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GESAC SUBMISSION TO THE CONSULTATION ON THE REFLECTION DOCUMENT ON CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET

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Executive Summary

GESAC welcomes the opportunity to express its views on the Reflection Document on Creative Content in a European Digital Single Market published on 22 October 2009.

- *The Protection of Rights Holders*

GESAC fully supports the Reflection Document's statement that "*copyright is the basis for creativity*" and "*one of the cornerstones of Europe's cultural heritage and of a culturally diverse and economically vibrant creative content sector*." The document also states in its first paragraph that "*European Policymakers […] have the responsibility to protect copyright, including in an evolving economic and technological environment.*"

However, the Reflection Document is somewhat disappointing as regards the improvement of said protection.

The Commission seems to consider that simply encouraging the development of online services is enough in and of itself to protect rights holders.

While supporting any policy aiming at encouraging legal online services to develop, GESAC considers that **improving copyright enforcement in the Internet** is a prerequisite for such a development. GESAC is in favour of a strong and effective **collaboration with ISPs**, which we understand should go beyond the provision of new business models,

GESAC's submission also addresses the issue of **alternative forms of remunerations for rights holders in the Internet**, In fact, the Reflection Document refers to a proposal made by a member of GESAC at national level. It should be pointed out that this is not a proposal for an *alternative* form of remuneration, but for a compensation that would be complementary to the improvement of copyright protection in the Internet.

As regards, **the creation of an unwaivable right to equitable remuneration** and **the introduction of mandatory collective management for online uses**, we believe that these two last proposals require further analysis.

- *Commercial Users' Access*

The Commission considers that issues related to the further streamlining of the licensing process for online exploitations are the priority. GESAC considers that, be it for offline or online exploitations, collective management is the best solution to strike a balance between easy rights clearance, legal certainty and adequate remuneration for rights holders. GESAC explains the steps already taken by authors' societies in the field of **governance and transparency**.

Concerning collective cross-border management of rights, GESAC's contribution focuses on the following points:

- First, it is important that the Commission services in charge of this initiative are aware of **past initiatives in the field of collective cross-border management of copyright**

and how the market reacted, and therefore the contribution provides an Annex with the historical background.

- Second, with the knowledge and the approval of DG Competition, which is regularly informed of the discussions, a group of European collecting societies is now working in the framework of CISAC to elaborate an administration model aimed at including the largest possible repertoire in the same licensing process for multi-territorial exploitations.

- Third, GESAC considers that the proposals made in the document, notably **the extension of the Satellite and Cable Directive model to online exploitations** and **the creation of a European Copyright title** would not achieve the Commission's goal to facilitate multi-territorial licensing. **Extending the principle of exhaustion to online uses**, which is an option considered in the Reflection Document, would, in GESAC's view, not only depart from the principles set forth in the Berne Convention, the Copyright Directive and the ECJ jurisprudence, but also have very negative economic consequences in the field of online exploitations.

- Fourth, GESAC regrets that, once again, the extremely important issue of **withholding tax rules** and the obstacle they constitute for collective cross-border management of rights is left outside of the debate.

The Reflection Document also proposes to **aggregate the making available right and the reproduction right for online exploitations** and **the provision of licenses covering both copyright and neighbouring rights.** GESAC believes that such objectives can only be achieved through voluntary agreements between the operators involved.

As regards, the **improvement of ownership and licence information**, GESAC considers that the steps taken by its sister umbrella organization CISAC and individual authors' societies in this field, go in the direction indicated in the Reflection Document.

- *Consumer Access*

GESAC is supportive of the Commission's proposal to apply **mandatory collective management for orphan works**, but remains sceptical on the need to **harmonize copyright exceptions and limitations**.

As regards **the copyright implications of the use of Web 2.0 services by consumers**, GESAC considers that a system based on the need for the consumer using the services provided by a Web 2.0 platform to clear rights is inappropriate and based on a wrong understanding of the situation. In our view, it is the responsibility of Web 2.0 service providers to clear the necessary rights.

1. General Remarks

GESAC represents 34 of the main collective copyright management societies (authors' societies) in the European Union, Norway and Switzerland, that administer the royalties of almost 500 000 authors, composers and writers of a variety of sectors (music, audiovisual, literary and visual and graphic arts), as well as of music publishers.

GESAC welcomes the opportunity to express its views on the Reflection Document on Creative Content in a European Digital Single Market published on 22 October 2009.

1.1 Authors' Societies and Collective Management

The document raises a number of issues related to collective management of rights. That is why this consultation is of great importance for the authors' societies members of GESAC. In fact, traditionally music rights of authors and composers have mostly been managed collectively through their authors' societies. On the one hand, collective management facilitates the licensing procedure for users and increases the legal certainty. Users do not have to negotiate and sign a license with every copyright holder. They can just go to an authors' society, who will grant them a license for the use of the repertoire its represents. On the other hand, by negotiating tariffs on behalf of a big number of rights holders, authors' societies can assure that their members receive an adequate remuneration for the exploitation of their works.

Therefore, be it for offline or online exploitations, collective management is the best solution to strike a balance between easy rights clearance, legal certainty and adequate remuneration for rights holders.

