expressly confirm that *reception* of a communication to the public outside the country of origin of the transmission did not constitute a legally relevant *act*. This cross-border element had always existed in the case of radio broadcasts (the only type of communication to the public at a distance in existence at that time).

At the beginning of the 1980s, the Commission took the important policy decision to take specific steps to promote the availability of broadcast programme services to audiences across the EU. Still with the same general policy considerations in mind, the Commission took the opportunity to *confirm* the "country-of-origin-of-the-transmission"

³ For example, this is the case for *transnational satellite-to-cable broadcasting services*, see the Summary of EBU proposals to the EC Commission for modification of the 1993 EC Satellite/Cable Directive, available at the EBU website at www.ebu.ch.

copyright rule in the 1993 Satellite/Cable Directive, in order to avoid any confusion or creation of obstacles to the proper functioning of the Internal Market in the case of communication to the public by satellite. Incidentally, the fact that this Directive confirms a pre-existing legal principle, rather than establishing a specific internal market instrument, is also borne out by a parallel confirmation of the same legal principle in the European Convention relating to questions on copyright and neighbouring rights in the framework of transfrontier broadcasting by satellite.

Since in actual fact there is no real difference between satellite broadcasting and on-line transmission of programmes, both being transfrontier by nature, the same approach should logically be taken towards mere transmissions on-line of broadcasters' programmes.⁴

In this context, it is only consistent, and generally acknowledged, that audiences beyond the country where the transmission takes place are *a relevant factor* for determining the *level of remuneration*. In fact, Recital 17 of the Satellite/Cable Directive specifically states that "*in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version*". The Court of Justice of the European Communities, in a judgment of 14 July 2005, has recognized the necessity to use these criteria, not only in the context of satellite broadcasting, but - as indeed is normal and to be expected - also in other circumstances where *the physical result of a particular act of communication to the public is merely the reception beyond the country where the act of transmission takes place*. This is indeed the case not only for traditional terrestrial radio and TV broadcasting but also for Internet real-time streaming. In all these cases there is no relevant "act" under copyright law taking place in any country other than the country where the transmission was originated by the service provider.

Therefore, mere reception of on-line transmissions in countries other than the country of origin may be referred to, loosely, as "accessibility", but this has no legal relevance. The "audience factor" can be understood only in a general sense of *economic* relevance, notably for determining the *appropriate level* of remuneration to be paid under the single payment and administration fee agreed with the single licensor collecting society in respect of the relevant act of transmission.

⁴ This is also why the EBU has proposed earlier (see the EBU response of 25.6.2004) that the Commission should take similar steps in the case of communication to the public by streaming on the Internet or other communications networks (thus covering, notably, Internet simulcasts of broadcasts over terrestrial or satellite Hertzian waves).

B. Obstacles to music collecting societies' agreements with broadcasters

B.1 Current agreements with societies representing musical works

The general situation regarding agreements between *petits droits* collecting societies and broadcasters is characterized by blanket licence agreements, covering the world repertoire, and many of these agreements also cover whatever technical means (on-line or off-line) are used by the individual broadcaster to bring its programme services to the public. Moreover, if on-line uses are included (simulcasting, webcasting, making available of broadcast programmes on-demand, as applicable), then payment for such use is normally integrated in the overall agreement with that society.

B.2 Current agreements with societies representing commercial phonograms

Contracts in respect of *off-line* transmission (broadcasting via terrestrial or satellite Hertzian waves) have always been concluded between the broadcaster and the relevant collecting society, on behalf of both record producers and performers, on the basis of a negotiated blanket rate for the act of transmission, the level of remuneration taking account of the audience factor, wherever the audience may be.

However, the position regarding *on-line* use of commercial phonograms is fraught with insurmountable obstacles. The EBU has previously and repeatedly pointed out to the Commission that the notified IFPI model Reciprocal Agreement for Internet Simulcasting does not effectively ensure collective licensing of legitimate on-line cross-border music services, for both legal and practical reasons. On the contrary, it expressly prevents collective licensing for *on-demand use* and, as regards Internet simulcasting, has been the direct cause of the *introduction* of obstacles, which previously did not exist, to the conclusion of collective agreements.

- *concerning on-demand use*

The IFPI Simulcasting Agreement expressly *prevents* the relevant collecting societies from granting any licences for on-demand use in respect of record producers' rights, including those needed by broadcasters to enable the on-demand use of their radio or TV programmes incorporating recorded music from commercial phonograms as an integral part thereof. In spite of the legislator's expectation (Recital 26 of Copyright Directive 2001/29/EC) that this be done, and nearly ten years after broadcasters first requested the possibility of such licensing, it appears that in only two countries have broadcasters been able to acquire rights for on-demand services on a collective basis. The continuing lack of the necessary mandate to the societies for collective licensing arrangements is why ***mandatory*** collective management of rights for such on-demand use of commercial phonograms by broadcasters should now be provided *through legislation*. Moreover, there is otherwise no guarantee that any on-line licence granted to broadcasters by the

collecting societies for musical works could ever be implemented, in which case authors are prevented from receiving any remuneration for such use.

