



EUROPEAN BROADCASTING UNION

UNION EUROPEENNE DE RADIO-TELEVISION

Legal and Public Affairs Department

Département des affaires juridiques et publiques

28.11.2008
DAJ/HR/mtp

**WIPO CONFERENCE
On Collective Management of Copyright and Related Rights in Europe**

Brussels, 24-25 November 2008

1. *What do European broadcasters want?*

- new technologies have created **increased consumer demand** not only for more content, but also for content available through *more platforms* and with *more convenience* as to the place and time broadcasts are consumed;
- this development creates new responsibilities and opportunities for broadcasters to adapt the delivery of their content to that demand (online catch-up services is the most striking example, but arguably the same applies also to archive programmes);
- the copyright framework must be (made?) suitable for this adaptation process to take place smoothly.

2. *What do broadcasters need for that framework? What are current problems?*

The copyright framework must provide **legal certainty**. From a legislator's perspective, this means that leaving it entirely up to market forces is not the best option. What remains are two other options: exceptions/limitations or rules to facilitate effective management of rights. The focus of this WIPO Conference is clearly on the latter option.

It should be recalled that legal certainty already exists for cross-border broadcasting services, **whether via terrestrial means, or via cable/wire or satellite** (in particular, the freedom of broadcasting services under the EC treaty, the principles of the country-of-origin and technological neutrality in the Audiovisual Media Services Directive and last, but far from least, the country-of-initial-transmission rule and the mandatory collective licensing scheme in the 1993 Satellite and Cable Directive).

Broadcasters therefore demand that such legal certainty should also be provided for the **online, on-demand availability of broadcast programmes**.

The main barrier today in the on-demand world is the collective licensing of *music rights to broadcasters*. This process has been operating smoothly in the off-line world for almost a century. I do not know any public broadcaster in the European Union that does not have collective agreements for the use of musical works and recordings. This is obvious because broadcasters can only clear music rights, in practical terms, via collective licensing agreements. The average national broadcaster in the European Union uses between 10,000 and 100,000 pieces of music every week, from all over the world. This makes individual licensing impossible. That is also the reason why the Berne Convention allows for **compulsory licensing** of rights for communication. That method is obviously not preferred by rightsholders, but it will become more relevant when and where the market itself creates a licensing chaos.

Knowing that rules for cross-border licensing to broadcasters already exist and that, on that basis, collective agreements between rightsholders and broadcasters are in place, the most logical step forward in the online, on-demand world for broadcasters is to extend the existing contracts to cover on-demand use of those broadcasts as well. However, this is where there are currently obstacles, because this process is undermined by the lack of a harmonized approach throughout Europe. This is partly due to the 2005 Music Online Recommendation and to a small number of powerful rightsholders, and the CISAC case certainly did not improve the situation. EBU Members are very much concerned by these developments, which are likely to lead to a *fragmentation of rights or repertoires over several societies*, which is the *opposite* of what most broadcasters need, namely a one-stop-shop for all rights to the global repertoire, which makes *reciprocity agreements among the societies indispensable*.

The "European problem" of today is therefore *a more fragmented European market for broadcasters' services in online form than for the same content of such services via other types of broadcasting*. This simple fact shows that, from the broadcasters' perspective, the new approach to music rights licensing is fundamentally wrong.

3. What are the most appropriate solutions (for licensing (existing) music)?

- a) Absolute key to finding appropriate solutions for the on-demand world is, first of all, to distinguish between the "broadcast model" and e-commerce.**

The first model is characterized by musical extracts that are integrated (embedded) into a broadcast programme, under the editorial responsibility of the broadcaster, so that the content is the programme itself, not the individual pieces of music. This model should be licensed, for practical and other reasons, on a *collective* (one-stop-shop) *basis* only. The e-commerce model is characterized by the offer of complete, individual music recordings, i.e. without any editorial input (other than perhaps lists of songs). For the latter, new business models are still, and continuously, under development (e.g. music

download offers based on pay-per-song, flat rate, à la carte, subsidized by advertising/sponsorship, etc.). Also, the e-commerce model often requires a pan-European (multi-territory) approach, as it targets various countries at the same time, and often the marketing is done using various languages.

The "broadcast model" is relatively easy to develop, as it concerns the on-demand use of *the same content for which collective licences already exist*. By contrast, the e-commerce model, in which commercial users engage in various copyright-relevant activities operating in, or at least clearly targeted at, *different territories*, does not yet have an established licensing scheme and may require a variety of different options, possibly including combinations of individual (direct) and collective licensing. It is still too early to see clearly which licensing scheme(s) will be established for the e-commerce model.

Examples:

- The Music Online Recommendation is mainly intended for the iTunes model, not for broadcasters' activities;
- The CISAC decision only deals with operators of various broadcast channels in different countries, but does not - and arguably should not - apply to the typical situation of national or regional broadcasters that operate mainly in their own country, whether or not their channels are on satellite too.

For the "broadcast model", the solution must be that, for all online use of musical works and recordings as integrated parts of broadcast productions, any broadcaster that is only engaged in copyright-relevant activities in its country of residence should be able to clear *all the necessary rights* (for the global repertoire) with the relevant collecting society in that country. Such rights clearance is already done today for satellite-to-home broadcast services in Europe. Collecting societies have demonstrated that they can easily deal with those services, whether or not those services can be received in five, ten or 40 countries. There is no reason to assume that the societies could not do so equally for the on-demand uses of the broadcast content by the same broadcaster.

This solution alone ensures that collective music rights management remains effective, while safeguarding the continuity of the one-stop-shop approach for music used by broadcasters.

For the sake of clarity: It may well be that commercially orientated operators develop activities in the future that combine both models ("listen-click-and-buy"). However, the distinction remains nevertheless crucial for the issue of which type of licence is most appropriate for which type of activity. This may need some safeguards: The e-commerce licence model should not lose its character when it simply adds a real-time streaming service while its main business is still dominated by its permanent-downloads-for-sale offers.

b) How to achieve this solution?

This can be achieved by any type of regulatory instrument that **mandates the extension of the existing collective licences** for the offline distribution of broadcast content and which includes the online distribution of the same content already covered by those agreements.

This would be a form of "mandatory collective licensing" which is clearly possible under current EC law, as national rules on the "exercise of rights" are not limited under the 2001 Copyright Directive; if that were the case, then arguably the 1993 Sat/Cab Directive should have been changed. Also, the scheme of "extended collective licences" in the Nordic countries is another existing form of mandatory collective licensing.

Let me finally give you some further reasons for this model:

- from a **regulatory** perspective: under copyright law there is a specific rights clearance regime for the use of existing music by broadcasters; the reasoning behind that regime (namely, mass use of the global music repertoire) applies equally to national broadcasters' online activities;
 - from a **copyright society** perspective: it creates a *win-win solution* for all copyright stakeholders involved in broadcasters' online services: authors, performers, producers, collecting societies and consumers, while at the same time *guaranteeing cultural diversity and the availability of creative European content online*;
 - from an **economic** perspective: broadcasters, who pay millions of euros for their licences to the collecting societies in their own countries, will have no interest in addressing *additional* societies in other countries for a tiny fraction of this amount only to cover the on-demand uses of their programmes; this will simply make no sense;
 - from a **competitive** perspective: this model prevents smaller societies (and their repertoires) from being marginalized by large entities not controlled by the supervision rules;
 - from an **administrative** perspective: this model is the simplest to implement, as nothing is easier than extending existing agreements; any other approach would require additional contractual arrangements and thus additional transaction costs, from which nobody would ultimately benefit.
-