1.2 Cross-Border Management of Rights

It should be recalled that authors' societies have always found a way to adapt themselves to any technological development, in order to guarantee the aforementioned balance. This includes technological developments that brought the need to grant licenses of the world repertoire for exploitations that went beyond national borders, as it was the case with satellite or online exploitations. The details of how authors' societies dealt with cross-border exploitations in the past will be explained below. However, it is important to point out here that, contrary to what the Reflection Paper seems to suggest, authors' societies granted licences of the world repertoire for pan-European – in fact worldwide – exploitations in the past. Why this possibility is no longer available, as will be addressed below, is greatly due to a series of interventions by different DGs of the European Commission, which have indeed contributed to the current market and repertoire fragmentation.

Notwithstanding the current framework, and while authors' societies are trying to find solutions to address current challenges of cross-border management of rights, licences are being granted and new online services are being put in place. Unfortunately, massive copyright infringements in the Internet continue to be a huge obstacle for the further development of the market.

1.3 Coordination of the Commission Services

We take note that the Reflection Document is due to a common initiative from DG INFSO and DG MARKT built on the Communication on Creative Content Online. However, the issues raised in the Reflection Document, as the document itself points out, have already been or are currently being dealt with in other different initiatives: the post i2010 initiative, the Green Paper and the Communication on Copyright in the Knowledge Economy, the Online Commerce Roundtable, the Commission Decision of 16th July 2008 on the CISAC case (the CISAC Decision),[1] etc. These initiatives are under the leadership of three different DGs (DG INFSO, DG MARKT and DG COMP) and sometimes addressed by different services within one DG. For example, it is our understanding that Directorate C of DG INFSO (Lisbon Strategy and Policies for the Information Society) is responsible for the post i2010 initiative, while Directorate A (Audiovisual, Media, Internet) is responsible for this Reflection Paper and the Content Online Initiative.

GESAC would like to emphasize that a strong coordination of all the services dealing with copyright is absolutely necessary to the efficiency of any policy and initiative related to the protection of creation and creativity and that initiatives on copyright related issues should be under the leadership of DG MARKT's services.

1.4 The Approach Given to the Protection of Rights Holders

As indicated above, the Reflection Paper seems to build on the Communication on Creative Content Online.[2]

In the Communication, the Commission expressed its will to "*launch further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services.*"[3] The Reflection Document follows a similar objective, namely "*creating in Europe a modern, pro-competitive, and consumer-friendly legal framework for a genuine Single Market for Creative Content.*"[4]

The Communication identified "*four main, horizontal challenges which merit action at EU-level: availability of creative content; multi-territory licensing for creative content; interoperability and transparency of DRMs; and legal offers and piracy.*"[5]

The Reflection Document addresses two of these challenges: the availability of creative content and multi-territory licensing. The other two are left unaddressed. While the debate on interoperability and transparency of DRMs seems to have lost momentum, **with illegal downloads outnumbering legal ones by 20 to 1, massive copyright infringements in the Internet should be a key issue in every initiative touching on the development of a market for creative content online.** Therefore, as it will be discussed in greater detail below, the lack of proposals of the Reflection Document as regards illegal up and downloading is

[1] Commission Decision of 16 July 2008 (Case COMP/C2/38.698 – CISAC).
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, COM/2007/0836 final.
[3] Page 3 of the Communication on Creative Content Online.
[4] Page 3 of the Reflection Document.
[5] Page 4 of the Communication on Creative Content Online.

totally unjustified. This lack of proposals to improve copyright enforcement in the Internet is all the more difficult to understand, if we take into account that the Reflection Document itself points out in its first paragraph that "*European Policymakers […] have the responsibility to protect copyright, including in an evolving economic and technological environment.*"[6]

Subject to this observation, GESAC will first express its views as regards the other two chapters of the Reflection Document - Consumer Access and Commercial Users' Access - starting with this second one.

Please note that, while GESAC's submission is divided along the lines of the Reflection Document – Commercial Users' Access, Consumer Access and Protection of Rights Holders –, for clarity's sake, some of our comments to topics included in one of the three chapters of the Document may, in this submission be included in a different chapter.[7]

2. ***Commercial Users' Access: The Availability of Legal Music Offer, Online Licensing and Territoriality of Copyright***

Before entering into the discussion on challenges for and proposals to the creation of a legal framework for a Single Market for Creative Content Online, the Reflection Document makes a description of the evolution of technology and content markets so far (Point 2). In that part of the Document, it is stated that "*the online dissemination of music […] causes the biggest challenges with respect to online licensing*".[8]

GESAC will not deny that licensing of music for online exploitations has not become much easier in the last couple of years.

However, it has to be noted that music is probably the most developed online content market. Point 4.1 of this submission lists some examples of the legal music services available in the UK, France and Germany. But similar services exist in the vast majority of EU Member States. Therefore, the current framework, albeit subject to improvements, has not impeded the flourishing of a wide variety of online music services. A different thing has been the uptake of these services by consumers and why they still have a preference for illegal platforms, but that is a question that is obviously not related to licensing.

We have already indicated the need to address issues concerning the enforcement of copyright in the online world. That, in our view, is the biggest obstacle to the further development of legal offers.

