EU-China Trade Project

Support to China's Integration into the World Trading System

COLLECTIVE MANAGEMENT OF AUTHORS' RIGHTS AND RELATED RIGHTS IN THE EU AND THE PRC

BENEFITS AND CHALLENGES IN THE DIGITAL ERA

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TABLE OF ABBREVIATIONS

AGEDI	The Association for the Management of Intellectual Rights (Asociación de Gestión de Derechos Intelectuales)
AIE	The Artists and Performers Society of Spain (La Sociedad de Artistas Intérpretes o Ejecutantes de España)
AISGE	The Artists and Interprets' Management Society of Spain(Actores e Intérpretes - Sociedad de Gestión de España)
AKM	Austrian Authors' and Music Publishers' Collecting Society (Gesellschaft der Autoren, Komponisten und Musikverleger)
ANGOA	French Collecting Society for Audio Visual Works (Association Nationale de Gestion des Oeuvres Audiovisuelles)
ARD	German Public Broadcasting Company (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland)
ASCAP	American Society of Composers, Authors, and Publishers
AUSTRO MECHANA	Austrian Mechanical Rights Society
AUVIBEL	The Belgian collective rights management company for the private copying of sound and audiovisual works
BBC	British Broadcasting Company
BIEM	Bureau International pour l'enregistrement mecanique
Bild Kunst	Visual artists'rights and cinema directors'rights in Germany
BMI	Broadcast Music Incorporated
BRT	Belgian Public Broadcastng Company (Belgische Radio- en Televisieomroep)
BUMA	Dutch performing rights' Society
CAVCA	China Audio-Video Copyright Association
CEDRO	Spanish Reproduction Rights Centre (Español de Derechos Reprográficos)
CISAC	Confédération International de Sociétés d'Auteurs et Compositeurs
CLA	Copyright Licensing Agency
COPIE FRANCE	French CMS for audiovisual private copy
COPY DAN	Danish CMS for private copy

COPYSUEDE	Swedish CMS for private copy
DAMA	Audiovisual media Author's Rights (Derechos de Autor de Medios Audiovisuales)
EGEDA	Audio-visual Producers' Rights Management Association (Entidad de Gestión de Derechos de los Productores Audiovisuales**)**
GEMA	German Authors' Collecting Society (Gesellschaft für musikalische Aufführungsrechte)
Gramex DK	The Danish Performing Artists' and Record Producers' Collecting Society
Gramex FI	The Finnish Performing Artists' and Record Producers' Collecting Society
GVL	German Performing Artists' and Record Producers' Collecting Society (Gesellschaft zur Verwertung von Leistungsschutzrechten)
GWFF	German Film and Television Producers Collecting Society
IFPI	International Federation of Phonographic Industries
IMAIE	Italian Performers' Collecting Society (Instituto Mutualistico Artisti Interpreti Esecutori)
KODA	Danish Authors' Performing Rights Society
Kopiosto	Finnish Collecting Society for Reprography and Private Copy
Kuvasto	Finnish Collecting Society for Works of Visual Arts
Stichting Leenrecht	The Dutch Lending Rights Collecting Society
MCPS-PRS	Mechanical Right Collecting Society – Performing Rights Collecting
MCSC	Music Copyright Society of China
MMC	Mergers and Monopolies commission
NCAC	National Copyright Administration of China
OFT	Office of Fair Trading
PRS	Performance Rights Society (UK)
Reprorecht	Dutch Reprographic Rights Collecting Society
SABAM	Belgian Authors' Collecting Society (Société Belge des Auteurs, Compositeurs et Editeurs)
SACD	French Dramatic Authors' and Composers' Collecting Society (Société des auteurs et compositeurs dramatiques)

SACEM	French Music Authors' and Publishers' Collecting Society (Société des auteurs compositeurs et éditeurs de musique)
SCAM	French Multimedia Authors' Collecting Societry (Société civile des auteurs multimédia)
SACEM/SDRM	French Mechanical Rights Collecting Society (Société des droits de reproduction mécanique)
SENA	Dutch Performing Artists' and Record Producers' Collecting Society (Stichting ter Exploitatie van Naburige Rechten)
SESAM	French Authors' Multimedia Licensing Agency (Société du droit d'auteur dans l'univers multimédia)
SGAE	Spanish Music Authors' and Publishers' Collecting Society (Sociedad General de Autores y Editores)
SIAE	Italian Music Authors' and Publishers' Collecting Society (Società Italiana degli Autori ed Editori)
SOCAN	Canadian Society of Composers, Authors, and Music Publishers
SORECOP	French Collecting Society for Audio Private Copying Levy (Société de perception et de répartition de la Remunération pour la Copie Privée sonore
SPA	Portuguese Authors' Society (Sociédade Portuguesa de Autores)
SPPF	French Independent Producers' Collecting Society (Société civile des producteurs de phonogrammes en France)
SPRD	Sociétés de Perception et Repartition des Droits
SPRE	French Collection Body for Broadcasting and Public Performance of Phonograms (Sociétés de Perception et Repartition des Droits)
STEMRA	Dutch mechanical Rights Society (Stighting für Mechanische Rechten)
STIM	Swedish Authors' Collecting Society (Svenska Tonsattares Internationella Musikbyrå)
STOART	Związek Artystów Wykonawców (Union of Polish Performing Artists' Association)
SUISA	Swiss Authors' Collecting Society (Schweizerische Gesellschaft für die Rechte der Urheber musikalischer Werke)
Teosto	Finnish Composers' Copyright Society
Thuiskopie	Dutch CMS for private copy

UNESCO	United Nations Educational Scientific and Cultural Organization
VFF	German Film and TV producers organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
ZAIKS	Polish Authors' Collecting Society (Zawiera informacje dotyczące Stowarzyszenia Autorów)
ZPAV	Związek Producentów Audio-Video - Polish Society of the Phonographic Industry
ZPU	The German central office for private copying rights (Zentralstelle fur private Uberspielrechte)

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1. INTRODUCTION

1.1 Foreword

Collective Management Societies emerged in 19th century in Europe and have since then become a comprehensive industry of copyrights management and royalty collections bodies covering all areas of copyright[1]. During the last decade, the rapid development of the internet and information technologies has had a significant impact on the collecting societies and their operating environment. The new digital environment poses many challenges to the collecting societies not least because the setting and enforcement of laws governing the use and transfer of rights in the digital environment has not always kept pace with the speed of those developments. However, it appears that collective management of rights has not lost its role or importance in the new environment. On the contrary in many respects effective collective licensing has become more important than in the analogical era.

China's IP laws are only 25 years old. China and the Chinese copyright industries are yet to establish a comprehensive and effective system of collective management of copyrights. Furthermore, enforcement of rights remains a challenge in China; particularly in the on-line environment. Faced with these challenges the Chinese government and IP industries are aware of the important potential of Collective Management Societies (CMS) and their development in China -- as well as the importance of developing a legal framework for effective individual licensing of rights. The Chinese authorities are currently examining the relative advantages and constraints that the alternative rights licensing and management methods can produce.

Under the circumstances the National Copyright Administration of China (NCAC) would like to better understand the role and operating modes of CMSs in Europe, in particular how they are coming to terms with the digital environment and its impact on the CMSs. The NCAC believes that the experiences from the EU Member States are valuable to the Chinese government and other Chinese stakeholders because they reflect well-established regimes for regulating the collective licensing of copyrights.

1.2 Background and Rationale of the Report

The Government of the People's Republic of China and the EC Commission have signed a cooperation agreement on the Support to China's Integration into the World Trading System.

Within the general framework of the Agreement – and following a request from the EUCTP – a project was set up to examine the European good practices in the area of collective licensing of authors rights and related rights. A Working Group was established in May 2006 and has prepared the following report. The objective of the report is to identify the particular needs related to collective management of rights in China, identify relevant European good practices, and make recommendations concerning procedures and measures that could contribute to the effective

[1] The term copyright is used here in the broad sense to cover also rights that are in many countries called "related" or "neighbouring" rights, notably performing artists and phonogram producers rights.

implementation of collective rights management of rights in China.

1.3 Methodology

In addition to the traditional comparative study, research for this report has taken both a quantitative and qualitative approach. A substantial volume of economic data and legal materials have been reviewed and analysed for this report.

This Study is part of the Project to support to China's Integration into the World Trading System, with the reference Project Number CHD/AIDCO/2002/0418 and the Contract Number Europeaid/116313/C/SV/CN.

2. EXECUTIVE SUMMARY AND MAIN RECOMMENDATIONS

2.1 Project Summary

In the EU there are currently approximately 65 CMSs in the area of music rights alone, collecting roughly € 6 billion on behalf of musical authors, music publishers, performing artists and record companies[2].

The rules governing CMSs vary across the EU Member States though their principle functions are the same across the EU. Whereas the European CMSs are mostly civil law associations, governments in most countries exercise control or oversight over the CMSs

CMSs as a rule engage both in the licensing of the rights they represent and in taking legal actions against those that use the rights without permission.

As CMSs mostly operate along national borders, bi-lateral agreements on reciprocal rights management services between CMSs have become an important part of the societies' day to day operations.

For some time the only operating CMS in China was the Music Copyright Society of China (MCSC). However, a recent law allows for the registering of new CMS to represent other right holder groups. Consequently, new societies managing literary, photographic and audiovisual rights have been either formed or are under consideration.

This report identifies good practices through comparative analysis of the regimes and systems across Europe in areas relevant to the Chinese authorities when they develop further the Chinese legislation and regulation relating to CMS. The report subsequently highlights and makes recommendations regarding concrete measures to be taken by the Chinese authorities as well as areas of cooperation

[2] See e.g. "The Collective Management of Rights in Europe" (KEA July 2006), a report commissioned by the European Parliament.

between European and Chinese CMSs.

2.2 Main Sections of the Report

The report contains the following substantive sections (note that the numbering follows that in the actual report):

- Section 3; summarises the current state of play in China and identifies the needs and the main issues for the Chinese CMSs.
- Section 4; Includes an overview of the relevant international treaties and laws
- Section 5; Examines the regulatory framework for CMSs in the EU
- Section 6; provides a comparative overview of the EU CMSs.
- Section 7; Examines issues related in particular to the digital uses and rights.
- Section 8; Outlines the recommendations and suggestions.

2.3 The main recommendations

The main recommendations of this report are:

- The Current Copyright Act should be reviewed and further updated to provide adequate legal rights as well as enforcement measures and procedures, including enforcement procedures that are workable in the on-line environment. Moreover, even though China ratified the 1996 WIPO Treaties in late 2006 it omitted to grant the performing artists and phonogram producers a general communication to the public rights for the use of their phonograms.
- New CMSs should be established to cover all the relevant areas of use and rights.
- The different public authorities' roles and responsibilities vis-à-vis the CMSs should be clarified, the registration process to establish new CMSs should be streamlined, and the rules related to CMSs activities reviewed so as to remove unnecessary regulation and provide the CMSs sufficient autonomy to run and develop their operations.
- Tariffs for the main areas of use – in particular for the broadcasting of musical works -- should be established without delay, and special dispute resolution bodies to deal with disputes between the collecting societies and users should be set up.
- The CMSs should invest in setting up digital database and developing on-line licensing platforms for all types of works and uses. Financing for such projects could be discussed e.g. with the authorities and development funds.
- The Chinese CMSs should be encouraged to sign reciprocal representation agreements with sister societies abroad.

- Chinese CMSs ties with the public authorities, rights holders and users should be strengthened through awareness raising, provision of members' services, and advice to judiciary and the government branches.

- Remove unreasonably burdensome obligations regarding evidence and other formalities related to legal proceedings against infringers. For instance, China is the only jurisdiction where lawyers representing a foreign client who does not have a permanent establishment in China are requested to produce a legalized power of attorney and where all written evidence originating from a foreign country must also be legalized.

3. STATE OF PLAY AND PRACTICES OF CHINESE COLLECTIVE MANAGEMENT SOCIETIES

3.1 Introduction

The Chinese IP system was founded in 1980s. In 1982 the "Trademark Law of the People's Republic of China" was promulgated. In 1984 the "Patent Law of the PRC" was put into place. The chapter of Civil Rights of the "General Principles of Civil Law" of 1986 spelled out the provisions of the intellectual property rights. In 1990, the "Copyright Law of the PRC" was promulgated and by then, China had completed the intellectual property rights legal system. In the period that followed the Chinese government has revised the "Patent Law", the "Trademark Law," and the "Copyright Law" several times. In January 2002, China was accepted to be one member of the World Trade Organization, which means that after a short period of 20 years, China has gradually established an intellectual property legal system that is largely compatible with international conventions and rules on intellectual property rights.

The highest administrative organ in the field of copyright in China is the National Copyright Administration of the People's Republic of China (NCAC), which was established in 1985. Its main functions include: formulating copyright related policies, drafting laws and regulations, general administration, instructing the subordinate agencies, international relations, promoting policies to raise public awareness, administering the related industries, and handling the copyright infringement cases that cause severe damage to the public. At present, 31 provinces, autonomous regions and municipalities directly under the Central Government have all set up Copyright Administration agencies. Further, 71 of the nation's 332 cities have set up the Copyright Administration agencies. The copyright administration departments in most other cities usually work together with the Press and Publication Administration, Cultural Institutions, or Administrative Agencies of Radio, Film and Television.

