



# EU IP Key SEA

## Session 9: Best Practices on Licensing in the Music Industry

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# 1. About IFPI





# About IFPI

**IFPI is the voice of the recording industry worldwide. We represent the interests of 1,300 record companies across the globe.**

IFPI is a not-for-profit international organisation registered in Switzerland. We have offices in London, Brussels, Hong Kong, South Korea, and Miami plus a representative office in Beijing.

**57** Countries with IFPI affiliated national groups or music licensing companies

**59** Markets where our member companies operate

- Legal policy & litigation
- Sales reporting & industry data
- Charts & certifications governance
- Insight & analysis
- Performance rights
- Content protection
- International trade
- Technology
- Communications



#### PROMOTING THE VALUE OF RECORDED MUSIC

Its economic value in creating growth, jobs and investment and its cultural value to society and in people's lives.



#### CAMPAIGNING FOR THE RIGHTS OF RECORD PRODUCERS

We work to make sure that the rights of our members, who create, produce and invest in music, are properly protected and enforced.



#### EXPANDING THE COMMERCIAL USES OF RECORDED MUSIC

Working to help our members license and generate commercial value for music through every available channel across the world.



# What We Do

## 2. Overview of Record Industry



# Global Recorded Music Industry 2018 Overview

**US \$19.06 bn**

global trade revenues for the  
recorded music industry in 2018

**↑ 9.7%**

Compared to 2017



**Streaming revenue growth of 34.0%, driven by paid subscriptions**



**Growth in every region and in 46 of 53 reporting countries**



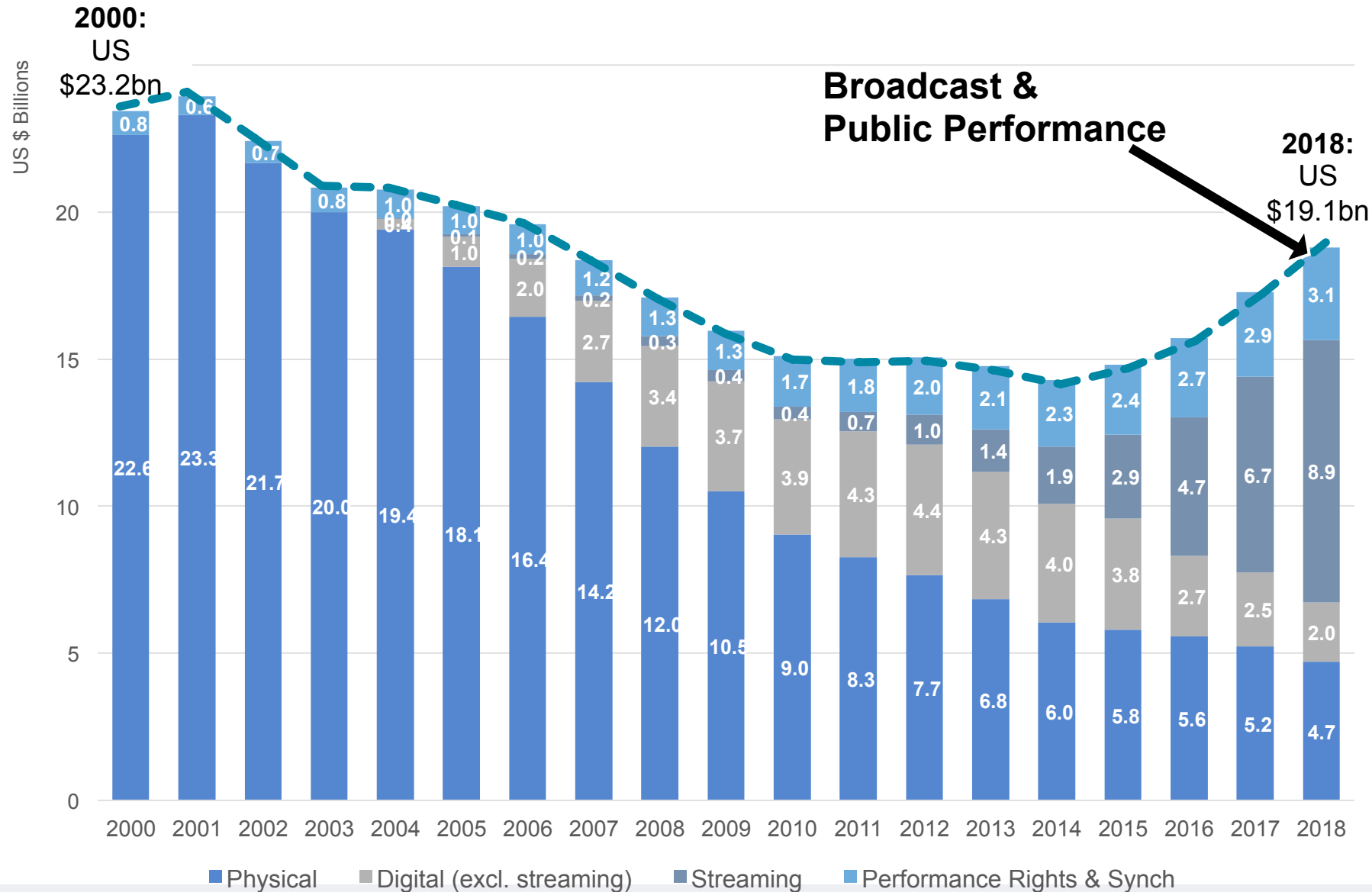
**Continued decline in physical income – but vinyl kept growing**