However, the Commission considers that issues related to the further streamlining of the licensing process for online exploitations are the priority. Its Reflection Document identifies four main areas where action could be envisaged:

[6] Page 1 of the Reflection Document.
[7] For example, we understand that our comments to alternative forms of remuneration will be clearer if we place them in the context of protection of rights holders.
[8] Page 4.

- The Aggregation of Reproduction and Making Available Rights;
- The Aggregation of the Rights of Copyright Holders and Neighbouring Rights holders in a Single Licence;
- The Improvement of Ownership and Licence Information;
- Collective Cross-Border Management of Online Rights and Territoriality of Copyright.

We will start with the last point, which we think is the most important. Also, some of our comments on these points, notably on the aggregation of reproduction and making available rights, can only be understood after taking a look at the developments that have taken place in the last years as regards collective cross-border management of rights.

2.1 Collective Cross-Border Management of Online Rights and Territoriality of Copyright

The situation as regards the collective management of online rights is, in our view, the most important issue when addressing the streamlining of licensing for online exploitations, notably when these exploitations are cross-border by nature.

The Reflection Document rightly explains that the current situation is extremely complex and has brought territorial fragmentation and fragmentation of repertoires. Today it is impossible to clear rights for the world repertoire for multi-territory exploitations in one transaction.

GESAC members are trying to find solutions to improve this situation and while they appreciate the Commission's good intentions to explore policy actions that could facilitate the licensing of rights for cross-border exploitations, we would like to stress that, in the past, the market reacted to every Commission intervention on this field with increased territorial and repertoire fragmentation.

When considering any new intervention on collective cross-border management of rights, it is therefore important to take a look back to previous initiatives and analyze why the market reacted the way it did. For that purpose, we have included in Annex I a description of the historical background, which is more globally described in the following pages.

2.1.1. Historical Background

The first thing that needs to be taken into account is that licences for the world repertoire for multi-territory – worldwide in fact – exploitations were available until 2004 and European authors' societies were in a position to act as one-stop-shops for these licenses. This was possible thanks to the system of reciprocal representation agreements between authors' societies that had been timely adjusted to the digital environment through the Santiago and Barcelona agreements.

In fact, this was not the first time that reciprocal representation agreements were adapted to exploitations that had an international dimension. Back in 1987 Authors' Societies adopted in the Sydney agreement, amendments to their reciprocal representation agreements to deal with satellite broadcasting. By introducing these amendments in their bilateral agreements, authors' societies actively promoted the granting of multi-territorial licenses covering the whole footprint of the satellite.

The Santiago and Barcelona agreements followed the same approach. The authors' society of the country where the online content provider had its economic residence was in a position to grant a license covering its repertoire and the repertoire of its sister societies – in practice the world repertoire – for a worldwide online exploitation.

Therefore, the Reflection Document's statement that "*the traditional licensing structure employed by CMOs is still in a process of adaptation to the ubiquity of the Internet*,"[9] is inaccurate. Authors' societies adapted their "licensing structure" to the Internet in 2000, when the Santiago and Barcelona agreements were signed.

However, the Santiago and Barcelona agreements were not cleared by DG COMP and were therefore not extended beyond 31st December 2004. (The details of DG COMP's decision are explained in Annex I.)

After that date, authors' societies were only able to grant licenses covering the world repertoire for online exploitations that were national in scope, or licenses for worldwide online exploitations but limited to the society's own repertoire.

At the beginning of 2005, authors' societies started to work on a model that would again allow for them to grant licenses of the world repertoire for multi-territory online exploitations. The idea was to find a model that would avoid a race to the bottom of tariffs and that would, at the same time, address DG COMP's concerns.

However, in October 2005, DG MARKT issued the 2005 Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services[10] (the 2005 Recommendation). The intention of the Commission was to encourage "*multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders*."[11]

In fact, the DG MARKT's approach departed from what had been the tradition of decades of collective management of rights. It proposed a model, not based on reciprocal representation agreements, but on direct management of their rights by collecting societies or rights holders. The 2005 Recommendation therefore gave clear encouragement to the fragmentation of repertoires.

The market evolved in many ways after the Recommendation was adopted, but the most significant outcome was the withdrawal by the international music publishers of their so-called Anglo-American repertoires mechanical rights from the traditional network of collecting societies in order to license these rights directly on a multi-territorial basis in cooperation with one or several collecting societies chosen by them.

Barely four months after the Recommendation was adopted,[12] GESAC's sister umbrella

[9] Page 6.
[10] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).
[11] Recital (8) of the Recommendation.
[12] The Recommendation was adopted in October 2005 and DG COMP sent the Statement of Objections to CISAC and its affiliates in January 2006.

organization, CISAC,[13] and its EEA affiliates received a Statement of Objections from DG COMP concerning, i.a., the network effects of reciprocal representation agreements as regards public performance rights for Internet, satellite and cable exploitations. In its Decision,[14] the Commission challenged that authors' societies limit, through reciprocal representation agreements, the right to licence their repertoire to the domestic territory of the other contracting collecting society. However, contrary to DG MARKT's thesis, DG COMP made clear that it did not "*call into question reciprocal representation agreements*," just *"the degree of participation of each collecting society within this system."*

The bottom line is that since 2004, it has become unclear from copyright and competition law perspective according to what rules authors' societies should manage their rights in the field of online exploitation. The result of these evolutions is an increased complexity and cost in the negotiation, licensing and administration of rights, and in some cases uncertainty about the scope of the representation of rights.