3.2 The regulation of NGOs in China

Due to the provisions in the Copyright Act the establishment of CMSs in China should follow the "Regulations on Registration and Administration of Social Organizations". Under the applicable laws and regulations, the regulatory system of Chinese non-governmental organizations can be described as "centralized registration, double responsibility and hierarchical administration". The

"centralized registration" means that unless specifically exempted from registration requirements, all non-governmental organizations should be registered at the civil affairs department. Registrations with other departments are regarded as invalid. The "double responsibility" means that non-governmental organizations are administrated by the registration department and the competent authorities, both of which work together to carry out the administration and supervision on the organizations. The "hierarchical administration" means that based on the scope of the organizations, the registration and administrative departments are different. The national non-governmental organizations are registered with the relevant department at the State Council and the lower-level ones with the local authorities.

3.3 Legal basis and state of play

The Chinese Copyright Act revised in 2001 included provisions regarding collective management of copyright. On 1 March 2005, the State council promulgated the "Regulation on Collective Administration of Copyright" ("Regulation"), which now governs the establishment, organizational structure, activities and supervision of CMSs.

3.3.1 Establishment of CMSs

Article 3 of the regulation provides that:

> *"The organization for collective administration of copyright as mentioned in this Regulation shall mean a civil society that is lawfully established for the benefit of the right owners, and conducts collective administration of the owner's copyright or other copyright-related rights upon the authorization of the right owners. An organization for collective administration of copyright shall be registered and carry out activities in accordance with this Regulation and other administrative regulations on registration and administration of social organizations."*

Article 7 of the regulation prescribes how to establish an organization for collective administration:

> *"Chinese citizens, legal persons or other organizations that lawfully enjoy copyright or copyright-related right, may initiate the establishment of an organization for collective administration of copyright. For the establishment of an organization for collective administration of copyright, the following conditions shall be fulfilled:(1) There shall be no less than 50 right owners who initiate the establishment of the organization for collective administration of copyright;(2) The scope of business of the organization for collective administration of copyright shall not overlap or coincide with that of another lawfully registered organization for collective administration of copyright;(3) The organization for collective administration of copyright may operate in the interest of relevant right owners throughout the country;(4) The organization for collective administration of copyright has formulated a draft articles of association, a draft of royalty rates to be charged, and a draft measures for distributing royalties to the right owners (hereinafter referred to as measures for distributing royalties)."*

Article 7 of the regulation states that only one collective society can be established for the exercise

of a certain type of right or use. It also provides a legal basis for the Chinese government for approving the establishment of collective societies to avoid competition between the collective societies administrating the same right.

3.3.2 Relationship between CMSs and right holders

Article 8 of the Chinese Copyright Act provides that the owners of copyright and related rights may authorize an organization to license their rights collectively. This clearly demonstrates that the relationship between CMSs and right holders is based on individual mandates from the right holders to the CMSs.

3.3.3 The supervision on CMSs

The Regulation also specifies the forms of government supervision of the CMS in the following five aspects:

Firstly, the right holders' rights vis-à-vis the CMSs are specified in the Regulation to ensure a balanced relationship between the CMSs and the right holders.

Secondly, the Regulation confirms the general assemblies position as the CMSs highest policymaking body to ensure that the power is in right holders' hands.

Thirdly, the Regulation prescribes the supervisory duties of executive branches of the government, such as departments of civil affairs, finance, and the copyright administration department under the State Council.

Fourthly, users and other social organizations have been conferred rights to oversee the CMSs activities.

Fifthly, the Regulation specifies the CMSs internal institutions and operations to ensure transparency.

3.3.4 Works subject to collective management

Not all categories of works and/or rights covered by the Copyright Act are subject to collective administration. According to the Chinese Copyright Act, works that can be managed by a CMS are mainly musical works, cinematographic works and works created by virtue of an analogous method of film production, written works, works of fine art, and photographic works. Article 4 of the Regulation provides the types of rights subject to collective administration

> *"Such rights as prescribed in the Copyright Law which are difficult to be effectively exercised by the right owners themselves as the right of performance, projection, broadcasting, lease, dissemination through information network, reproduction, etc., may be subject to collective administration by organizations for collective administration of copyright."*

3.3.5 Statutory licenses

According to the Chinese Copyright Act certain users (such as book publishers, newspapers, periodical publishers, and producers of sound recordings, and broadcasters) can under certain conditions use the works without the right holders' permission, but they must pay compensation to the right owner.

Article 47 of the Regulation provides that

> *"Whoever uses the works of any other person in accordance with statutory licensing, but fails to pay royalties to the right owners, shall submit the royalties along with the postage and the relevant information on use of the works to the organization for collective administration of copyright which administers the related rights, and this organization for collective administration of copyright shall distribute the royalties to the right owners."*

Considering establishing a statutory licensing system requires a close relationship between the CMS and right holders, the Regulation stipulates that

> *"the organization for collective administration of copyright, which is responsible for distributing royalties shall establish an inquiry system for details of use of works for access by both Right Owners and users. The organization for collective administration of copyright which is responsible for distributing royalties may withdraw management fees from the royalties it has collected. The amount to be withdrawn shall equal to 50% of the management fee of the copyright collective management organization determined at the Members' Assembly. Except for management fees, the copyright collective management organization shall not withdraw any other fees from the royalty fees collected."*

3.3.6 The development of CMS of China

In December 7th 1992, the Chinese Musicians' Association and the NCAC initiated the establishment of China's first organization for collective administration – the Music Copyright Society of China (MCSC). NCAC also approved the preparation for the establishment of the Literary Works Copyright Society of China in 2000, and the Sound and Video Recording Copyright Society of China in 2001, the latter of which is established on May 28, 2008. Photographic Works Copyright Society and Literary Works Copyright Society of China have been ratified by the NCAC and they are now in the process of registration with the Ministry of Civil Affairs. The collecting society of performers is also in the preparatory process.

3.4 Main issues / problems for CMS related laws and regulation in China

Compared with more developed countries, China's CMSs are less developed in terms of the number of members, revenues and the efficiency of management. The development of CMSs has encountered many difficulties.

The revision of China's Copyright Act in 2001 and the enactment of the Regulations have improved the situation, but many problems related to the design of collective administration system remain

and they will be discussed hereafter.

3.4.1 Extended collective licensing

The Collective Administration as prescribed in the Copyright Act and the Regulation is a voluntary licensing system, and consequently the CMS need direct mandates from the right holders. The existing legislation does not include a provision whereby the "small rights" including the broadcasting, public performance and showing of non-dramatical works could be licensed by an approved collecting society even without an express mandate from the right holders. Moreover right owners can exercise those rights separately. The existing legal system does not grant CMSs a privileged status in exercise of the mentioned small rights. This results in the risk that the licensees – such as broadcasters or bars or shops – that have obtained a blanket license from a CMS may still be sued by individual small right owners.

3.4.2 The absence of a dispute settlement mechanism

Article 26 of the Regulation provides that where two or more organizations for collective administration of copyright charge royalties for one type of rights they may negotiate in advance to determine which one shall charge the royalties in a unified way. But what if no agreement can be reached? How to settle the severe dispute relating to the royalty fee rate and main right users or association of right owners? How to deal with the dispute between the member of the organization and the users?

Due to an absence of dispute settlement mechanism in the Regulation, the Regulation empowers the government to intervene in the management of CMSs for the purpose of supervision. As the administrative and supervisory agency for CMSs, NCAC should supervise the organisations to ensure that they safeguard the interest of the copyright owners, facilitate the lawful exploitation of copyrighted material and endeavor to keep a balance between the interests of the right holders and the users of works or other protected subject matter.

It is however not an easy task on one hand to strengthen the supervision on CMS and on the other hand to ensure sufficient independence for the societies so that right holders are given maximum autonomy and a sound environment for development of CMSs can be created. In general the relationship between CMSs and the right holders, between the CMSs and the users and between the CMSs should be subject to civil law rules and normal civil process. However the absence of dispute settlement mechanism has lead to an excess of "red tape" and interventions by NCAC and the passiveness of CMSs.

3.4.3 Standing to take actions on behalf of foreign right holders

According to Article 8 of the Copyright Act a CMS may appear in its own name before courts in cases involving rights it administers. It is the first time that the standing of the CMSs has been established in China.

But even after the revision of the Copyright Act it not sufficiently clear that Chinese CMSs may take legal action in their own name on behalf of foreign copyright owners. For instance in the case

concerning Jacky Cheung's concert in 2002, Tianjin High People's Court ruled that the MCSC could not sue in its own name on behalf of the members of a Hong Kong based CMS, which should itself initiate the lawsuit. The decision of this case has direct impacts on the protection of the rights of foreign copyright owners. It is unrealistic and also does not conform to the international practice to require overseas collective societies to bring legal actions in their own name in China. The MCSC has appealed the case to the Supreme People's Court of China.

Moreover mainly due to the large number of works involved the cost of litigation for the CMSs has surpassed the cost of individual suits, especially in cases involving foreign parties. However the damages awarded are usually much less than those awarded to copyright owners who bring lawsuit individually.

In addition by virtue of the Chinese laws on Civil Process the burden of proof that rests on a CMS is heavy and costly. Whereas the CMSs are ratified by the state and operate under the supervision of the government, the courts should be allowed to acknowledge their status and determine that after a CMS has presented evidence to back their infringement claims the user should have the responsibility to prove that he or she has not infringed copyright.

3.4.4 Miscellaneous issues

Additional problematic issues / areas include:

- Citizens have little or no awareness on intellectual property rights;

- Insufficient enforcement actions and lack of deterrence;

- Discrepancies between laws and administrative regulations, departmental rules and judicial interpretations. For example:
  - although CMSs are defined as "non-profit organization" tax authorities still require them to pay income taxes for monies they collect;
  - CMSs face difficulties in registering local offices in the different regions; China Audio-Video Copyright Association (CAVCA) was ratified by NCAC but its establishment remained effectively blocked by the registration procedure that took the Ministry of Civil Affairs for over two years and half. It was until June 2008 the CAVCA finally completed its registration.
  - The standard tariffs applied by CMSs for music broadcasted on radio and TV has not yet been fixed;
  - some courts do not recognize the CMSs' standing to bring legal actions in their own name to protect the rights of foreign right holders the CMSs represent by virtue of reciprocal representation agreements concluded with foreign societies

- Local protectionism -- some local governments are reluctant to take actions against known pirates or cooperate with CMS in such action, so as to protect local economy;

- Lack of coordination between administrative departments and industrial organizations. The Ministry of Culture, which is not the government branch responsible for copyright, is in the

process of setting up a nationwide "unified karaoke music database" which will automatically record the number of orders of karaoke products incorporating musical works. The objective is to enable the calculation of royalties for the copyright holders on the basis of recorded orders. This project is however in conflict with the work of MCSC and the China Audio Visual Products Copyright Society that are in charge of collecting royalties from karaoke clubs for the use of musical and audiovisual works. Furthermore, the government branches responsible for radio and TV are unwilling to enter negotiations on royalties with MCSC. As a result the music copyright holders are losing substantial revenue as radio and TV broadcasters organizations refuse to pay royalties.

3.5 Collective licensing of digital services and the main challenges

The digital music market has grown rapidly in China. iResearch, a media consultancy, forecasts that China's digital music market (including both on-line and mobile) would come up to 2.66 billion yuan, 4.12 billion yuan, 5.58 billion yuan, and 7.64 billion yuan respectively in 2005, 2006, 2007 and 2008

The Chinese digital music market has absorbed also a large amount of international capital. During a short span of 6 months from October 2005 to March 2006, China's digital music industry obtained nearly 700 million yuan of investment. Hurray, a NASDAQ listed company acquired 60% of shares of Feile Recording, and then 51% of shares of Huayi Music. Rolling Stone Mobile has received a venture investment of 30 million dollars. Moreover, new business models which rely on the Internet to distribute music, movies and games constantly emerge in China.

Digital technology not only enables new distribution models and new business opportunities it also provides CMSs with the technical solutions for more efficient management of rights. However, at present collective management of digital rights in China is limited to the licensing of authors rights for the downloading of ring tones. In addition, CMS are unable to deal effectively w3ith the rampant on-line piracy. The main reasons for the above situation are:

- There are only few CMSs and they deal exclusively with music. In line with the international practice largest right holders such as the film studios and record companies have opted for the individual rather than collective licensing of their on-line and mobile rights;

- Some agencies collect authorizations from the right holders in order to become engaged in the collective management of their rights without being officially accredited to do so, which can lead to problems. For instance, some of these agencies are only allocating small portions of the collected royalties to right holders, which is hardly in the best interests of the right holders.

- CMSs lack the capabilities to use high technology such as digital rights management applications (DRMs). For instance, when the MCSC authorises on-line services to use rights in the works in its repertoire, it does not track the use of the rights using applicable technologies -- such as DRMs. Neither does it add DRM to music authorized so as to prevent the reproduction and dissemination of unauthorized music. It is understood however that the actual application of DRMs is as a rule the task of the producer of the final product (a film or a sound recording) or the service provider

rather than the CMSs' task;

- The Chinese CMSs have not sufficiently adapted their operations to the digital environment. For instance the CMSs are yet to establish on-line repertoire databases open for public inquiries or set up on-line licensing platforms.