- ***concerning Internet simulcasting***

Even for the simulcasting of broadcast programmes, many broadcasters are faced with various obstacles which effectively prevent the conclusion of reasonable agreements with the relevant collecting society for such use of commercial phonograms:

- continuing attempts are being made to force broadcasters to accept *different tariffs* for all territories where Internet simulcasts can be *received*. For the reasons set out above (see under A.3), such demands are unacceptable on both legal and practical grounds;
- in several EU countries the licensing terms put forward *purport to be on the basis of a restricted mandate* only, and are intended to exclude any reception of Internet simulcasts outside the country of transmission, or to cover reception only in the limited number of countries in which the collecting society is a signatory to the IFPI Simulcasting Agreement;
- although many of the relevant collecting societies are supposed to act on behalf of *both performers and producers*, they have stated that their mandate did not in some cases cover *performers' rights* (since the performer members of the respective collecting societies have not subscribed to the IFPI position or procedures for Internet simulcasting).⁵

C. Conclusions for the best approach

What is required is *legal certainty* that each music collecting society (i.e. in respect *both* of musical works *and* commercial phonograms) in each EU country is in a position to grant and guarantee a *pan-European* (i.e. covering the whole EU) *blanket licence*, for the whole world repertoire, to broadcasters (and other users who so request), in order to enable their particular pan-European service to function effectively.⁶ This involves an express legislative confirmation that the licence covers not only the initial act of on-line transmission or making available, but also any other act relevant under copyright or

⁵ Indeed, most national laws, in line with the international treaties and EU Directives, specifically require users to pay a *single* equitable remuneration, i.e. one single amount covering payment due to *all* performers and producers of phonograms used for broadcasting or any communication to the public (including webcasting and Internet simulcasting). The IFPI Simulcasting Agreement as notified to the Commission does not in fact cover performers' rights.

⁶ As pointed out in para. 259 of the 1990 WIPO Study on Collective Administration of Copyright and Neighbouring Rights, "the whole system of collective administration would be undermined if collective administration organizations would not be allowed to grant blanket licences and would be obliged to identify, work by work, and right owner by right owner, their actual repertoire".

neighbouring rights, taking place anywhere within the EU territory, which completes the intended effect of those initial acts. It also involves an express reference to the fact that, in calculating the equitable level of remuneration, *due account has to be taken of the entire audience of the on-line service, wherever it may be*. This reference should be based on the directions given in Recital 17 of the 1993 Satellite/Cable Directive.

For users, the essential requirement is the possibility of one-stop-shop acquisition of the necessary rights, in terms of *scope* (world repertoire) as well as *territory* (the EU territory). However, as is apparent from the discussions on Internet simulcasting which have been taking place between broadcasters and collecting societies for commercial phonograms (see under B.2 above), the risk of "holes" in blanket licences is not theoretical but very real, because of *inadequacies* in either the content of the reciprocal agreements or the extent to which societies (or the performer members thereof) have not subscribed to the terms of such agreements. It seems also still to be the case that societies for commercial phonograms are not yet effectively operational in certain EU countries. Therefore, given the absolute necessity of blanket licensing for broadcasters, such problems must be effectively avoided through provision of a *legislative guarantee* that the collective licence covers the whole world repertoire. As regards authors' ("*petits droits*") societies, no such absolute *practical* necessity has been shown for additional guarantees beyond those which already exist. Nevertheless, the necessity to ensure that musical authors' societies and record producers' societies do adhere in practice to the same kind of licensing principles would plead in favour of applying the legislative guarantee to both categories.

As is well known, such a guarantee can be implemented *either through provisions resulting in an effective legal presumption* that the organization has the power to administer the right in the world repertoire of the category of material covered by the blanket licence and to represent the right owner in legal proceedings, *or through the system of extended collective licences* (to which specific reference is made in Recital 18 of the Copyright Directive 2001/29/EC, and which has been used for very many years to the satisfaction of right owners and users alike in, for example, the Nordic countries).

Moreover, for the reasons given above, mandatory collective management should be provided for licensing of the rights needed by broadcasters to enable the on-demand use of their radio or TV programmes incorporating recorded music from commercial phonograms *as an integral part thereof*.

In the light of the foregoing, Option 1 ("do nothing") is obviously not acceptable, as it does not take away any of the current obstacles. But also Option 3 cannot achieve the desired results, as it ignores the absolute necessity of blanket licensing for broadcasters, which requires a comprehensive system of reciprocal representation agreements covering on-line rights for the whole world repertoire.

Only when taking Option 2 as the starting-point, but complemented by the above-mentioned indispensable obligations, can it be guaranteed that the music licensor collecting societies for both musical works and commercial phonograms are in a position to provide the necessary *blanket licence covering the world repertoire* and, in accordance with the practical needs of individual broadcasters, to cover terrestrial and satellite broadcasting as well as their Internet simulcasting and on-demand services.