Authors' societies are currently striving to introduce means of enabling the widest possible repertoire to be combined within a single licence. The Reflection Document refers to the roundtable organized by Mrs Kroes, which could constitute a catalyst for the community of European authors' societies, together with other stakeholders, to find solutions that serve the interests of their members and users alike.

More particularly, with the knowledge and with the approval of the DG COMP, which is regularly informed of the discussions, a group of European collecting societies is now working in the framework of CISAC to elaborate an administration model aimed at including the largest possible repertoire in the same licensing process for multi-territorial exploitations.

2.1.2. The Extension of the Satellite and Cable Directive to Online Exploitations

As for the options mooted by the Commission, the Reflection Document considers a possible extension of the scope of the 1993 Satellite and Cable Directive to the online use of audiovisual content.[15]

First of all, it is unclear whether the term "audiovisual content" is to be narrowly construed as referring only to the use of works comprising both sounds and images, or more broadly to also include the use of purely audio works.

Be that as it may, the Commission argues that "*transposing the rationale of this Directive to the Internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this licence would cover all Community territories. The principal rationale for domiciling licensor and licensee in one territory is to identify the relevant territory in which the multi-territorial licence can be obtained.*"

This possibility was already considered in the Communication on the Management of Copyright and Related Rights in the Internal Market issued in 2004. Then, the Commission understood that "*if this model is applied to copyright and related rights without limiting the*

[13] CISAC stands for the International Confederation of Societies of Authors and Composers.
[14] Commission Decision of 16 July 2008 (Case COMP/C2/38.698 – CISAC).
[15] Page 17.

contractual freedom of the parties, as was done under Directive 93/83/EEC, it does not necessarily yield the desired result of multi-territorial licensing, as it only determines the applicable law and does not by itself result in extending the licence to the footprint in question." [16]

Today the Reflection Document seems to put in the same pot different things: the determination of the law applicable to the multi-territory exploitation, the determination of the society authorised to grant rights clearance to a commercial user and the territorial effect of the license.

- The determination of the applicable law

It must be recalled that the objective of the Satellite and Cable Directive was, by identifying where the act of communication to the public by satellite takes place, to specify that licences should be acquired only from the holders of the corresponding rights in the territory where that act of communication takes place in accordance with the law applicable in that territory and not the laws of reception countries.[17]

The situation in this respect is clearly different where online uses are concerned and rights holders have always argued - not least when the Rome II Regulation was being framed - that online uses should be governed by the laws of all the reception countries.[18] In this perspective, it has to be mentioned that copyright was excluded from the general country-of-origin principle of the E-Commerce Directive. [19]

GESAC therefore does not support an approach that aims to make the applicable law the law of the country of origin.

- The Society Authorised to Grant Rights Clearance to a Commercial User

Regarding the authors' society that would be authorized to grant rights clearance, it seems that the solution envisaged by the Commission would resemble the system put in place by authors' societies for 20 years under the Sydney Agreements (now called into question by DG COMP) and what they strove to do with the Santiago and Barcelona Agreements, which the Commission deemed contrary to competition rules.

The only difference would be that, in this case, the solution would not be implemented on a voluntary basis, as was the case for the Sydney, Santiago and Barcelona Agreements, but would be compulsory.

However, the fact is that the Commission stated clearly in the CISAC Decision that the Satellite and Cable Directive has never required authors' societies to make arrangements so that the society authorised to licence commercial users is that of the territory on which the

[16] Communication on the Management of Copyright and Related Rights in the Internal Market COM(2004) 261 final. Page 9.
[17] Recitals 14 and 15.
[18] Additionally, under article 8.3 of the Rome II Regulation the choice of law is prohibited in infringement cases.
[19] Annex to the Directive of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market: *"As provided for in Article 3(3), Article 3(1) and (2) do not apply to [...] copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC (2) as well as industrial property rights."*

user is situated. Consequently, the reference made by the Reflection Document does not seem appropriate.

Moreover, to seek to impose such obligation on collecting societies by a directive would be a flagrant breach of the principle of freedom of contract and the right of rights holders - including collective management societies - to set the terms on which they mean to manage their rights.

- The territorial effect of the license

Finally, the Satellite and Cable Directive does not provide either that licences must necessarily have a multi-territory or pan-European scope. Recital 16 of the Directive is clear on this and the Reflection Document acknowledges that this is what happens in practice.[20]

Moreover, rights holders, as currently provided for in the Satellite and Cable Directive, have within the limits imposed by competition law, the possibility to freely determine the territorial scope of the licenses they grant and any multi-territorial, pan European or worldwide license can only be granted on a voluntary basis (see 2.1.4 hereafter).

Consequently, an extension to online exploitation of the Satellite and Cable Directive is not the way forward to secure the delivery of licenses covering all EU territories.

2.1.3. The Creation of a European Copyright Title

The Commission argues that one way to overcome this situation would be through a profound harmonization of copyright and the creation of a copyright title with instant Community-wide effects, which could co-exist with national copyright titles.[21]

It has to be mentioned that the use of the expression "copyright title" seems to imply some sort of formality in order to exercise the rights associated with it, such as it is the case for patents. However, as regards copyright, such principle would be contrary to article 5.2 of the Berne Convention, which provides that copyright protection is granted without any formality.