4. OVERVIEW OF THE RELEVANT INTERNATIONAL FRAMEWORK FOR THE PROTECTION AND MANAGEMNT OF AUTHORS' RIGHTS AND RELATED RIGHTS

Copyright is an exceptional field of law in that it is widely harmonised at international level by operation of international treaties, the most important of which include the Berne Convention, The Rome Convention, The Phonograms Convention, The WIPO Copyright Treaty, The WIPO Performances and Phonograms Treaty, and the WTO TRIPs Agreement.

The Treaties are all based on two general principles of national treatment (i.e. grant the same rights to works – and other protected subject matter – from other countries as to their own nationals) and minimum protection (i.e. the rights and protections stipulated in the Treaties as a minimum). In addition the WTO TRIPs Agreement also includes a "Most Favoured Nation" (MFN) clause. It is maintained here that ensuring that national law meet the international copyright standards established in these essential treaties is a prerequisite for the development of vibrant creative industries at local level. The rights incorporated in the Treaties also provide the basis for effective licensing of authors' rights and related rights nationally and internationally.
Of these Treaties the WTO TRIPs Agreement is obviously particularly important for this report. The obligations of the Parties to TRIPs Agreement concerning the substantive rights and protections to be granted to the right holders can be summarised as follows:

TRIPS AGREEMENT RIGHTS SUMMARY (articles 9 to 14)
a. Authors:
- Obligation to adhere to the Berne Convention provisions (articles 1 through 21) with the exception of moral right.
b. Performing artists:
- Obligation to provide protection against the unauthorised fixation of live performances in a phonogram, and the reproduction of such fixations
- Obligation to provide protection against the broadcasting and communication to the public of live performances
- A minimum term of protection of fifty years from the date of fixation or performance
c. Producers of phonograms:
- Obligation to provide protection against the direct or indirect reproduction of their phonograms
- Obligation to provide the right to authorise the commercial rental of phonograms
- A minimum term of protection of fifty years from the end of the year of fixation
d. Broadcasting organisations:
- Obligation to provide protection against the unauthorised fixation of their emissions

- Obligation to provide protection against the unauthorised reproduction of fixations made of programs
- Obligation to provide protection against re-broadcasting by wireless means.
- Obligation to provide protection against the communication to the public of TV broadcasts
- Where Contracting Parties do not grant such rights to broadcasting organisations they shall at least ensure the content owners have the means to prevent the above acts.
- A minimum term of protection of twenty years from the end of the year of the broadcasting

It can be noted that regarding authors' rights the TRIPs Agreement by incorporating the material provisions of the Berne Convention, which was first adopted in 1886 and modernised 6 times since then to respond to the technological developments, provides for a high level of protection to authors of works.

Regarding the related rights the TRIPs Agreement only incorporates a relatively small portion of the provisions of the Rome Convention -- which at the time was the seminal treaty on the protection of rights of performers, phonogram producers and broadcasting organisations -- or its "successor" the WPPT. It follows that the TRIPs Agreement alone does not guarantee adequate level of legal protection for performing artists and phonogram producers. The EU and the Member States all provide performers and phonogram producers legal rights and protections that exceed the minimum required by the TRIPs Agreement, for instance by providing that both have at least a right to remuneration for broadcasting and any communication to the public of phonograms (Rental directive 92/100/EC, Art 8(2))

The EU has implemented all the above international copyright treaties into its *acquis communautaire*.

China is Party to the Berne Convention and the WTO TRIPs Agreement. In December 2006 China has also ratified the 1996 WIPO treaties, the WCT and the WPPT. As regards to benchmarking the national implementation of these international treaties it would appear well advised for the Chinese Government -- within the framework of the EU -China cooperation – to examine the relevant EU Directives in the field of authors' rights and related rights which together with the national laws implement the international treaties in the EU. For instance; the Chinese Government is encouraged to use the EU Information Society' Directive (2001/29/EC) as a benchmark and a possible model for its national implementation of the treaty obligations under the WCT and the WPPT.

Finally, China is also a signatory to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005,* which among other things recognizes "*the importance of intellectual property rights in sustaining those involved in cultural creativity*".

Although there is no international treaty dealing directly with the management and exercise of rights, the international treaties in the filed of copyright in many respects at the very least implicitly recognise the existence and even need for collective management and licensing of rights in certain situations. For instance Article 12 of the Rome Convention states that when a phonogram is used in broadcasting or any communication to the public users shall pay a "single equitable remuneration" to either performers or phonogram producers, or to both. The EU has gone further in that respect and stipulated on mandatory collective management in certain situations, for instance, with respect to the

exercise of rights to cable retransmission (Article 9, Directive 93/83/EC). In addition the European Commission issued in 2005 a recommendation regarding the collective cross border management of rights for online music services (2005/737/EC).

We will proceed to examine closer the mechanisms and legal basis for collective management in the EU.

5. Overview of Collective rights management Mechanisms in the EU

5.1 Basis

The starting point is the right holders' freedom to determine whether, when, and how to license the use of their rights. In the EU this principle is enshrined in and it underpins for instance the EC Recommendation on cross border licensing referred to in the previous section.

The international copyright treaties are also built on this principle in that they for instance limit the national governments' powers to impose compulsory licenses and the governments' powers to force right holders to transfer or license their rights against the right holders consent[3]. Equally, it appears that national provisions on mandatory collective management would need to be tried against the "three step test" incorporated in the Berne Convention and the 1996 WIPO Treaties before they can be applied. It follows that as regards to the exercise and management of their rights right holders -- authors, performers and producers – have a number of options available to them.

The preferred form of licensing – individual or collective -- depends on several factors such as the nature of the work, the nature of the intended use, and the status of the right holder. For instance whilst some right holders decide to manage their rights individually, others may decide to license their rights for the same use through collecting societies. To give an example: authors of musical works and music publishers license their reproduction and performance rights for on-line services through collecting societies, whereas record companies license individually their rights and the performers' rights they control for the same uses. This goes to highlight that different right holders come to different conclusions regarding the licensing methods that best serve their needs.

It should go without saying that right holders' ability and freedom to choose between individual or collective management does not undermine the importance or status of technique of collective licensing or CMSs. It is imperative for the functioning of the copyright system that effective collective management societies exist even if collective licensing is not made mandatory. It is for the governments to ensure that when collective management is in the best interest of the rights holders they have the option available for them and that the CMS have a legal environment that enables them to carry out their tasks in an efficient manner to the benefit of the right holders and the users.

[3] See e.g. Berne Convention articles 11*bis* and 13.

5.2 Generally about management of authors' rights and related rights

The first operational CMS was set up in France during the mid 19th Century. Already at the time the national applicable law provided for the possibility of establishing CMSs with the objective of enabling the right holders to benefit from their legal rights and the users to use obtain the necessary authorisations in a cost effective manner.

The technique of collective management has since then been further developed first to face the growth of the use of musical works in particular and the development of communication channels. Ithas then been spread over to cover virtually all fields of rights and uses.

Due to the sheer number of stakeholders and remuneration schemes involved -- as well as the increasingly international nature of the trade in rights -- CMSs and the network of reciprocal representation agreements between the societies have become a critically important tool in driving the growth in copyright related industries. However it is worth stressing that the role and management procedures of the CMSs differ depending on the services and rights and right holders they represent, for instance CMS play a different role in licensing the authors' rights than in the field of related rights.

5.3 Regulatory approaches to collective management

There is currently no general EU harmonization as regards to the activities of CMSs and consequently the national legal and regulatory frameworks for CMS vary across the EU Members States. For instance, in Germany the establishment and operation of CMSs is closely regulated by a special law[4] whereas is the UK there are no special provisions (apart from rules on tariff control in the form of a copyright tribunal) regulating the establishment and running of a CMS.

However, despite the differences in the regulatory approaches all the Member States recognize and allow for collective management of authors' and related rights. Moreover there are many similarities between the Member States laws dealing with the area of collective rights management, for instance most Members States' laws regulate on the legal form of CMSs and include provisions to the effect that CMSs shall be non-profit making. Other areas of national regulation include accreditation, governance, government supervision, transparency both vis a vis right holders and users, tariff setting, and dispute resolution[5].

Also, regardless the different regulatory approaches the actual functions and operations of the collecting societies across the EU are very similar, which indicates that the way CMSs are actually structured and run is affected more by their function and purpose than the regulatory environment.

[4] Act on the administration of copyright and neighbouring rights of 9 September 1965 (http://transpatent.com/gesetze/urhwg.html)

[5] For a concise overview of the national law provisions governing CMSs see Part III: *State of play and Practices of Chinese Collective Management Societies.*

5.4 Mandates from the right holders

The authorisation given to a CMS may take the form of a "mandate to administer" the rights[6] -- in which case the CMS does not become the owner of the rights in the proper sense of the word -- or of a time limited assignment of rights to the CMS[7] – in which case the CMS is the owner of the assigned rights for the duration of the mandate. This applies equally to authors' rights and the related rights.

In some cases the CMSs require the rights to be assigned to the society for the reason that otherwise the society would not have legal standing to defend the rights in court proceedings. This particular issue has been addressed in the EU Enforcement directive (2004/48/EC), which recognises the special standing of CMSs and establishes in Art. 4(c) that

> *"Intellectual property collective rights-management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law"*

shall be entitled to apply for all the same enforcement measures, procedures and remedies that are made available to individual right holders under the directive.

The mandate, in whichever form it is given, includes as a rule the right to license rights to third parties, the collection and distribution of royalties, and the right for the society to start the necessary legal actions in its own name to defend the rights.

In most EU countries CMSs are de facto if not de lege monopolies, which means that the societies have managed to obtain through voluntary assignments the vast majority of rights for the repertoire used, which paradoxically even if it creates tensions in terms of creating market power at the end benefits both right holders and users. For right holders this ensures that the CMSs hold the power to effectively defend the rights they administer and for users it provides access to a blanket license to all rights in a particular category of works or other copyrighted matter from one place.

5.5 Rights managed

The authors' rights that are most commonly licensed by the CMS include:

- Public performance / communication to the public / broadcasting of musical works (excl. dramatic works, opera, i.e. the so called grand rights):
- Reproduction of musical works

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[6] Example for instance the Articles of Association of the PRS which under "Membership – Assignment of Rights" state that: Every Member shall, on election, or at any time thereafter if requested by the Society, assign or cause to be assigned to the Society all rights to be administered on his behalf by the Society in accordance with the following provisions of this Article.

[7] Example The straight forward assignment of rights include all situations whereby the right holder transfers the ownership of the rights -- as opposed to the mere administration thereof -- to the CMS, against the obligation imposed on the CMS to pay through the collected royalties to the right holder.

- Performance right for literary works
- Use of works of visual arts (in particular the reproduction right, the resale right, the private copy levy and licenses for the right of public communication, including the use in TV broadcasts;
- Reprography (CMSs managing the reprographic rights are often "umbrella" societies managing rights on behalf of all types of right holders and users. The same umbrella societies sometimes also administer the cable retransmission rights).

In the area of related rights in particular as concerns the performing artists and phonogram producers the rights most commonly licensed by CMSs include:

- The broadcasting and public performance of phonograms and music videos

- The reproduction of phonograms for subsequent use in broadcasting and public performance (*so called dubbing)*

As can be seen from the above CMSs manage a substantially smaller set of rights in the related rights area than they do regarding authors' rights. For instance rights implicated in the sale of sound recordings in physical format or via on-line or mobile services are not managed by producers' and performers' CMSs. Equally, producers' and performers' rights implicated in the use of sound recordings in commercials, feature films, or computer games are licensed directly by the phonograms producers, who in all these cases by virtue of contracts with the artists, as a rule also control the performing artists' rights.

5.6 Distribution of Collections

Even though CMS are as a rule free to define independently their distribution rules in conformity with their statutes, some national laws provide general conditions for the manner societies' distribute the collected monies. For example:

- The German Act[8] Art. 7 states that distribution must take place "*in accordance with fixed rules excluding any arbitrary way*";
- The Spanish Copyright Act Art. 149.2 in turn requires that "*the CMSs have to reserve to the right holders a distribution based on the use of their works*";

In addition, pursuant to the Rental directive (92/100/EEC)Art. 8(2), remuneration for broadcasting and public performance of phonograms has to be shared between performers and producers. The directive goes on to state that in the absence of an agreement between performers and producers Member States may lay down conditions for the sharing of the remuneration. Some Member States, e.g. Spain and France, have subsequently stipulated on equal shares between the right holders whereas others, e.g. Germany and the Nordic countries leave parties the freedom to agree on the modalities.

[8] See supra footnote 4.

Lastly, the French legislation provides for unassigned amounts (e.g. prescribed and unidentified monies) to be allocated for cultural purposes. This also the case for private copying levy income of which 25% is allocated to cultural and social purposes.

5.7 Examples of national rules and regulations

The statutes of CMSs may differ from one jurisdiction to another, with differences in the legal basis, legal form, the role of accreditation and controlling bodies, the rights conferred to the CMSs, the amounts allowed for cultural and social purposes and other particularities such as the application of extended collective management – a particular statutory construction first practiced in the Nordic countries.

The following provides an overview of a sample of national regulations and the general status of CMSs in important EU territories.