**Increased collections from performance rights worldwide**



# Growth after a long decline



## PERFORMANCE RIGHTS & SYNCH

Music used in broadcast and public performance and royalties from TV, film, and games

## STREAMING

Audio and video streaming revenues, paid subscriptions and ad-supported

## DIGITAL

Premium downloads, mobile revenues (includes streaming)

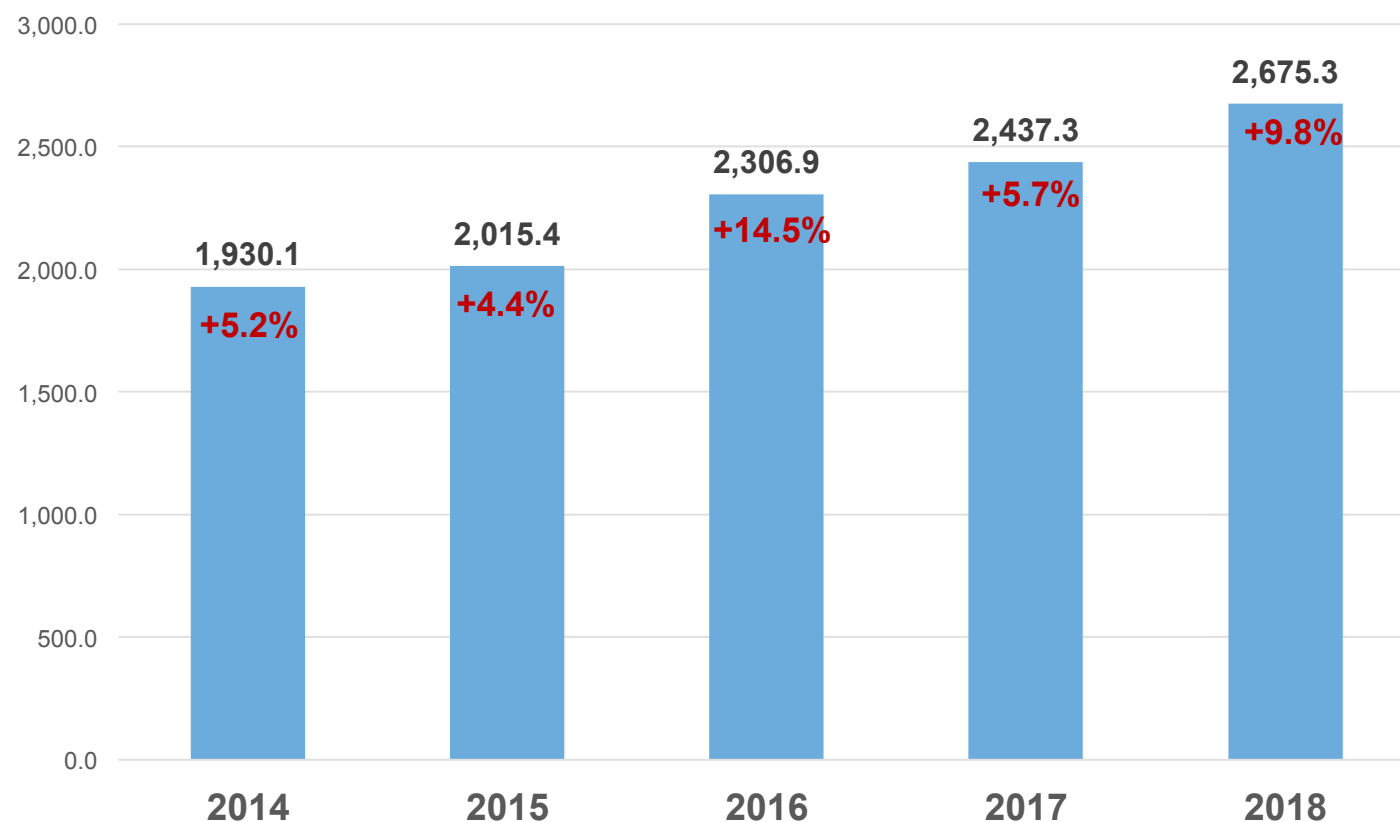
## PHYSICAL

Sales of all physical formats, including CD and vinyl



# Performance rights collections grow

PERFORMANCE RIGHTS REVENUES 2014-2018  
(US \$m, TRADE VALUE)



Country	PR revenues 2018 (US\$)
US	754.1
France	269.3
Germany	260.6
UK	245.8
Japan	146.6
Netherlands	80.6
Brazil	77.4
Italy	59.6
Spain	59.1
Austria	56.4

All values in US\$ at 2018 exchange rates

# Importance of performance rights revenue – Contribution of CMOs

Country (2018)	US\$ in millions	% of total revenues	Global Ranking
France	269.3	27.1%	2
Germany	260.6	19.9%	3
UK	245.8	17.6%	4
Argentina	42.9	55%	12
Austria	56.4	41.8%	10
Netherlands	80.6	27.3%	6
Brazil	77.4	25.9%	7
Italy	59.6	22.1%	8
Finland	26.9	31%	19
South Africa	16.4	31.9%	25

**This shows why good functioning of CMOs is important!**

### 3. Code of Conduct



# IFPI Music Licensing Companies (MLCs) Code of Conduct

- Sets out the guidelines for member MLCs to achieve best practices in the conduct of its operations
- Guided by 3 General Principles – the MLCs must:
  - Act in the best interests of all right holders they represent
  - Offer services and conduct operations in a fair, effective and non-discriminatory manner and in compliance with the applicable legislation
  - Collect and distribute remuneration effectively and accurately