Moreover, it is our understanding that there is a heated debate as to whether article 118 of the Lisbon Treaty[22] provides a sufficient legal basis for such an initiative. Many people think that the way this article has been drafted seems to imply that it is a provision limited to patents and trademarks, and that other forms of intellectual property rights would be excluded.

In any case, the creation of a single copyright title would probably not bring the Commission's desired outcome.

The first thing that should be pointed out is that harmonization is already quite substantial as regards exclusive rights. This is acknowledged by the Reflection Document itself.[23]

[20] Page 17.
[21] Page 18.
[22] Consolidated Version of the Treaty on the Functioning of the European Union.
[23] Page 15.

Moreover, a European Copyright title does not imply that rights holders should be prevented from freely delimiting the territorial scope of the licence they grant.

A similar situation appears at national level where, despite the existence of national copyright titles, rights holders can delimit the territorial scope of the licenses they grant to a part of the national territory.

Again, be the copyright title European or national, rights holders must retain the possibility to delimit the territorial scope of the licenses they grant (see 2.1.4 hereafter). However, this possibility does not preclude that multi-territory licenses be granted, too.

2.1.4. The Extension of the Principle of Exhaustion

The Reflection Document mentions the possibility[24] to extend the principle of exhaustion - thus far confined to the marketing of tangible products enshrining copyright protected works - to online uses.

Such way forward (i) would mean to depart from the rule to the opposite effect contained in article 6 of the WIPO Copyright Treaty that envisages the introduction of exhaustion with regards to the distribution of work copies only, article 3.3 of Copyright and Related Rights in the Information Society Directive of 22 May 2001 and the principles laid down by the ECJ in the Coditel I and Coditel II judgement (ii) would infringe the principle of freedom of contract (iii) and would very definitely have extremely seriously detrimental economic consequences in the field of online exploitation.

The fact that rights holders would no longer be able to grant licences with a territorial scope other than EU-wide would prevent them from adjusting licensing practices (and fees) to the practical realities of online exploitations.

All users have not the same characteristics and capabilities, markets and the value of copyright protected content vary from country to country. Consequently, rights holders should have the possibility to define the territory where they authorize each user to exercise its activity. Again it has to be stressed that this possibility does not preclude that, when appropriate and on a voluntary basis, multi-territory licenses be granted, too.

Also, not all users are interested in EU-wide licenses and they should be able to get a license according to their needs, without being obliged to acquire EU-wide licences even for exploitations intended to be national in scope or limited to a part of the national territory of a Member State.

In fact, territory-by-territory launches are driven by a whole range of factors, including language, tax, and revenue strategies for the content companies. Revenue for advertising-based services, for example, is national and therefore music services which are supported by advertising will by definition also be national when they launch.

Moreover, ISPs who launch services bundled to subscriptions are also going to be looking at national customer plans.

[24] Pages 10 and 11.

Also, authors' societies have found that in various cases it is the services themselves, which request national music licences (YouTube).

We understand that the negative implications of such an outcome explain why the Commission does not include this proposal in point 5 of the Reflection Document.

2.1.5. Issues on Collective Management of Rights not Addressed by the Reflection Document: Withholding Tax Rules

One thing that has to be addressed, in order to create a legal framework that would facilitate the cross-border management of rights, is the current situation as regards withholding tax rules. We would like to stress that, notwithstanding its importance, this issue is constantly left outside of the debate.

The fundamentals of direct taxation are not harmonized at Community level and remain the exclusive competence of Member States. This has resulted in the fact that, with the exception of countries like Luxembourg, the Netherlands, Hungary and Malta, most States levy a withholding tax on copyright royalties accruing to those who are not resident for tax purposes. The statutory rates of tax charged in each State vary widely from one country to the next - ranging from 5% to 33.33%.

Double taxation agreements often provide for a reduced or zero rate. However these agreements only apply when the rights holder is a resident in the country signatory of the agreement. The fact that authors' societies are not always considered by the tax authorities of the Member states as the beneficial owner of the payment hugely complicates the administration of the payments made by one collecting society to its sister society, notably members of this latter society who live in different countries than the one where this society is located.

While the situation has been difficult to deal with in an environment in which licences were granted on a mono-territorial basis, the situation in a multi-territory rights licensing environment will be much worse.

This situation creates borders within the EU for the trade in intellectual property, is detrimental to the rights holders and is clearly at odds with the Lisbon agenda. .

GESAC thinks that this issue should be urgently and closely addressed by the Commission in cooperation with Member States and is prepared to actively participate in such process.

2.2 The Aggregation of the Reproduction and the Making Available Rights

The Commission proposes to aggregate the reproduction and the making available rights in order to facilitate the clearance of rights for online exploitations.[25]

[25] Page 16.

First, it has to be stressed that online exploitation is not the first type of use for which concurrent clearance of reproduction and public performance rights is required. It has long been the case for both radio and television - including satellite – broadcasting. The management of these two rights has never been split - including for satellite broadcasting – because both rights have been exercised through collective management societies. Moreover, as explained above, authors' societies made arrangements between themselves under the 1987 Sydney Agreements to address operators' needs through a single licence for the world repertoire in all territories covered by the satellite footprint.