5.7.1 Germany

Oversight and statutes

The German Collecting Society Act[9] regulates the activities of the CMSs, including the obligation to seek authorisation from the Federal Patent and Trademark Office, operating under the Ministry of Justice (PTO). The PTO is in charge of overseeing the activities of German CMSs and it has the power to request information from the CMS, to attend to the meetings of the General Assemblies and executive bodies of the CMSs, and to revoke the authorization.

Relations with right holders and users

The German Act does not regulate the legal form of the CMSs and in practice the CMS have been set up in a variety of forms, from limited liability companies to associations of economic character. The Act further imposes a list of obligations upon the CMSs with respect to relations to the rights holders as well as the users. For instance within the scope of their activities the CMSs have on one hand the obligation to accept to administer on equitable terms the rights of all right holders (Art 6), on the other hand the CMSs have the obligation to grant licenses on equitable terms to all users requesting to be licensed (Art 11).

Dispute resolution

The Act also includes provisions on dispute resolution (Art 14). In the event a CMS and a user or (as is very often the case) an association representing users cannot agree on the terms of the license the dispute shall be brought to the Arbitration Panel (*Shiedsstelle*), that has the power to issue recommendations to parties, before an action is brought to a Civil Court.

[9] See supra note 4.

5.7.2 Spain

Oversight and statutes

Spanish Copyright Act contains a title[10] related to the CMS. According to the Act CMS need the authorization of the Ministry of Culture and are subject to the oversight of the Ministry.

CMS have to be non-profit organisations and most of them are civil associations governed by the applicable Spanish law on associations, together with applicable provisions of the Spanish Copyright Act.

The Spanish law favours the operation of only one CMS for each sector of activity, but accepts also more, as far as they all comply with the obligations and conditions set out in the Act.

According to the Act CMSs are entitled to manage rights on behalf of third parties, and the societies are mandated either by way of an assignment for the purposes of collective management, which is used in the music and audiovisual field, or by an administration mandate, which is used with the literary authors' rights. The Act sets the maximum term for the mandates from the right holders to the CMSs at 3 years, following the relevant ECJ case law.

Relations with right holders and users

CMSs are obliged to conclude framework agreements with associations representing users and to publish their tariffs for each type of exploitation. For instance, the music and audiovisual rights licensing fees are separated in the SGAE's (the Spanish Music Authors' and Publishers' Collecting Society) tariffs table.

Dispute resolution

The Act includes provisions on voluntary arbitration before an Arbitration Commission established by the law of 1987, but until 2007 the option has never been used.

5.7.3 France

Oversight and statutes

The French Intellectual property Code[11] has included specific provisions on CMS only since 1985, despite the fact that it was in France in the 19th century where the first CMSs were set up.

French law call CMSs as "societies for the collections and distribution of rights" (S.P.R.D.- *Sociétés de Perception et Repartition des Droits*) and they constitute a particular category of civil associations: non-profit societies, members of which have to be right holders -- authors, publishers, performing

[10] Book III Title IV of the Spanish Copyright Act of 12 April 1996

[11] Book 3, title 2 title of the French Intellectual Property Code, 1 July 1992. Articles L321 1-13. (http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm)

artists, phonogram and/or video producers, or their successors in title.

The law does not impose a requirement of prior authorisation but obliges the CMSs to submit their statutes and general regulations to the Ministry of Culture that can, if serious reasons exist to do so, oppose the constitution of a collecting society. CMSs are also under the obligation to submit their yearly accounts to an official controller.

Relations with right holders and users

The French law aims to ensure transparency in relation to right holders and users through provisions on:

- The obligation to communicate CMSs' statutes and modifications thereof to the Ministry of Culture;
- The obligation to communication annually a report on the society income and distributions to the Ministry of Culture;
- The obligation to publish the repertoire represented by the CMS;
- Powers granted to the Minister of Culture to apply the Court to order the dissolution of a CMS

The law also states specifically that the contracts between users and the CMSs shall be regarded as civil law contracts.

The law gives CMSs the legal standing to appear in courts in their own name to defend the rights they administer. This authority is further enhanced by the appointment by the Ministry of Culture of sworn agents within the CMSs "to verify any evidence of infringement" of authors' and neighbouring rights. This system of "official agents" is unique to France and has proven to be an efficient tool in the fight against piracy.

Dispute resolution

There are no general provisions on dispute resolution in the French Code, special rules exist concerning disputes regarding cable retransmission rights, which will be subject to mediation, and disputes regarding performers' and producers' rights to broadcasting and public performance of phonograms which will be settled by a special commission.

5.7.4 Denmark

Oversight and statutes

In Denmark only CMSs administering the resale right, private copying levy and the remuneration for broadcasting and public performance of phonograms need an official appointment by the Ministry of Culture. Apart from the CMS administering the private copying levy, CMSs are not subject to specific on official supervision in Denmark.

Relations with right holders and users

No specific regulations exist, but the Danish CMSs are subject to the generally applicable civil law and competition law rules regulating the activities of associations and economic undertakings.

As a rule right holders assign their rights, present and future to the CMSs.

Dispute resolution

There are no generally applicable rules on dispute resolution. Copyright Licensing Panel a special dispute resolution body has the authority to solve disputes in certain fields of exploitation, including the broadcasting and public performance of phonograms.

5.7.5 United-Kingdom

The UK Copyright, Designs and Patents Act of 1988 inlcudes no specific provisions on CMS or their control. The only form of control of CMS in the UK is through the Copyright Tribunal, which has the sole jurisdiction to hear cases regarding the CMS tariffs in the UK.

In addition the Office of Fair Trading – the UK competition authority -- may initiate investigation into alleged breach of competition law by the CMSs. Following a request by the OFT the UK Mergers and Monopolies Commission (the MMC) prepared a thorough report on the UK collecting societies in 1994. The MMC report obliged among other things the UK Performance Rights Society (PRS) to change the exclusive character of the rights mandates so as to give the right holders the possibility for individual management of rights, particularly with respect to live concerts.

5.7.6 Belgium

Oversight and statutes

The Belgian Copyright Act of 30th of June 1994 contains a Chapter dedicated to the CMSs. Any society or company that administers and collects or distributes royalties for authors' or related rights is subject to the provisions in this Chapter.

A CMS must have its commercial establishment in one of the EU Member States. Anyone can take the initiative of creating a CMS, but it will have to be authorized by the Minister of Economy

As a private company, an authorized CMS will have the total freedom in drafting its rules and deciding over the tariffs, with the exception of the CMS for related rights. Tariffs applied by the CMS for related rights will be determined by a Royal Decree that will be adopted after a negotiation between rights holders and consumers.

The obligations imposed on the CMSs include:

- Control by an external reviser;
- Control by a delegate of the Ministry of Economy;

- Special rules as to the distribution of non-identified works;
- Rules on transparency.

All the CMS have to pay 0.2% of their collected rights to the Ministry of Economy in order to finance the oversight.

A new Act on the control of the CMSs is now being drafted by the Federal Parliament, and should be adopted in 2007. According to the current draft, it would strengthen the controls and obligations of the CMS.

Relations with right holders and users

Within the scope of its activity a CMS has the obligation to accept to administer the rights of any right holder asking for it.

Dispute resolution

There are no special provisions on dispute resolution

Authors' Societies Boost Users' Activity

The societies group together individual right holders, so that users do not have to seek them out and negotiate specific licensing agreements with them. Each authors' society represents a large number of rights holders (SACEM has 109,000 members) and via reciprocal representation agreements each society makes the world-wide musical repertoire available to users. SACEM has a repertoire of some 2 million works that are effectively used, and the "FastTrack" repertoire includes nearly 20 million works. FastTrack is a network connecting the documentary databases of several main authors' societies. It includes the following societies:

SACEM, GEMA, SGAE, SIAE, BUMA-STEMRA, PRS-MCPS, SABAM, AKM, SUISA, SOCAN, ASCAP, BMI. When a user signs a contract with an authors' society, this licensee is authorised to use this entire repertoire, in keeping with the contractual conditions.

This "one-stop" role of authors' societies is essential in providing users commercial and legal certainty. In practical terms only the blanket license stemming from the network of reciprocal agreements between the authors' societies can legally and effectively offer the flexibility and variety that users need.

Licensing conditions are the same for all works, i.e. the authors' remuneration varies only according to the number of times the works are used. This pricing policy based on solidarity is the best possible protection for small authors; it is also an essential factor of simplification for users.

Licenses granted by CMSs are not exclusive, and CMSs may not discriminate between users without an objective reason. All users can obtain licences to use the repertoire of authors' societies under the same conditions insofar as their circumstances are the same; licenses are not granted to one operator to the exclusion of others. Record companies, radio and television broadcasters, and Internet music

services all have access to the same works, provided they sign a license agreement with a representative CMS .

It is not unreasonable to say that neither the phonographic industry, nor radio and television would have developed as they have, if they had not benefited from the advantages offered by collective licensing. Indeed, representatives of the BBC have not hesitated to underscore how useful authors' societies are to broadcasters. It is fair to say that CMSs give a boost to economic activity in the sectors that rely on the use of musical works.

6. EUROPEAN CMS COMPARED

6.1 Licensing practices

As has been established above the activities of CMSs in the EU cover a wide range of rights. These include compensation for private copying, reprography, rental, resale (*droit de suite*), mechanical reproduction and performing rights, which includes broadcasting and online rights. The main differences lie in the organisation of CMSs. Despite the fact that all European Member States recognize the right holders' entitlement to be remunerated for the use of their copyrighted material, the modalities for collective management vary quite significantly from one jurisdiction to another and from one CMS to another.

The following section examines closer the actual licensing practices of the CMSs in the different EU Member States and with respect to the different categories of rights.

6.2 Remuneration for private copying

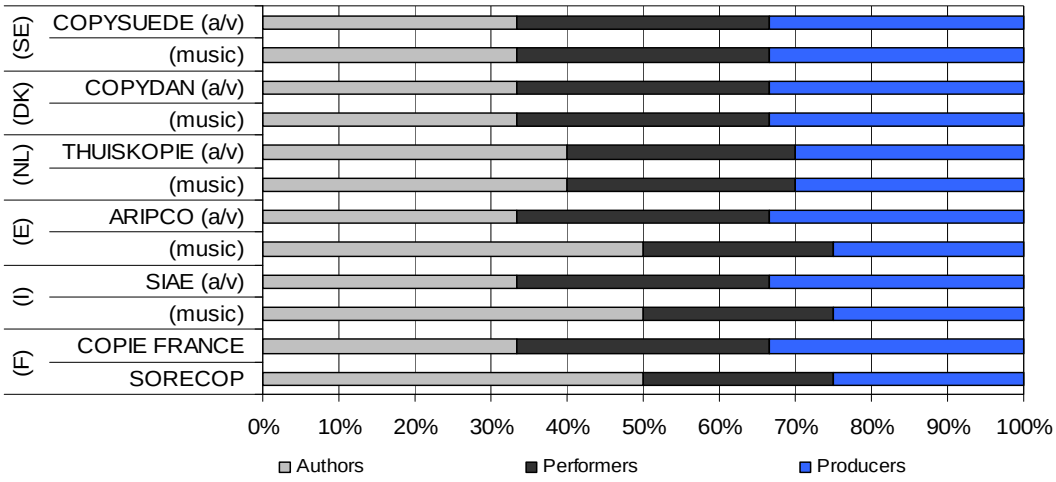
All EU member states, with the exception of the UK, Ireland, Luxemburg, Cyprus and Malta recognize the right of remuneration for the recording of music and audiovisual works and phonograms for private purposes.

The collection and distribution of the private copying levy is without exception performed by CMSs. Most countries have designated one CMS to be in charge of the collection of the levy and subsequently distributing it to the various representative right holder organisations, normally the CMSs directly representing the different right holders, i.e. authors, performers, and producers. This is not mandatory however and France, for instance, has introduced a different system in which collections are made by the musical authors' society SACEM/SDRM on behalf of two "private copying societies" managing the levy collections in the field of music (SORECOP) and audiovisuals (COPIE FRANCE) respectively. Levies are then distributed to right holders by the SORECOP and COPIE FRANCE according to surveys on the actual copying made by the private individuals.

Here follows a list of some of the EU CMS active in this area:

- Finland: KOPIOSTO
- France: SORECOP (sound);
  COPIE FRANCE (a/v);
- Germany: ZPU
- Belgium: AUVIBEL
- Holland: THUISKOPIE
- Sweden: COPYSUEDE
- Spain: SGAE, AIE, AGEDI, AISGE, EGEDA, DAMA
- Austria: AUSTRO MECHANA
- Denmark: COPY DAN
- Italy: SIAE
- Poland: ZAIKS, STOART, ZPAV

In most Member States the levy paid is proportional to the capacity of the recording media. The sharing of the levy income between the right holders however varies from country to country. Before the distribution between authors' CMSs, performers' CMSs and producers' CMSs as represented in the chart below, certain countries impose an obligation to deduct an initial amount to be allocated for cultural purposes actions (in Denmark 33%; France 25%; Spain 20%; the Netherlands 15%) and to other possible beneficiaries such as the union of the radio broadcasters (in Denmark 5.3%; Sweden 6%).