# Structure of MLC Code of Conduct

- Based on these high level principles, there are guidelines covering:
  - Relations with Rights Holders
  - Relations with Other MLCs
  - Relations with Users
  - Transparency
  - Distribution & Management of Revenue
  - Governance

# I. Relations With Right Holders

1. Allow right holders to determine scope and nature of mandates given to CMO
  - that is, the rights licensed to MLC for collective administration (rights, uses, repertoire and territory; exclusive or non-exclusive); unless restrictions are imposed by legislation, court, or are objectively justified for reasons of effective management and licensing of rights and they are proportionate to the objectives they seek to achieve
    - E.g.: digital rights are managed individually by member-companies unless they decide to appoint MLC to collect on their behalf in specific cases such as Webcasting and Simulcasting

# I. Relations With Right Holders

2. Allow right holders to terminate the mandate wholly or in part with reasonable notice period that shall not exceed six months
  - with certain exceptions - at the end of the financial year or continue to be included in licenses granted to users prior to date of notice of termination for a reasonable period of time, not exceeding 12 months.
  - MLC shall continue to distribute to right holders revenue collected prior to termination, on equal terms
    - PPL A12 – “Any Member may terminate his membership .. at any time on at least six calendar months’ written notice, .. in the event of such termination, all rights and authority assigned shall .. be re-assigned by the Company to such Member ...”