For online exploitations, in countries under the so-called "continental" tradition of author's rights, creators normally entrust management of both rights to the collective management society of which they are members, thereby enabling it to license reproduction and making available rights simultaneously to commercial users.

The situation is different in countries under the Anglo-Saxon "copyright" tradition where creators normally entrust the management of public performance right to collective management societies and the reproduction right to publishers who are thereby able to exploit it themselves.

It has to be recalled that if the management of the two rights for online uses is now starting to be split, it is largely down to the Commission itself, which advised rights holders through the 2005 Recommendation to grant multi-territory licences without going through the network of reciprocal representation agreements. As indicated above, major music publishers, holding mechanical rights in huge repertoires, chose the way paved by the Recommendation.

In spite of this, collective management societies and publishers can, in order to avoid the commercial user having to negotiate separate licences for the rights in the same work, aggregate in a single licence for these works the public performance right, which they exercise on a Community-wide basis under the representation agreements in force with the authors' societies of Anglo-Saxon tradition that manage public performance right, with the mechanical reproduction right that they manage under the agreements concluded by them with the multinational publishers.

Such re-aggregation of these two rights is an essential part of the efforts currently developed by right holders to find the appropriate solutions concerning licensing in online exploitation (see 2.1.1 hereabove).

2.3 The Aggregation of the Rights of Copyright Holders and Neighbouring Rights holders in a Single Licence

In its Reflection Document, the Commission moots the idea of streamlining the pan-European and/or multi-territory licensing process by aggregating all the rights - copyright and related rights - into a single licence.[26]

However, authors' societies consider it in the creator's best interest to keep the possibility to negotiate and grant licences separately from neighbouring rights holders.

[26] Page 16.

If GESAC is not, in principle, opposed to the idea of aggregating authors and neighbouring rights in the same license, as long as such process is implemented on a purely voluntary basis - the Reflection Document acknowledges that common licences have been granted in the past for certain exploitations -, extending this practice to online exploitation would not be appropriate and, as the Reflection Document itself concedes, would create a lot of complexity.

This complexity is not limited to the distribution of the jointly collected revenue, which would entail copyright and neighbouring rights holders agreeing on the breakdown of remuneration. It is also a matter of how to negotiate the tariff with the user(s). It is difficult enough for one rights holder alone to negotiate with a user, but it is certainly more difficult when all rights holders are involved. Additionally, it should be pointed out that the business practices of copyright holders (authors, composers and music publishers) and those of record companies are very different, and it is therefore important that the independence that creators have in negotiating clearances be maintained.

Finally, it should not be forgotten that separation of rights has existed for a long time in traditional exploitations, such as radio or TV broadcasts, without impeding the development of these services. There is no reason why this should be different in the online sphere.

2.4 The Improvement of Ownership and Licence Information

The Commission suggests improving information on the ownership of rights and licensing.[27] Two options are considered by the Commission, the creation of a central repository, or the obligation for collective management societies to make available a list of their repertoire.

GESAC supports the principle of improving access to ownership and licence information. In fact, authors' societies already provide copious information on the content of the repertoire that they manage.

However, it must be taken into account that, as the Reflection Document indicates, any initiative in this field should remain voluntary in order to comply with the international rules, especially article 5.2 of the Berne Convention which provides that copyright protection must be exercisable without formality. This is a fundamental point for GESAC. Notwithstanding the need to make all the efforts in order to improve ownership and licence information, the fact that a work is or not included in a repository, register or database of any kind cannot be a condition for its copyright protection.

As regards the practicalities of any such initiative, the whole issue is about how, and how much, information should be given. Generally, we share the views expressed by the former Commissioner for the Information Society, Mrs. Reding, in a speech given in Visby, Sweden, when she said that "*setting up a central repository in the form of interconnected online databases would be the best route*."[28]

This is the approach followed by authors' societies, which have been working for a long time on these matters.

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[27] Page 17.