6.3 Reprographic Rights

All EU Member States with the exception of Cyprus have established Collective Management Societies to administer Reprographic Reproduction Rights (Reprography), normally referred to as Reproduction Rights Organisations (RROs). These CMSs that are set up jointly by authors and publishers, receive their mandates from the right holders, from the law or a combination pf both. Any authors or publishers who can have their work reproduced in printed form such as writers including journalists and translators, visual creators of all kind, composers and publishers of books, journals newspapers, magazines and music (e.g. sheet music or song books) are members of a RRO.

The RROs in Europe offer licences/authorize the reproduction of portions of copyright works (e.g. a chapter or a few pages) for internal, personal use in all relevant sectors: education, public administration, private corporations, etc. The authorization would often encompass at least digitization for posting on internal electronic networks.

The RROs operate according to 3 main models. With the exception of Cyprus and Malta the operation of RROs has at least some form of recognition or backing in the Copyright legislation. The Copyright Licensing Agency (CLA) and the Irish Copyright Licensing Agency (ICLA) in the UK and Ireland operate on the basis of voluntary licenses.

In France there is a system of compulsory collective administration, whereas the RROs in Denmark, Finland and Sweden operate under an Extended Collective Licence, a legal structure under which the license is by law extended to cover also the works of non-member right holders. The normal situation is that the RRO receives a non-exclusive mandate, which enables also the authors and publishers to license reprographic copying of their works themselves, but this option is rarely used.

In the Netherlands and to an extent also in Italy there is a system of statutory licences, i.e. the law grants the user the right to make reprographic copies but subject to the payment of a compulsory remuneration to the right holders paid via the RRO (CMS).

A levy system to compensate authors and publishers for the reprographic reproduction of their works exists in a total of 22 out of the 27 EU Member States including Austria, Belgium, Greece, Portugal and Spain. The levy is paid to the RRO (CMS) for further distribution to the authors and publishers.

In most Member States the reprographic levy is on equipment and devices (equipment levy). In Luxembourg it is not yet fully operational as the tariffs have not been approved by the authorities**.** In a number of countries the reprographic equipment levy is complemented with a voluntary licence for multiple uses in education and administration. This is for instance the case in Spain. In other countries such as Austria, Belgium, Germany, Portugal and Slovenia the operators of the reprographic equipment also have to pay a levy per copy made, referred to as an operator levy, in addition to the equipment levy.

6.4 Unwaivable right to remuneration for rental

The Rental directive (92/100/EEC) harmonised the rental and lending rights throughout the EU. In spite of that, significant differences exist between the Member States. In some Member States these rights are managed by individual authors and artists, which is the case for instance in Germany, Denmark and the UK and in which case the producer as the assignee manages the rental right and remunerates authors and performers in accordance to the contract. In other Members States the rights are managed by a CMS, which is the case e.g. in Austria, Belgium, Spain, Finland, Greece, Italy, the Netherlands, Portugal and Sweden. Ireland and Luxembourg are yet to implement the exclusive rental rights.

6.5 Resale right (Droit de suite)

As with rental rights, one a difference lies in whether these rights are subject to mandatory collective management (as in Germany, Denmark, Finland, Portugal and Sweden) or whether right holders can administer the rights individually (as in Belgium, France, Greece, and Spain). Some Member States have not yet established this right (Austria, Ireland, the Netherlands and the UK) or have not yet put it into practice (Italy and Luxembourg).

6.6 Mechanical reproduction right

The right to authorise mechanical reproduction of musical works onto analogue or digital carriers is as a rule managed by CMSs, which license the authors' exclusive reproduction rights implicated in the process.

BIEM / IFPI Agreement

BIEM -- which represents the CMSs that administer the mechanical reproduction rights on behalf of authors, composers and music publishers -- used to negotiate international industry agreements with the IFPI -- representing the interests of the phonographic industry -- to agree on the terms of mechanical reproduction on audio and audiovisual carriers (such as the applicable royalty rates, conditions for payment, verification of the volume of copies, etc). The general contractual conditions

were then included and adapted into national agreements. The last international BIEM / IFPI agreement was terminated in June 2000 and it as not been renewed since

Large producers tend to establish relationships with a single or some CMSs and conclude Central License Agreements that cover the entire EU

One difference between the mechanical reproduction CMSs is that in some EU countries musical authors' mechanical reproduction rights and performance rights are managed by one and the same society (for instance in Germany, Spain, Italy, Portugal and Poland) whereas in others there are specialised societies for both rights (for instance in France, the Netherlands and the UK). Further in some countries the mechanical rights societies act as agents for the right holders (e.g. MCPS in the UK) whereas in most EU countries the CMSs are the assignees of the rights and may license them in their own name.

6.7 Communication to the public

Whilst the legal regimes governing the communication to the public of works and phonograms in the EU Member States are very similar -- by virtue of minimum harmonisation brought about by the Rental directive (92/100/EEC), the Satellite and Cable directive (93/83/EEC) and the Information Society directive (2001/29/EC) – there are practical differences in the licensing practices between the territories.

Two particular areas of licensing are worth closer examination, namely the licensing of rights for public performance[12] and for satellite broadcasting.

[12] Public performance refers here specifically to the making of works or sounds or representation of sounds fixed in a phonogram audible to the public, see e.g. WIPO Performance and Phonograms Treaty Art. 2(g). For a further example of the definition of public performance see e.g. the Spanish Copyright Act Section 20 (1) and (2), an English translation of which is available at http://www.wipo.int/clea/docs_new/en/es/es070en.html#JD_ES070_A17

6.7.1 Public performance

A major difference between the CMSs' licensing practices in this field lies in the tariff structures applied in the various segments of the public performance markets.

A basic distinction between the applicable tariffs and tariff structures is often made on the basis of the character of the use and the role of music in the users activity. Music can be essential, necessary or incidental for the users' activity and the tariffs should be and as a rule are structured accordingly. This principle is generally followed by CMSs administering authors' rights as well as those administering performers' and phonogram producers' public performance rights.

In other words, when the use of music is essential to the user's activity (e.g. discotheque, a jukebox, or karaoke service) the fee should be higher than that charged from a user who is using music in a less intense manner. Further, often times the public performance fee for discos and jukeboxes is calculated as a percentage of the user's turnover, whereas the fees for other public performance uses are as a rule monthly, quarterly, or yearly lump sums.

With a large number of users scattered around a given territory, it is essential for the CMSs to deploy efficient modern marketing and collection techniques to keep the cost of collection to a minimum. CMSs have to, among other things, choose whether to set up collection operations to approach individual users with a view to ensure the payment of the license fees or remuneration or to seek operational savings through co-operation and framework agreements with associations representing a large number of users. The methods deployed for the public performance collections may and are even likely to vary between the market segments and territories, and from a society to another depending on the level of development of the society. For instance, established CMSs are likely to be better off with seeking to maximise the number of paying customers, whereas young societies could be well advised to start by concluding framework agreements with associations representing users.

6.7.2 Satellite broadcasting

Although the copyright regime regulating the communication to the public by satellite is largely harmonised in the EU, the rules governing the technicalities of radio and TV broadcasting (such as rules on operating concessions and content regulation) vary from one MS to another.

The license fee and remuneration for satellite broadcasting is as a rule paid either as a percentage of the broadcasters' gross revenue generated by advertising, sponsorship, subscription fees, selling of air-time etc, or as a fixed fee per subscriber in the case of subscription services. The tariff can also be a combination of both, or "greater of" a fixed fee and a percentage of revenue.

The tariffs are generally negotiated between the parties. Contrary to the general rule of territoriality of copyrights, cross border satellite broadcasters are licensed by the up-link country CMS due to the provision in Art. 2(2)(b) of the Satellite and Cable directive (93/83/EEC) which establishes a country-of-origin rule through a legal fiction whereby a cross border satellite transmission from one Member State to another is deemed to take place only in the country where the "signals are introduced into an uninterrupted chain of communication".

6.8 Distribution practices

The principles according to which the EU CMSs distribute monies to right holders are very similar in all Member States and for each category of rights. The distributions should reflect the actual use of the copyrighted material. However, some differences exist with regard to the modalities involved, including but not limited to the management of the sampling process, the financing of the costs of administration (e.g. through administration fees), and in certain cases the socio-cultural dimensions.

6.8.1 Identification processes

As the distribution must be proportional to the actual use of the protected material, it is essential that the CMSs receive adequate usage reports from the users. Accurate distribution comes with a cost however. The more usage reports are being processed, and the more precise and detailed the information that is being surveyed to achieve higher accuracy, the higher the costs. At one extreme, in particular in the case of smaller users, it is possible that the license fees paid by a particular user would be used up in the identification and matching process. To achieve an optimum balance between accuracy and cost effective distributions virtually all CMSs apply sampling -- whereby especially smaller users are grouped together and monies collected from the entire group are distributed on the basis of a sample of usage reports -- with respect to some areas of licensing including public performance, reprography, and private copying.

A couple of remarks are in place in this context. First, even if the sampling method is used it is important that all users provide accuratlly a full usage report. Second, technologies are being developed that facilitate automatic and cost-effective ways to identify material that has been used. Such technologies include identification based on digital fingerprints[13] and/or embedded information. Wider use of such technologies will be in the best interest of all stakeholders the CMSs, right holders and the users. As a result of effective use of IT and new applications most of the monies collected by CMSs -- on an average over 70% -- are distributed according to precise reports or logs or programmes. This is the case for main radio and TV broadcast stations, concerts, mechanical reproduction, performance of drama works etc.

6.8.2 Administration fees

The amounts and allocation of administration costs vary from society to society. Some CMSs charge the same percentage to all rights categories, whereas others determine the fees based on actual costs for each exploitation.

For instance, with respect to the mechanical reproduction rights that are generally managed by CMSs administration fees vary between 5 to 8% of the rights revenue. For performance rights, which are more costly to administer due to the large number of users, the cost of administration is typically between 10 and 15 % for established CMSs, whereas new societies' costs would form a higher percentage of their revenue.

[13] See for instance www.audiblemagic.com

6.8.3 Deductions for social and cultural purposes

Some national laws impose on the CMSs the obligation to allocate a certain proportion of their collections for social and cultural purposes, for instance in France 25% of the income from private copying levy shall be used for such purposes. Similar provisions exist in the laws of other Member States particularly with respect to private copying levy income.

In addition, some Member States oblige CMSs to set up bodies with the aim and responsibility to protect the social welfare of their membership. It is debatable whether it is good policy to impose such obligations on private parties and to require individual right holders to finance the operation of these bodies. Be that as it may, it is noteworthy that some Member States e.g. the UK and Ireland have to date not imposed such burdens on CMSs.

6.8.4 Use of accrued interests

Due to the nature of their activity CMSs as a rule have at any one time substantial amounts of right holders' money waiting on their accounts for the next distribution. Prudent management of these means is part of CMSs activities.

Some societies, such as the Spanish SGAE, use the interests accrued to deduct their administration fees (as do most French CMSs such as the SACEM). Others, such as the German GEMA, integrate them with the society's income.

6.8.5 Unidentified or unclaimed monies

At the end of the applicable prescription period, which varies between the general civil law prescription period [of 10 years] in some Members States to a special [3 years] limit applied especially to claims against CMS in others, many CMSs are left with income for which they have not been able to find the correct individual recipients. In most cases the share of such unidentified monies is marginal, and generally less than 2% of all distributions.

CMSs statutes generally include rules regarding the use of these sums, which often needs to be agreed on by the Board or the General Assembly. In many cases these sums are used for social and cultural purposes.

6.9 The role of public authorities

As has already been established in section 2.7 of this study public authorities are in many Member States involved, one way or another, in the establishment or running of the CMSs. In the main the authorities are involved in the activities of CMSs either in accrediting new CMSs, or in exercising control and oversight over the societies, or in exercising control over tariffs through approval of the proposed tariffs or through arbitration or other dispute resolution mechanisms.

In the following we will examine in more detail the role of public authorities in these three stages. It is worth noting at this point that apart from the intervention based on specific CMS related legislation

competent authorities throughout the EU have dealt with CMSs also based on competition law[14] or general civil law rules.

6.9.1 Establishment of CMSs

There are two main alternative procedures for the establishment of new CMSs in the EU, notably one requiring prior authorisation and another requiring only registration. There are also Member States, such as the UK and Sweden, which require neither for the setting up of a CMS.

The regime of prior authorisation is by its nature more restrictive and interventionist than the regime of declaration and/or registration, in that it normally establishes a supervising authority, and introduces the possibility of revoking the authorisation. Where authorisation is required it normally applies to all CMSs nationwide, although some Member States apply it only to CMSs dealing with rights that are subject to mandatory collective management.

The table below provides an overview of the authorities competent to authorise the establishment of new CMS (or the renewal of CMSs' concessions) in selected MS together with the applicable criteria[15] (Deloitte et Touche, 2000).

	FR	**AT**	**BE**	**DK**	**LU**	**SP**	**DE**	**GR**
Competent Authority	Min. of Culture	Min. of Education	Min. of Economy	Min. of Culture	Min. of Economy	Min. of Culture	Patent Office	Min. of Culture
Competence	x	x	x		x	x	x	X
Material means	x		x		x	x	x	x
Representation				x		x	x	x
Ability to cancel or suspend	x	x	x	x	x	x	x	

6.9.2 Surveillance and Control

As a rule, the public authority in charge of overseeing the CMSs is the same as the one empowered to authorise the societies.