# I. Relations With Right Holders

3. Keep and maintain up-to-date records of the members and/or right holders it represents in electronic form, in compliance with applicable laws on data protection and privacy.
  - For distribution purposes
4. Accept as members and provide services to all right holders on a non-discriminatory basis and according to principles of equal treatment, unless refusal is justified and absolutely necessary based on objective criteria:
  - Applicant/member is proven to be engaging in piracy/illegal activities
  - Applicant/member's rights being managed do not fall within MLC scope



## II. Relations With Other MLCs

1. Conclude reciprocal agreements with every other MLC to facilitate multi-repertoire, multi-territory licensing
  - subject to such other MLCs complying with this Code and any requirements of international law
2. Manage the rights they are mandated by virtue of a reciprocal representation agreement in a transparent and non-discriminatory manner

# III. Relations With Other Users

1. Interact with users in a fair and non-discriminatory manner and in a way that ensures that right holders receive a fair price for use of their rights.
2. Establish tariffs that are transparent and based on objective criteria that fairly reflect the value of right holders' rights in trade and the benefits to users of the MLCs services.
3. Require usage reports submission promptly and accurately using standardized formats and identifiers.
4. Provide detailed information within a reasonable timeframe on the repertoire and rights they represent upon justified request from licensees.

## IV. Transparency

1. Make available on their websites:
  - (i) annual reports and accounts
  - (ii) bi-lateral agreements concluded
  - (iii) template membership agreements with right holders
  - (iv) general tariffs
  - (v) articles of association/by-laws
  - (vi) distribution rules
2. Make available to all right holders a list of recordings where owners have not been identified after concluding reasonable identification procedures.
3. Provide to the right holders royalty statements itemized per track and usage sector (radio, TV, cable, public performance).
4. Establish and communicate a fair and effective policy for dealing with competing claims, and to publish dispute resolution procedures.

# V. Distribution and Management of Revenue

1. Encourage right holders to provide accurate, complete and timely information on their rights, repertoires, new recordings, including use of industry standard recording identifiers.
2. Accurately identify the usages and distribute monies to all right holders based on actual use at track level.
  - Distribution of revenue at track level based on actual usage should be the rule in broadcasting.
  - General public performance revenue maybe distributed using statistical samples, monitoring reports, best available proxy reports, or objective market share information



# V. Distribution and Management of Revenue

3. Distribute collected revenue no later than 6 months after the end of the financial year
  - at least twice per year; or
  - at least once a year, in which case MLCs should pay advances to right holders not exceeding the amounts the right holders are actually due for the relevant period.
4. Deduct from the collected sums only the appropriate operational costs
  - No additional deductions unless agreed upon by the rights holders or stipulated by law.
  - MLCs should provide details of such deductions, indicating whether statutory or voluntary.

# V. Distribution and Management of Revenue

5. Distribute unidentified and unclaimed monies proportionately to right holders no later than 3 years after the end of the calendar year in which the monies were collected
  - after best efforts to identify and locate the correct recipients
  - without discrimination between members and non-members
  - according to usage information
  - making reasonable provisions against future claims
6. The distribution rules and practices shall be based on principle of individual distribution according to actual usage
  - non-discriminatory on the grounds of nationality, ownership, genre, or otherwise without objectively justifiable reasons

## VI. Governance

1. Provide right holders the opportunity for a fair and balanced representation in the governing bodies taking into account the direct economic interest of a member.
2. All members should be given voting power that is fair and proportionate to the value of rights, on the basis of the following criteria:
  - (i) Number of the tracks registered
  - (ii) Amounts received
3. Each MLC shall have a general meeting of members at least once a year, which shall have the following powers:
  - (i) appoint/dismiss the members of the board of directors
  - (ii) approve any changes to the statutes and general distribution policies