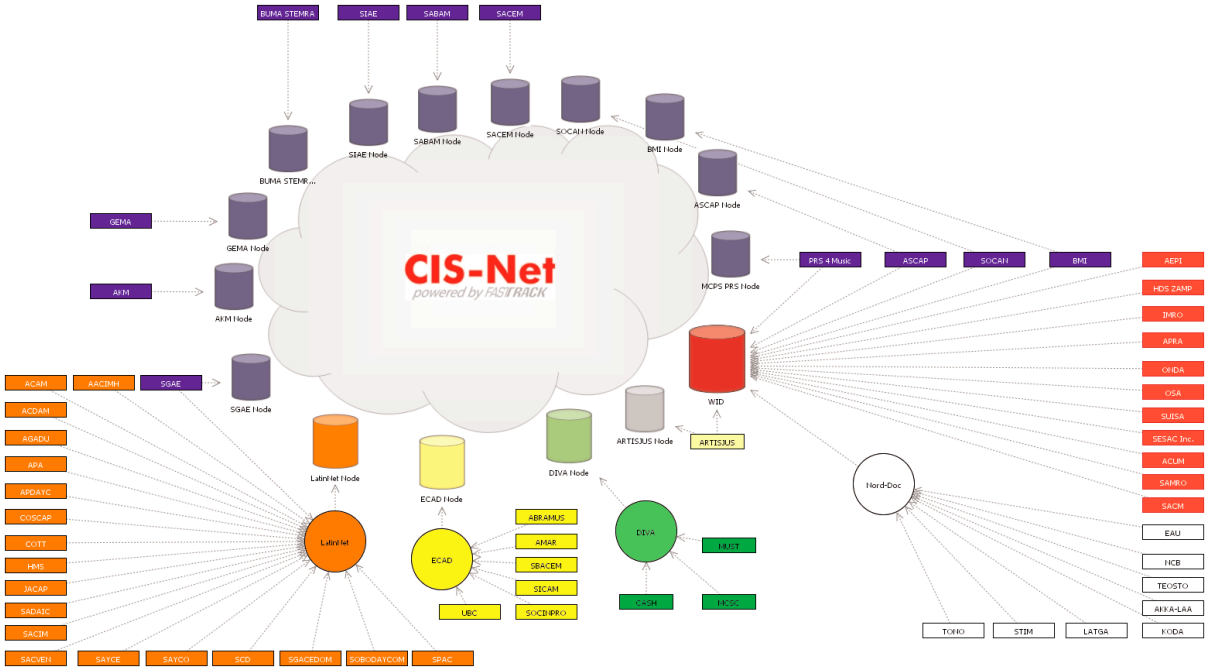
[28] Viviane Reding, Bringing down walls and barriers in the digital world – priorities for the European Digital Agenda, Visby/Gotland, 9 November 2009.

In 1994, under the auspices of CISAC, the Common Information System (CIS) was launched to provide advanced tools for electronic data exchange between societies. At the heart of the CIS project is a desire not only to use the most advanced technology to streamline authors' societies' business processes but also to uphold the rights of creators in all repertoires in the digital universe.

One of the biggest achievements of this initiative is CIS-Net. CIS-Net, which is powered by FastTrack, is the information system that connects musical societies to one another to facilitate documentation sharing, data exchange and royalty distribution. Its full potential will be realized once all of CISAC's members are connected to it. This goal was one of the driving forces behind the Binding Resolutions for Musical Societies, a set of technical requirements relating to documentation and distribution practices of CISAC's members. In fact, one of the Resolutions requires all musical societies belonging CISAC to contribute to and use CIS-Net. Although the Binding Resolutions have yet to enter into force, many societies have already achieved compliance. In 2008, there were already over 38 million musical works from 59 contributing societies available through CIS-NET,

With adoption of the Binding Resolutions expected for 2011 and implementation set to take place over 2011 and 2012, CIS-Net is poised to become a truly global network.

Here is how it works:



© CISAC[29]

CISAC is also the driving force behind the ISWC[30] Dissemination Project. Like the ISBN for books, the ISWC is becoming the reference for identifying musical works across the entire value chain. While work does remain to be finished, ISWC is ready for cross-industry adoption. CISAC and many of its leading members are currently working with several ISPs

[29] Graph used with the kind permission of CISAC.
[30] ISWC stands for International Standard Work Code.

and content users on the integration of ISWC into worldwide digital platforms. The progress made with ISWC serves as an important precedent for all other creative standards.[31]

Moreover, a working group that includes SACEM, PRS, STIM, EMI and UNIVERSAL has been set up under the Roundtable initiated by Mrs. Kroes to work on the issue of developing information.

Any policy action on this subject should therefore wait for the outcome of said discussions and should in any case take into account the initiatives undertaken by authors' societies in this flied.

3. ***Consumer Access: Exceptions and Limitations, Orphan and Out-of-Print Works and User Generated/Created Content***

3.1 Harmonization of Exceptions and Limitations

The Reflection Document suggests that further harmonization as regards copyright exceptions and limitations may be needed.[32]

As indicated in our submission to the consultation launched by the Green Paper on Copyright in the Knowledge Economy, GESAC opposes any re-opening of the 2001 Directive, which could lead to an extension of the scope of the current exceptions (or the inclusion of new ones), as well as making them mandatory.

At the time of the adoption of the Directive, it was decided that not each aspect of the copyright exceptions had to be harmonised, giving Member States some room of manoeuvre. We believe that this proportionate approach is still valid and that the balance achieved by the Directive between the protection of rights holders' interests and those of Society remains appropriate

Moreover, calls from certain stakeholders for a re-opening of the Directive and a re-examination of its list of exceptions often hide an aim to either legalise certain acts that today qualify as piracy or to allow the setting up of certain for-profit services without remunerating rights holders for the use of their works.

3.2 Extended Collective Licensing for Orphan Works

The Reflection Document moots the idea of introducing a system of extended collective licensing for orphan works.[33]

GESAC would be very supportive of such a system. An extended collective licensing system, in combination with an adequate set of criteria on diligent search, would achieve the right balance between the needs of users of orphan works and the needs of rights holders

[31] More information on CIS-Net, ISWC and other initiatives, in which CISAC is involved, can be found at CISAC's 2008 Annual Report.
[32] Page 15.
[33] Page 14.

As regards the diligent search, the *Sector Specific Guidelines on Due Diligence Criteria for Orphan Works* that were agreed upon amongst stakeholders through the *Memorandum of Understanding on Orphan Works* gives a very solid base, providing Member States with sufficient guidance on this issue.