The oversight can take the forms listed below, however, it should be stressed that these powers are not cumulative, i.e. the competent national authorities are not as a rule vested with all the powers in the list, and that they are not necessarily applied to all CMSs, but applied only to societies that operate in sectors where collective management is mandatory**,** such as cable retransmission and private

[14] In fact there is a body of competition law cases and decisions dealing with CMSs both at the European level and at the Member States level.

[15] Source Deloitte and Touche, 2000.

copying.

a). Nomination of one or more delegates from the surveillance authority to the CMS's governing bodies, with the right to:

- Attend the General Assemblies
- Be in receipt of all pertinent CMS documentation.
- Approve the CMS distribution rules
- Propose sanctions against the CMSs in cases of breaches of relevant laws
- Right to ask for the removal of an individual representative

b) Approval of the CMSs' accounts by an auditor appointed by the surveillance authority

c) "Ex post" control by an independent authority, such as the "Permanent Commission for the control of CMSs" established in France.

6.9.3 Dispute Resolution

Conflicts between right-holders often relate to the distribution of royalties. The collecting societies generally provide for voluntary internal mediation bodies to deal with these disputes. This is for instance the case in France (SACD), Denmark (COPY-DAN Tribunal) or in Portugal (SPA). In other cases such conflicts are solved by an external dispute resolution body: for example in Germany a right-holder that thinks he/she has suffered damages can appeal to the Arbitration Panel, a body operating under the Patent and Trademark Office.

The most frequent conflicts are those between users and the CMSs and dealing with the license fees. Most EU countries have established voluntary mediation or arbitration mechanisms or procedures to facilitate out of court settlements and/or to ensure the required expertise in these cases. The Austrian, German, Finnish, Spanish and Danish dispute resolution procedures are based on the generally applicable arbitration rules, whereas in France, Ireland, Luxembourg, Netherlands, and Sweden have established an ad hoc procedure, where the mediator is appointed by the Government.

6.9.4 The European Commission involvement

The European Commission has followed actively the developments in the rights management sector in Europe, in particular as regards to cross border licensing of rights.

In 2006 the EU Competition Directorate issued a "Statement of Objections" against CISAC and EU CMSs' territorial licensing practices as regards to the licensing of satellite and online rights. The EU investigations followed complaints by two broadcasters RTL and Music Choice. The case is now subject to a possible negotiated solution that would lead to removing the territorial restrictions and more competition among EU CMSs.

Moreover, the Recommendation published by EU Internal Market Directorate concerning Cross

Border Licensing of Copyrights in 2005 has lead to the setting up of new licensing platforms, such as CELAS – a joint venture between PRS and GEMA to administer the rights of EMI Music Publishing – and HARMONIA – an alliance between SACEM, SIAE and SGAE – that intended to license also the rights of other right holders and other EU CMSs if they agree.

Conflicts with right holders: Scope and duration of CMSs' mandates

The extent, scope and duration of the rights mandates to the CMSs are frequent sources of conflicts between the right holders and the CMSs. The content and form of the mandates requested by the CMSs differ, often even between the CMSs operating in the same Member State, for instance in the following respects :

Nature of the mandate

- Authorisation to administer: BE, DK, FI, FR, GR, IT, LU, NL, PT, DE, SE, UK, POL.
- Transfer/Assignment of rights: BE, DK, FR, GR, IT, LU, NL, SP, UK, POL.
- Contract *sui generis*: AT, DE.
- It is worth noting that differences between the type of mandates are sometimes due to differing legal regimes applied to the different categories of rights rather than due to actual right holder preferences

Extent/scope of the transfer of rights

- Exclusive mandates(authorization/ agreements): AT, BE, DK, FI, FR, LU, NL, IT, SE;
- Future works covered: BE, DE, DK, FI, FR, IT, LU, NL, SE, UK;
- Option to fragment works and/or rights: BE, DE, GR, IE, UK, SP, FR.

Duration of the transfer of rights

- Indefinite: AT, BE, DK, IE, FI, FR, LU, UK;
- Limited but renewable term (3 to 5 years): DE, GR, IT, PT, SP, SE.

The decisions of the European Commission and the Court of Justice confirm two important principles applicable to the relations between the CMSs and the right holders: first, the term of the mandate should be limited to a maximum of five years (but it can be renewable), and second, the CMSs cannot require the right holders to mandate them with respect all the rights to all their works. These decisions have lead to a series of modifications in the status of the CMSs to ensure that right holders are able to split the administration of their rights between CMSs and/or license some of their rights individually.

In addition following a report by the UK Monopolies and Mergers Commission (1996) that criticised the exclusive nature of the PRS's mandates, the UK musical authors CMSs -- PRS and MCPS -- modified their statutes in order to allow in particular for the individual administration of rights implicated in major live concerts.

7. IMPACT OF THE INTERNET AND THE DIGITAL ENVIRONMENT ON CMS

7.1 Copyright laws are technology neutral

EU and the Member States' copyright laws are built on the principle of "technological neutrality", which in essence means that the Copyright laws are applicable and the legal protections valid with respect to restricted acts regardless of the technology or media used in the exploitation of the protected material.

The Internet and digital technologies do however pose many new challenges to the efficient licensing and enforcement of copyrights. This does not imply that the underlying copyright rules would be as such inefficient or obsolete, but it calls for changes on one hand to the licensing practices and on the other hand to the enforcement of copyrights.

7.2. Enforcement of copyrights in the digital era

The development of digital technologies over the past twenty years amounts to nothing short of a revolution in many respects, in particular within the cultural sector. The benefits of digital technology are multiple and undeniable, for instance:

- In terms of access to copyrighted material;
- In terms of capacity and durability of storage of data;
- In terms of arrangement, indexing and searching of information;
- In terms of the quality and cost of reproduction.

At same time, it is an often-repeated fact that applications based on digital technology can also be used in ways that pose significant risks for the right holders. For instance, increase in broadband Internet penetration facilitates equally the dissemination of genuine products and access to pirated products. In addition to the constantly surfacing new ways to abuse technologies the sheer volume of infringements poses a major problem for the right holders. IFPI the association representing the recording industry world-wide estimated in January 2006 that the number of infringing music files available on the Internet at any one time was 885 million, a figure incomprehensible in its magnitude -- even if it was down from the July 2005 figures!

It seems that in order to ensure that the Copyright system continues to function effectively certain material provisions as well as enforcement procedures and remedies need to be adapted to the digital network environment. Regarding the enforcement related provisions the TRIPs Agreement in fact requires much, stating in Art 41(1) that:

> *"Members shall ensure that enforcement procedures as specified in this Part are available under their law so* ***as to permit effective action against any act of infringement of intellectual property rights*** *covered by this Agreement****, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements****…"* (emphasis added)

The EU has taken a number of steps to ensure right holders have adequate means to enforce their copyrights in the digital network environment. For instance both the Information Society directive

(2001/29/EC) and the Enforcement directive (2004/48/EC) include provisions aimed ensuring fair and effective enforcement of rights in the Internet environment. Such provisions include:

- Possibility to apply for injunctive relief against Internet intermediaries to prevent infringements, even where such intermediaries cannot be held liable for infringements (Directive 2001/29 Art. 8(3)) – which enables the right holder so put end to an on-line infringement even when they do not yet know the identity of the infringer

- Right of information against those whose services have been used to infringe rights (Directive 2004/48 Art. 8(1)(c)) – which enables the right holder to obtain the true identity of the infringer so as to start legal actions

- Presumption of ownership and subsistence of copyrights (Directive 2004/48, Art. 5) -- which ensures that the Courts are not clogged in infringement proceedings involving hundreds or even thousands of individual works by obviously groundless claims regarding the true ownership of the rights

- Standing of professional organisations and CMSs (Directive 2004/48, Art. 4) – which gives the professional industry anti-piracy bodies and CMS authorized by the right holders to defend their rights a legal standing to bring legal proceedings in courts

- Right to obtain adequate and deterrent level damages for on-line infringements (Directive 2004/48, Art. 13 and Directive 2001/29 Art. 8(2))

In addition the EU is currently looking to adopt a directive that would among other things harmonise criminal penalties for IPR infringements in the EU[16].

In terms of legal actions against on-line infringements it is worth noting that the music industry has taken a number of high profile legal actions against illegal services in Europe and outside (including against at the time biggest P2P service KaZaa) as well as against large scale up-loaders on P2P networks. China has recently become a particular problem for the music sector especially due to Internet services offering unauthorized music through so called deep links[17].

Whilst these actions have not been able stop on-line infringements, according to the IFPI they have helped contain the problem despite the simultaneous growth of broadband penetration. The IFPI is however calling for the Internet Service Providers to assume greater role in the fight against illegal activities in their systems and networks. Such calls are likely to be boosted by the recent decision by the Brussels Court of First Instance in the case SABAM v Scarlet (Tiscali) [18], in which Scarlet the Belgian ISP was ordered to take steps to filter out unlicensed music files in its network.

[16] The Commission Proposal COM(2005) 276 final, July 12, 2005

[17] See e.g http://www.ifpi.org/content/section_news/20070424a.html

[18] Published on 27 June 2007, available at http://www.juriscom.net/jpt/visu.php?ID=939

Challenges for the Music Sector

The music sector was the first to be profoundly affected by the growing distribution of pirated digital works over the Internet. The first serious legal challenge appeared with the development of "decentralised" peer-to-peer (P2P) software which, rather than connecting users to a central server, creates a network of clients or peers, to search for and distribute copyrighted material on the peers' computers. However, recent court decisions from around the world – including from Australia, Finland, Korea, Japan, and the US -- have confirmed that the operators of these services as well as the individual peers uploading pirate files may be liable for the infringements and thus subject to the same penalties as other ordinary counterfeiters.

The downloading of pirated music has increased with the development of the Internet and the new illegal services. Over the past 6 to 7 years the legitimate music sales have experienced steep decline; the value of global music sales fell by 23 % between 2000 and 2005. A number of reports and independent studies now confirm the link between downloading from illegal sources and the decline of legitimate sales.

In some European territories the decline has even surpassed the global average.

In France for instance the industry revenue declined by 14.,4 % in value in 2003; 13,6 % in 2004; 1,7 % in 2005; and 9,8 % in 2006. This decrease has affected all categories of repertoire, including classic, international, and francophone.

These developments raise a number of particular concerns: The recording industry employs directly about 10 000 people in France, however, the number of people directly and indirectly employed by the music sector in the country is about 130 000. From the cultural diversity point of view the fall of

revenue means that the record companies have been forced to cut down the number of recording artists. In particular new artists may find it difficult to find a company willing to take the risk of a new release.

The IFPI Digital Music Report 2007 – available at www.ifpi.org -- provides a full and up-to-date account of the current state of the digital on-line and mobile music markets

Increasingly Worrying Situation for the Film Sector

For a long time the film sector was not hit as hard as the music industry by on-line piracy for reasons that include the following:

- Due to limited bandwidth at the consumer end it was not feasible to download feature length films
- In contrast to audio CDs, DVDs include copy protection measures;
- Recordable DVD players were expensive thereby out of reach to many users;
- DVD rental provided consumers easy access to films

However, because of the development of new digital formats in particular MP4 and powerful applications like DivX, combined with the significant increase in broadband internet access and the popularity of P2P software designed to facilitate the distribution of films (e.g. BitTorrent), the film industry is now facing major difficulties.

In France, two studies carried out by the national film centre in May 2004[19] researched the Internet usage and its consequences on the music and film sectors. These studies established among other things that:

- Of the 15,3 million internet users, 8 million had broadband access and 41% had already watched pirated films over the Internet and 31 % had also downloaded such copies;
- The average number of downloads was 11 new films per month (32 million copies per month) which were not kept for subsequent viewings, and 27 films which were kept (80 million).

These French data illustrate the threat posed to the film industry by downloading from illegal sources. The threat was has subsequently been confirmed by the decrease in industry turnover. The decrease is at least partly due to the fact that downloaders reduced their cinema going – according to the studies 21 % of the downloaders reduced their cinema going -- which amounts to an estimated 9 million tickets, and affected both national and foreign films.

Finally, it is intriguing that 55 % of Internet users thought that downloading films from the internet is lawful at least for as long as long as there is no commercial activity involved. Only 31% of users knew that the practise of making copyrighted content available to the public without the right holder's consent is a criminal infringement.

7.3 Envisaged Solutions

7.3.1 Cooperation between stakeholders

In 2004 the French government launched an initiative aiming at promoting cooperation between all stakeholders -- right holders, intermediaries and the public authorities – to enable the launch of new on-line service and fight online piracy. The initiative took the form of a charter that was signed by various stakeholders (see Annex 2). Pursuant to the charter, all parties undertake to take steps to ensure that intellectual property is respected and that right holders are remunerated. The charter also includes measures aiming at developing legitimate online music services and making legislative changes in close collaboration with Internet Service Providers and right holders. Progress with the implementation of the charter as well as any future developments, are being addressed in a committee, which is to meet every second month. The Government is monitoring the results of the implementation of the charter. This initiative could set an example of better cooperation between the stakeholders, including the internet intermediaries, to boost the legitimate online music market.

In Spain, an inter-ministry Committee has prepared an information and awareness campaign in TV

[19] Population: 75% men aged 15 to 24 years; 40% pupils and students; 34% of higher socio-professional categories;

with the message that downloading from illegal sources "kills the culture" and we all have to respect the creators and culture activities.