# WIPO Good Practice Toolkit for CMOs

- IFPI is also a contributing stakeholder representative for this Toolkit which brings together examples of legislation, regulation and codes of conduct in the area of collective management from around the world.
- The Toolkit is a working non-normative document that will continue to be improved.
- <https://www.wipo.int/publications/en/details.jsp?id=4358>

### **3. Fundamentals of Collective Licensing**





# Individual Licensing v. Collective Licensing

## - Management of Rights

**Important** - Right holders' voluntary choice

Factors considered:

- cost-efficiency, business practicality
- nature of use, not nature of rights (often a determining factor)
  - Broadcasting, including satellite and cable (Art 15 WPPT)
  - Public performance (Art 15 WPPT)
  - Dubbing (reproduction for the above purposes)
  - Certain on-line uses (linear simulcasting and webcasting, broadcasters' catch-up services, background music for websites)
- primary use - rights affecting the primary markets, such as digital services (streaming and download services, see [www.pro-music.org](http://www.pro-music.org)) or sales of CDs, always licensed individually.

# Collective Management of Rights

## - Collective Licensing

*Important* – CMOs are **controlled by right holders**, act on their behalves, and are not for-profit entities

CMOs' purpose and main objective – providers of essential business services:

- **Services to right holders** - to monetise their individual rights in a cost-effective manner, and
- **Services to users** - lowering their transaction costs by providing access to recordings on fair and non-discriminatory terms.

# CMO Decision Making

**Important** : *Right holders decide! Right holders know their business and have a vested interest in the CMO's success.*

## Business Decisions:

- What rights should the CMO administer?
- How and by whom should the CMO be governed?
- How much are their rights worth? (setting tariffs on commercial terms)
- How and when should the CMO distribute?

***All decisions should be made by rightsholders collectively.***

# Collective Management of Rights

## - Collective Licensing

CMO Essential framework condition: **Good governance**

Experience shows that good corporate governance ensures:

- Effective, accountable and transparent operations,
- Establishment of reasonable tariffs reflecting the value of the use of the rights in trade, and
- Fair distribution policies and accurate distribution.



# Tools for Good Governance

- **Constitution / by-laws** guarantee members' rights (such as right to vote, right to elect / be elected as directors, and fair, indiscriminatory treatment)
- Set of clear, detailed, fair **distribution rules** reflecting actual use as closely as possible
- Members' representation in **board and general meetings** democratically deciding on matters that affect their interests
- **Independent, professional CEO/GM** who runs the CMO and who does not have conflict of interests or stake in the collections
- Working with international organisations such as IFPI which in collaboration with MLCs and right holders develop **good practices** for MLCs to follow

# Good Governance

## Membership:

- All right holders – domestic and foreign - whose repertoire is in use should be able to become members, provided they meet fair and non-discriminatory membership conditions

## Voting:

- general assembly – weighted voting
- voting powers using criteria such as:
  - Number of tracks [in use] registered;
  - Amounts received or due to a member;
  - Such criteria must be determined and applied in a manner that is fair and proportionate to their value of their rights managed by the MLC.
- limitation on a number of votes by a single proxy holder.



# IFPI & Music Licensing Companies

## Working Together

- Collect and share information and data
- Develop performance benchmarks and set targets
- Identify and help implement industry good practices
- Coordinate and encourage cooperation

## Good governance and conduct of operations of MLCs:

- IFPI MLC Code of Conduct
  - ✓ Financial Monitoring Guidelines
  - ✓ Standard Distribution Principles
  - ✓ Reviewed by IFPI to ensure compliance before affiliation
  - ✓ Agreed roadmap and assistance to those CMOs which have yet to reach compliance

# CMOs – When is Government Support Needed?

In certain situations, *minimal* government supervision / control may be warranted.

- Inadequate rights
- Market confusion
- Establishment and Good Governance
- Low public awareness

Government support can help ensure that right holders control and govern the CMOs.