7.3.2 Adequate criminal and civil enforcement

The EU has updated and harmonized the enforcement related rules in the Member States to ensure that right holders -- including the CMSs -- and public authorities have access to fair and effective procedures, measures and remedies to fight on-line piracy[20]. The EU directives in this area provide a benchmark for legislation that ensures adequate means to defend copyrights in the digital network environment.

7.3.3 Increasing public awareness

On-line piracy is not a victimless crime! Apart from the direct revenue losses to the right holders piracy leads to

- Job losses throughout the value chain, as legitimate content providers and retailers have to scale down or shut down their operations
- Loss of tax revenue for the governments as pirate operators do not declare revenue or pay taxes
- Loss of consumer confidence when consumers become disappointed and frustrated with the inferior quality of the unauthorised on-line services and the spyware and viruses they often carry.

The public should be made aware of the benefits of the copyright system to the society at large and the negative effects of online piracy and downloading from illegal services.

8. RECOMMENDATIONS AND SUGGESTIONS TO FURTHER DEVELOP THE COLLECTIVE MANAGEMENT OF COPYRIGHTS IN CHINA

8.1 General Recommendations

Based on the analysis of the current state of play in China and the overview of the practices and legislation related to CMS in Europe we submit the following general recommendations for the development of collective management of copyrights in China.

8.1.1 Legal rights and enforcement provisions

China should ensure adequate legal protections and rights in line with the international treaties both as regards to substantive rights and enforcement thereof. There are still major shortcomings in the

[20] See supra section 4.2

copyright protection in China, most notably the absence of performing artists' and phonogram producers' rights for the broadcasting and public performance of their phonograms. China should provide those rights forthwith to comply with the European and international standards.

Equally, China should benchmark its enforcement related legislation, in particular as regards to the procedures and measures to fight the on-line piracy, with the respective EU directives that provide fair and effective provisions for the enforcement of copyrights.

8.1.2 Establishment of new CMSs

Right holders in China and the Chinese authorities should establish separate CMS at least for

- literary works,
- visual arts and photographic works,
- performing artists' and phonogram producers' broadcasting and public performance rights[21]

[Note: Photographic works copyright society and Literary Works Copyright Society of China have been ratified by the NCAC and they are now in the process of registration with the Ministry of Civil Affairs.The collecting society of performers is now in the preparation process.]

8.1.3 Removing legal obstacles

The Chinese Government should see to that legal obstacles to effective collective management should be eliminated, in particular:

(i) Standard of royalty fees for the broadcasting of music in radio and TV broadcasting should be formulated;

(ii) CMSs should not be treated as profit making entities and consequently the tax authorities should not tax CMSs with respect to the monies collected by the CMSs on behalf of the right holders, but tax instead the CMSs with respect to the surplus they might make with their administration fees and directly the right holders with respect to the revenues they receive form the CMSs

(iii) The competent registration authorities (civil affairs and social registration departments) should facilitate setting up CMSs as well as the registration of their local and/or regional branches;

(iv) The division of work and responsibilities between the different government branches and between the CMSs and the public authorities should be clarified, for instance so that

[21] We appreciate that currently the Chinese Copyright Act does not vest full performance rights to performers and producers. Providing such rights to performers and producers in line with the EU rental directive (92/100/EEC) and the 1996 WIPO Performance and Phonograms Treaty is however a priority.

- The National Copyright Administration of China (NCAC) is vested with the powers to deal with all CMS related issues and the Ministry of Culture and other departments will collaborate with the NCAC and the CMSs accredited by the NCAC

- Collection of royalties is entrusted exclusively to legally established CMSs .

8.1.4 Updating operating models and business methods

The Chinese CMSs should change and update their management models and methods so as to adjust their operations to the needs of collective management in the digital environment, including:

(i) Establishing online repertoire databases to deal with users' inquiries;

(ii) Developing systems for granting licenses on-line in a semi or fully automated manner;

(iii) Making effective use of DRM and other relevant technologies;

(iv) Setting up effective procedures to monitor suspected infringements of rights and bring legal actions against such infringements.

8.1.5 Set a capacity building program

Copyright and management training programs should be provided to CMSs to further improve the quality and skills of the CMSs' staff across the organisations.

8.2 Specific suggestions to develop the collective management in China

In addition to elaborate further the above general recommendations, we make the following suggestions.

8.2.1 The establishment of new CMSs

There are currently only two collective societies of copyright in China, one for musical works and the other for audiovisual products. This situation is not satisfactory from the point of view of the needs of the right holders to other kinds of works and rights. It is now urgent to establish CMSs for the licensing of performers' and phonogram producers' broadcasting and public performance rights, reprographic rights, and the rights in works of visual arts.

The relevant government agencies should expedite the procedure for the accreditation and registration of these new collective societies.

8.2.2 Capacity building

It is necessary to find and train the staff to work in the CMS sector as well as carry out research and training regarding the different types of CMSs. For instance, it would be advisable to organise a special seminar as a follow up to this project that would involve professionals from the CMS sector, major users groups, and academics both from the EU and China.

8.2.3 Reform of the collective administration system

The Chinese Copyright Act of 2001 and the Regulation promulgated in 2005 provide a basic regulatory framework for the Chinese CMSs. However, it appears that these special norms, which regulate the CMSs' operations, are not fully coherent with other relevant administrative regulations. A rule would therefore have to be established that clarified that the special laws and regulations dealing with CMSs supersede the general administrative laws and regulations.

8.2.4 Introduce Extended Collective Licensing

The Chinese Copyright Act and the relevant Regulations establish that the CMSs shall not exercise the rights of non-members. While at the face of it such a rule is fully understandable, it is also true that the CMSs cannot possibly clear the rights to 100 % of the world repertoire. This is so because in practice a CMS cannot possibly obtain mandates from all local and international right holders. As a result, although a user can get the license from a CMS with respect to the vast majority of works and rights, there is still at least the theoretical possibility that the user is being sued by a right holder not represented by the CMS. This is a particular problem for users that use works and rights on a large scale -- such as radio and TV broadcasters and public venues playing background music. To solve this problem, the Chinese Government should consider introducing Extended Collective Licensing, a mechanism used in the Nordic Countries with respect to the licensing of broadcasting of musical works and used at the EU level with respect to the licensing of cable re-transmission of all categories of works. Extended Collective Licensing provides added legal certainty to commercial users, while at the same time guaranteeing that the non-members have always a claim for individual remuneration from the collecting society.

8.2.5 Establish a dispute resolution body

The Chinese Regulation has detailed provisions on the operation of CMSs, the standards for tariff setting, and the relationship with the users, but it remains silent on the issue of resolving disputes between the CMSs and users or CMSs and right holders. As a result, there is no mechanism for a fast and effective dispute resolution if disagreement arises. For instance, a special body with the authority to issue binding rulings on tariffs would have made the implementation of the KTV licensing scheme much easier for all the parties involved. Therefore the Chinese authorities should consider drawing on the experience of the EU Member States and establish dispute resolution bodies with the authority to issue rulings in dispute between the CMSs and users, and the CMSs and rights holders. The recent EC Recommendation on cross border collective licensing (2005/737/EC) also includes a recommendation to that effect. It is important that pending the proceedings before such bodies the users are obliged to pay through at least a reasonable license fee, and that when issuing their rulings on tariffs the bodies are bound by legal standards.

8.2.6 Liability for entities engaged in collective administration without a valid mandate

Although the Regulation prohibits unauthorized collective administration activities, there might be attempts from time to time by entrepreneurial business persons to engage in quasi collective management, without actual mandates from the right holders. Such activities seriously disturb

collective licensing markets and harm the right holders and their representative societies. The Government should consider introducing statutory provisions on the liability of organisations that engage in collective licensing without being duly authorized by express mandates from the right holders. Naturally, such liability provisions should not be so broad that they could limit the right holders' freedom to license their rights directly and individually where they choose to do that instead of collective licensing.

8.2.7 Introduce new tariffs for broadcasting

A prerequisite for the smooth functioning of the broadcasting licensing system under the current Copyright Act is that the State Council promulgates the remuneration standards for the license. However some of the currently applicable remuneration standards lead to very low payments to right holders -- in international comparison -- and some has not even been worked out yet. For instance, due to the absence of the applicable remuneration standards for the license to broadcast musical works, right holders are deprived of any meaningful protection. Consequently, the MCSC has never received any license fees from the broadcasting organizations in China. Therefore, we suggest that the State Council promulgate and/or review the relevant remuneration standards.

8.2.8 Ensure that CMSs are not taxed for the income they collect for and distribute to the right holders

CMSs are non-profit organizations that, after deducting their direct costs, distribute all the collected revenues to the right holders. It follows that CMS should not be obliged to pay income tax on the amounts they collect on behalf of the right holders, and which do not at any point belong to the CMSs! This is the practice throughout the EU, where CMSs pay taxes only on income generated by their own activities, and it arguably is also the intention of the Chinese Regulation. However, in China, CMSs have no choice but to pay income tax, which results in the royalties being taxed twice. Accordingly, we suggest that the Government branches responsible for copyright consult with the tax departments, or clarify the current regulation to avoid such unreasonable practices

8.2.9 Speed up the registration process

In the current system of "centralized registration, double responsibility and hierarchical administration", it takes a long time for a prospective CMS to finalise the registration formalities with the civil affairs department. As a result the establishment of a CMS has become a slow and burdensome process. Therefore, we propose that all the relevant departments consult with the civil affairs department to agree on measures to expedite and facilitate the registration of CMSs .

8.2.10 Ascertain the standing of CMSs to litigate in its own name on behalf of foreign right holders it represents by virtue of the reciprocal representation agreements in infringement actions

In the EU, CMSs have the standing to bring legal actions in infringement proceedings in their own name, both concerning their direct members' rights and the rights of right holders they represent through bi-lateral agreements concluded with CMSs in other countries. However, some Chinese lower courts do not accept that for instance MCSC has the standing to litigate in its own name on

behalf of foreign right holders it represents by virtue of the reciprocal representation agreements it has concluded. To deal with this problem it would be helpful to introduce judicial interpretations or to clarify the Copyright Act so as to ensure that CMSs standing is recognized in a clear-cut manner.

It is also proposed that the EUCTP should organise as a follow up to this project technical assistance and training seminars for the Chinese judges and judiciary focussing especially on collective management.

8.3 Suggestions on improving the collective administration in the digital environment

Exercising collective licensing comprehensively and effectively is a demanding task already in the traditional world and that task gets even harder when the CMSs move into the digital environment. It follows that the pace of setting up and training the Chinese CMSs should be accelerated to enable them to manage the different types of rights also in the digital environment. The method of collective management should be extended to cover also digital rights and uses the soonest possible, using the experiences from more developed countries as benchmarks.

8.3.1 The Chinese CMSs should make use and take full advantage of the Digital Rights Management technologies

One of the greatest benefits of the digital environment is that users can get access to a wider variety of works in a wider variety of ways using flexible and more personalized licensing terms. Moreover, if DRM technologies are implemented in the technology platforms used by the on-line music providers, the CMSs will be able to track the works actually used and collect and distribute the royalties accordingly. Following the more accurate individual distribution the economic incentive provided to popular creators will be greater, thus boosting the functioning of the entire copyright system.

The benefits of using DRMs are not limited to increasing the accuracy of distribution, it also allows the users and CMSs to agree on tariffs based on the actual use of protected works, instead of fixed sums or percentages -- thus reinforcing the legitimacy of the collective management system.

Although the use of DRMs is in the interest of right holders, there are still problems related to their deployment. The CMSs, together with other industry players, can play an important role in the design and use of DRM applications. It is understood that the MCSC is currently cooperating with the related Government departments, to develop a DRM application, which can monitor the use of digital works, and assist in the online licensing and distribution activities.

8.3.2 Chinese CMS should invest in building online repertoire databases and developing on-line licensing mechanisms

Another major opportunity provided by the advances of digital technology is that the CMSs can achieve real time and paperless reporting, which can lead to substantial cost savings. In this area too China's CMSs should draw on the experience of the more developed CMSs and work actively to build an on-line repertoire database. The database will become an important tool that will increase the efficiency and expand the scope of CMSs licensing activities.

A central on-line database of works enables the users to search information on the works they wish to use, including the title, the author, the publisher, the publishing date, the language, and the rights that the relevant CMS has. Such a facility renders it easier for the users to make informed decisions about the works they wish to use, the cost of use and the preferred way of licensing the works. In the absence of an on-line database users will have to obtain the information through other often less effective channels, which results in the users spending time and money in merely trying to find information of the works they might want to use, which in turn might even become an obstacle to the intended use. At present when the CMSs world wide are cooperating closely through reciprocal representation agreements, it is particularly important to establish an industry standard database of works which is interoperable with the databases of other CMSs around the world.

Currently, MCSC has the world's most authoritative and largest database of works of Chinese origin, which is a significant step in terms of the administration of digital uses and works. However, due to various reasons, users who wish to obtain a license are still unable to conduct comprehensive inquiries regarding the MCSC repertoire through society's website. Developing industry standard on-line databases in the immediate future should be a priority for all the Chinese CMSs.

The digital environment allows for the use of alternative licensing processes: the traditional manual licensing, semi-automated licensing and even automated licensing, which can greatly reduce the licensing transactions costs. CMSs around the world are all examining ways to simplify their licensing procedures using digital technology, so as to cut costs and enable the potential licensees to obtain the licenses faster and more conveniently.