# CMOs – When is Government Support Needed?

## Note:

- Extended Collective Licensing (ECL) or mandatory Collective Management (CM) – should be imposed only in exceptional circumstances
- Statutory dispute resolution measures - while license fees / tariffs should be commercial decisions between rightsholders and users, both parties should have access to fair dispute resolution

# ECL – benefits?

- Provides a higher degree of **legal certainty for users** than e.g. contractual indemnities; enables users to obtain all rights from a single point;
- **Reduces number of transactions** and related costs for users;
- Increases **CMOs' bargaining power** towards users; CMOs are able to claim to represent 100 % of rights and repertoire (but that power is curbed by competition / antitrust laws or tariff setting tribunals);
- CMOs' ability to **license rights effectively** should benefit right holders – provided they can control the societies and the way they operate;
- From right holders point of view: a lesser evil than an exception or compulsory license.

# ECL – drawbacks?

- Substitutes “opt out” for exclusive rights;
- Places the **burden on the unrepresented right holders to monitor** whether their rights have been licensed, where and by whom;
- Could **remove incentives** to improve CMO services:
  - ECL's tends to increase CMO's undistributed revenues,
  - ECL requires a high level of efficiency, transparency and accountability and high standards of “corporate governance” of the CMOs,
  - ECL combined with unrepresentative or poor quality collective licensing is a toxic mix;
- Requires judicious application as well as sophisticated and effective collective management system, in order to work as intended; otherwise can create serious disruption in the market place.

# ECL – conditions for use

- In order to make use of the benefits and avoid the drawbacks, and to ensure that the ECL complies with the international copyright rules (Berne, WCT, WPPT, TRIPs) any national implementation of an ECL system should meet the following 6 conditions:
  - 1) ECL should always be **limited to specific uses and rights**, i.e. well-defined uses and rights of a narrow, specifically defined scope:
  - 2) **Only truly representative CMO** should be eligible:
    - The CMO should represent the majority of “rights actually used”, both national and international;



# ECL – conditions for use

- 3) In order to be appointed a **CMO must meet high standards of transparency, accountability and governance** (set out in statutes), right holders must have fair and balanced representation in the governing bodies;
- 4) Only one CMO at the time can benefit from the ECL in a given sector and for given rights;
- 5) Right holders should always retain a real option to **“opt out”** from the ECL;
- 6) it **should not be applied** with respect to rights and uses that can be **licensed by right holders individually** (i.e. licensing of most digital uses and services).

# Use of ECL in the recorded music sector

- Which rights are licensed collectively?
  - Broadcasting (including satellite and cable) & public performance (= Art 12 RC / Art 15 WPPT),
  - Dubbing (reproduction for the above purposes),
  - Private copying,
  - Certain on-line uses, but as a rule NOT interactive services (streams or downloads) or distribution of sound recordings,
  - Note, record industry CMOs (MLCs) offer already, on voluntary basis, multi-territory, multi-repertoire licenses for simulcasting, webcasting, catch up services, and for background music on websites;
- Determining factor: **nature of the use, not the nature of rights;**
- ECL has no application for online rights or uses that are as a rule licensed individually not through CMOs.

# Tariff Setting

## Main principles:

- reflect the **economic value of the rights** and the benefit to users of collective licensing
- **simple and workable** tariffs based on economic data

## Economic evidence/justifications:

- USCA - “willing buyer, willing seller” rate setting standard
- EU CRM Directive Art 16(2) – “value of the use of the rights in trade” and “as well as in relation to the economic value of the service provided by the collective management organization”

**Tariffs should be set by MLCs (right holders)** not by statute or governments, but with access by both parties to **fair dispute resolution**.

# Tariff Setting by Governments

- If tariffs, however, are set by government: the same principles must be applied, i.e. **tariffs must reflect the economic value of the rights;**
- Non-discrimination: each MLC is to interact with users in a fair and non-discriminatory manner and in a way that ensures that right holders receive a fair price for use of their rights;
- Communication – right holders, users, professional circle (lawyers, accountants etc) and general public.

**Thank you**