Chinese CMSs should follow the example set by the more advanced CMSs and gradually try out these new forms of licensing activities. As the first step the Chinese CMSs should start accepting online applications for licenses, using the information in their online repertoire databases. At the same time the CMSs should actively pursue the research and testing of the DRM technologies in order to carry out the real time online licensing of digital works as soon as possible.

8.3.3 Improve the quality and intensity of enforcement of rights

At present, the greatest obstacle to effective collective administration of copyrights in the digital environment is the rampant on-line piracy. The increase in infringing activities is a result of, among other things, the abuse of technologies to facilitate and profit from the infringing activities of others, and the shift of the direct infringements from the "professional" sphere to the "private" sphere.

International experience shows that, apart from the need to continue to combat the individual infringing acts, it is also important to provide adequate legal protections and enforcement procedures and to and impose stringent sanctions on all infringers including those who induce or aid and abet direct violations

For instance, the proceedings that MCSC has initiated so far are in practice all against "direct infringers"; they have not yet taken any actions against the services that profit from such direct infringements. However, the right holders will not achieve the fundamental objective of safeguarding their rights unless actions are also taken against the services that used by the primary

infringers and that are liable for "indirect infringements". For example, at present, the main method for young people to obtain popular music and movies is no longer by downloading them from a server or website, but by downloading them through dedicated links sites (such as Baidu or Yahoo!China) or through P2P services such as BitTorrent or Limewire. At the latest with the "Regulation on the Protection of the Right to Network Dissemination of Information" taking effect, actions against "indirect infringers" in the digital environment should have sufficient legal basis.

ANNEX 1: CHART OF COMMITMENTS FOR DEVELOPING A LEGAL SUPPLY OF MUSIC ON LINE, RESPECTING THE INTELLECTUAL PROPERTY AND ENHANCING THE FIGHT AGAINST THE DIGITAL PIRACY

«Whereas the recognition of the interest to develop the digital economy and the broadband Internet for the diffusion of artists works and for the consumers in general.

Whereas the necessary changes of the cultural industries face to the technological changes arisen by Internet and being aware that appropriate answers have to be fast implemented.

Wishing to fight against the illicit exchanges of music recorded from copyrighted works in Internet which generate a major harm to the right holders and do it by measures of sensibility prevention, dissuasion, and taken in front of the network users.

The signatories of the current chart commits themselves in the framework of an Action Plan to develop the legal online supply of music and fight against the piracy as from immediate effect after this Chart signature, to:

1. for the access providers' trough Internet:

1.1 to organise a campaign of communication in front of their subscribers to inform them of the illicit nature of non authorised exchanges of files protected by the IP Code as well as the risks involved in such actions;

1.2 to equally warn the new subscribers of dangers and piracy problems they may incur;

1.3 do not start advertising campaigns supporting the illicit downloading or promoting the dissemination of unlicensed music files; in the case of invocation, for publicity purposes, of the possibility of legal download files whose they are not providers to join legal information in a visible way mentioning that piracy harms the artistic creation according to Article 7 of the law developing the trusting in the digital economy;

1.4 in respect of the Law prescriptions and the Cnil, an automated process is implemented in cooperation with the right holders enabling to address to their demand and in a brief delay a personalised message to all subscribers downloading illicit files to change their demands to legal supply ;

1.5 to continue the efforts to fight against the violation of IP rights including incorporating relevant clauses in the contracts with the subscribers;

1.6 to immediately implement the juridical decisions taken enforcing the law including cautional measures and mainly in matters of procedures of identification and cancel of subscriptions ;

1.7 to only index legal music supply and their portals avoiding hypertexts and links with portals infringing the law offering illicit files excluding search engines ;

2. for the right holders signing this chart :

2.1 to engage before end 2004 civil and penal actions in front of the pirates giving visibility to such actions to achieve the goal expected by this chart;

2.2 to quickly increase the legal offer of music online in financial conditions, transparent and non discriminatory, according to the competition law for all the platforms and specially those set up by Internet access providers ; regarding SACEM to consent in such conditions autorisation to exploit its repertoire.

3. for producers and platforms represented here:

3.1 to participate, each of the producer according to his capability to offer a diversified catalog to get a 600000 titles offered through end 2004;

3.2 respecting the competition law to propose a clear tariff for pay music taking into account the sector particularities;

3.3 to do a visible mention to promote artists promoting legal supply of music in Internet ;

3.4 for the platforms, to communicate in a significant way their promotions of legal music, offline and online;

3.5 to engage negotiations, as from September, to achieve before the end of 2004 a dynamic partnership among producers, platforms and Internet access providers in order to get:

- increase the advertising efforts in Internet ;
- develop new promotional offers online ;
- develop crossed promotions among physical supports and online supply offers;
- to rush the digitalisation to easy catalogs' access to the platforms.

4. together with the public powers:

4.1 to study the implementation of measure' tools against the counterfeiting and the disposal of music online' catalogues- diversity, pertinence;

4.2 under the monitoring of two experts appointed by the public power to study before the 1st of October of 2004 the proposed solutions by the music industry related to the peer to peer' filtering in Internet. The experts will assess whether it is necessary and possible from a technical and economical perspective to implement technical solutions on Internet access providers' systems and networks. A report on such experiments will be made in order to propose such solutions and to encourage the introduction of the necessary terms and conditions in the contracts with the subscribers. The conditions of deployment of such solutions, including the financial aspects, will be determined in a separate agreement. During the study and eventual test period, the music

industries will abstain of asking filtering measures in front of any Court;

4.3 organise campaigns of awareness addressed to the young people, mainly by the projection of films during the courses to explain the threats of the piracy with the participation of authors, artists and producers.

4.4 to give a priority in the political, police and judiciary action to the fight against piracy; in particular, to study the possibilities of reinforcing the means of the right holders to act against the Internet piracy;

4.6 to go on the action in front of the Brussels authorities to cut down the V.A.T. on music records and to prepare an action with the same goal for the music online legal services and Internet access;

4.7 to continue the concertation mission assigned to Mr Philippe Chantepie and Mr Jean Berbinau ;

4.8 to study with the music on line' dissemination platforms the modalities of distribution of their service directed to the subscriber of access providers specially in matters of invoicing and payment in satisfactory conditions for all the parties;

4.9 to held an secured environment for the content in the Internet and take the required measures to enhance that coding formats and uploading of music be compatible and interoperable as well as between distribution platforms, equipment and software manufacturers in order to get a common cooperation among the stakeholders ;

4.10 to study and promote actions of prevention and sensitivity in direction of companies and public administrations in the antipiracy fight.

ANNEX 2: MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE INTERNAL MARKET

The Commission addresses questions relating to the collective and individual management of copyright and related rights in the internal market. It would like to implement a common legislative framework for the collective management of rights and particularly for good governance of collecting companies.

ACT

Commission Communication of April 16, 2004 on the management of copyright and related rights in the internal market [COM (2004) 261 - Not published in the Official Journal]

SUMMARY

This communication deals with the management of copyright and related rights, i.e. how they are administered (granted through licences, assigned or financed). It concludes a consultation process started in 1995.

The Commission considers whether current management methods, which are mainly governed by national legislations, hamper the good functioning of the internal market. The exchange of goods and services based on copyright or related rights increasingly often takes place at Community level. Accordingly, the legislative framework governing the protection of these rights has to cater for this.

The Commission considers whether it is convenient to let the market stimulate Community licensing or whether it is preferable to enact Community legislation. The Commission puts forward a number of options:

- ensure that any licence on the rights to communicate with or make available to the public, allows - by definition - usage throughout the Community;
- adopt the same model as the one chosen for satellite broadcasting under Directive 93/83/EEC. The relevant act of communication to the public occurs solely in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication up to the satellite and down towards the earth. The Commission expresses reservations, underlining that this approach does not necessarily yield the desired result of multi-territorial licensing;
- bring the exclusive rights of communication to the public and of 'making available' under one remuneration right subject to obligatory collective management;
- leave users the freedom to choose the collecting society within the European Economic Area which will issue the required operating licence;
- empower collecting societies to offer Community licences;
- focus exclusively on forms of collective management by specialised societies.

Another fundamental issue is the management of digital rights. Digital Rights Management systems (DRM systems) enable the distribution to be restricted to copies of digital content by obtaining and managing copyrights. To complete the internal market in this area, it is necessary to establish a global and interoperable technical infrastructure based on consensus among the interested parties, including consumers.

The management of copyrights and related rights can be done either individually or collectively. The Commission has examined these two ways of managing rights.

Individual Rights Management

It is the marketing of rights by individual right holders to commercial users through exclusive or non-exclusive contractual licences.

The Commission has noted that the degree of common ground across Member States regarding the rules appears to be sufficient in this area. It is therefore not necessary to undertake action at Community level in the near future.

Collective Rights Management

This term refers to the system under which a collecting society, as trustee, jointly administers rights and monitors, collects and distributes the payment of royalties on behalf of several rightholders.

In this area, the Commission underlines the need to have a common legal framework based on the principles of copyright and the needs of the internal market. It would deal with issues linked to the establishment and status of collecting societies. This legislation would foster the emergence of Community licences for exploiting rights and would finalise the internal market.

It has initiated a new consultation process which has led to the adoption of a recommendation on cross-border collective management of copyright and relative rights in the field of legal on-line music services. It also intends to put forward legislation on certain features of collective management and good governance of collecting societies in order to ensure a higher degree of efficiency, legal certainty and transparency

ANNEX 3: COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY: HARMONISATION OF CERTAIN ASPECTS

This Directive aims to adapt legislation on copyright and related rights to technological developments and particularly to the information society. The objective is to transpose at Community level the main international obligations deriving from the two Treaties concerning copyright and related rights, adopted in December 1996 in the framework of the World Intellectual Property Organisation (WIPO).

ACT

European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

SUMMARY

Scope

Unless otherwise provided, the Directive applies without prejudice to existing provisions relating to

- the legal protection of computer programs,
- rental and lending rights and certain rights related to copyright in the field of intellectual property,
- copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission,
- the term of protection of copyright and certain related rights,
- the legal protection of databases.

The Directive deals with three main areas: reproduction rights, the right of communication and distribution rights.

Reproduction rights

Member States are to provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- for authors, of the original and copies of their works,
- for performers, of fixations of their performances,
- for phonogram producers, of their phonograms,
- for the producers of the first fixation of films, in respect of the original and copies of their films,
- for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Right of communication

Member States are to provide authors with the exclusive right to authorise or prohibit anycommunication to the public of the originals and copies of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The same applies as regards the making available to the public of protected works in such a way that members of the public may access them from a place and at a time individually chosen by them:

- for performers, of fixations of their performances,
- for phonogram producers, of their phonograms,
- for the producers of the first fixation of films, in respect of the original and copies of their films,
- for broadcasting organisations, of fixations of their broadcasts - regardless of the method of transmission.

Distribution rights

The Directive harmonises for authors the exclusive right of distribution to the public of their works or copies thereof. This distribution right is exhausted where the first sale or other transfer of ownership in the Community of a copy is made by the rightholder or with his consent.

Exemptions and limitations

The Directive lays down a number of exceptions to the right of reproduction and the right of communication (Article 5).

Mandatory exception to the right of reproduction

A mandatory exception to the right of reproduction is introduced in respect of certain temporary acts of reproduction which are integral to a technological process, the purpose of which is to enable the lawful use or transmission in a network between third parties by an intermediary of a work or other subject-matter and which has no separate economic significance.

The Directive also makes provision for other non-mandatory exceptions to the rights of reproduction or communication. In these cases, they are accorded at national level by the Member State concerned.

Rights of reproduction and communication

The exemptions and limitations relating to the rights of reproduction and communication are optional and particularly concern the "public" domain. For three of these exceptions - reprography, private use and broadcasts made by social institutions - the rightholders are to receive fair compensation.

With regard to the exceptions or limitations to distribution rights, these are accorded depending on the exceptions relating to reproduction or communication.

Legal protection

The Member States are obliged to provide legal protection against the circumvention of any effective technological measures covering works or any other subject-matter. This legal protection also relates to "preparatory acts" such as the manufacture, import, distribution, sale or provision of services for works with limited uses. Nevertheless, for some exceptions and limitations, in the absence of voluntary measures taken by rightholders, the Member States are to ensure the implementation of an exception or limitation for those who may benefit from it. The Member States may also take such measures with regard to the exception for private use, unless reproduction for private use has already been made possible by rightholders in accordance with the economic damage test.

Protection of rights-management information

Member States must provide for adequate legal protection against any person knowingly performing, without authority, any of the following acts:

- the removal or alteration of any electronic rights-management information;
- the distribution, broadcasting, communication or making available to the public of works or other subject-matter protected from which electronic rights-management information has been removed.

Penalties and redress

The Member States are required to provide appropriate sanctions and remedies in respect of infringement of the Directive.

No retrospective effect

All works and subject-matter covered must be protected by the Member States' copyright law or meet the criteria for protection laid down in Community law by 22 December 2002.

Amendment of existing measures

There are amendments to Directives 92/100/EEC on rental right and lending right and 93/98/EEC harmonizing the term of protection to the extent necessary in order to transpose into Community law the new international obligations in the field.

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