Concerning the introduction of extended collective licensing system, it would bring along a number of positive effects:

- It would give users the certainty that they are using works in full respect of copyright rules;
- It also would give them the certainty that they will not have to deal in the future with copyright claims;
- It would give the author of an orphan work the possibility to claim royalties from the collective management society;
- It would keep the same value for works, irrespective of them being orphaned or out-of-print or not;

Additionally, the point also has to be made that collective management largely precludes works becoming orphaned. The number of orphan musical works, for example, is very small because almost the entire repertoire is managed collectively by authors' societies. Extended collective management will contribute to authors having an additional incentive to register their works with their collective management societies.

Also, Collective management societies are best placed to find the holders of rights in orphan works, not least thanks to the databases they keep.

3.3 User Created/Generated Content and Web 2.0 Services

User Created Content (UCC) is another important issue raised in the Reflection Document where it is stated that the Commission often receives request of citizens who wish to comply with copyright rules when using Web 2.0 services.

GESAC welcomes that the Commission is willing to clarify citizens' doubts as regards copyright. The Reflection Document states that consumers are often bewildered by the complexity of the Commission's response.[34] The Document, however, does not enter into the details of such response, but in the past, the Commission has suggested that clearing copyright in the field of Web 2.0 services was the consumers' responsibility. This view is expressed in the post i2010 Questionnaire, for example.

In GESAC's opinion a system based on the need for the consumer using the services provided by a Web 2.0 platform to clear rights is inappropriate and based on a wrong understanding of the situation.

It has to be recalled first that copyright laws do not prevent consumers from using copyright protected content within their private sphere. If that use implies a reproduction, the latter is subject only to the private copying compensation provided by the national law according to article 5.2.b) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects

[34] Page 10.

of copyright and related rights in the information society.[35]. This freedom allows the consumer to use in his or her private sphere copyright protected content, without any need whatsoever to clear rights. Therefore, as regards uses in the private sphere, the only possible increased freedom or flexibility that could be introduced would be an extension of the private copying exception (and thus of private copying compensation schemes) to those countries where this exception does not exist.

As regards the upload by consumers of copyright protected content to Web 2.0 services and its subsequent making available, this would exceed the private sphere of the consumer. In this case, it is the responsibility of the provider of said service (and not of the consumer) to clear the public communication and reproduction rights.

Indeed, the purpose and activity of such services, which are voluntarily and completely construed and organized to fulfil these objectives in the most efficient way, is to communicate protected content on their own brand and to realize and maximise commercial, essentially advertising, receipts.

Consequently, contrary to what has been supported by Web 2.0 service providers, the task to clear the public communication and reproduction rights necessary in order that their services comply with copyright laws is their responsibility as commercial operators of a public communication service.

It should be pointed out that the claim by certain Web 2.0 operators that their activities are covered by article 14 of the E-Commerce Directive is totally unjustified.[36] This provision, discussed and adopted when Web 2.0 services did not exist yet, was never meant to cover Web 2.0 services providers whose activity goes beyond hosting content uploaded by consumers and mainly consists in organising the public communication of such content.

Therefore, the temptation to make copyright laws more flexible to facilitate the clearing of rights by end-consumers to use existing content should be avoided, while the appropriate licenses should be applied for by Web 2.0 service providers themselves.

4. The Protection of Rights Holders

The Reflection Document states rightly on the starting page that "*copyright is the basis for creativity*" and "*one of the cornerstones of Europe's cultural heritage and of a culturally diverse and economically vibrant creative content sector*."

However, as indicated above, GESAC is disappointed with the Reflection Document's proposals regarding the protection of rights holders. Indeed the Commission seems to consider that it is in rights holders' interests that online services should be developed and, consequently, that simply encouraging that development is enough in and of itself to protect rights holders.

[35] GESAC recalls that the private copying exception has not been implemented in all the EU Member States and that a private copying compensation scheme does not exists in all countries where such exception has been introduced.

[36] Directive 20/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

GESAC totally supports the Commission's policy to encourage the development of online services, but proper copyright enforcement on the Internet should be part of that policy, securing further development of legal online services.

As the Reflection Document points out, illegal downloads on a large scale do jeopardize the development of legal offers of online content. In fact, in our view, the most important obstacles to the development of new online content services are piracy and other forms of unlawful uses.

Consequently, it is regretful that the Reflection Document does not really raise this issue, notably when the Commission itself, in the Communication on Creative Content Online in the Single Market, had identified piracy as one of the four horizontal challenges which merit action at EU-level.

In fact, the Communication on Creative Content Online in the Single Market stated that: *"The fight against online piracy involves a number of complementary elements: (1) developing legal offers; (2) educational initiatives; (3) enforcement of legal rights; (4) seeking improved cooperation from Internet Service Providers (ISPs) in stopping dissemination of infringing content."*

The Reflection Document limits its analysis to the development of legal offers and does not address the rest of the elements raised in the Communication.

4.1 The Lack of Proposals as Regards Copyright Enforcement in the Internet

While the legal offer of online music services may always be improved, it is undisputable that a sufficiently wide and diverse offer of legal services is already available in most EU countries. This offer is bigger and cheaper than anything that was ever available in the offline world. Legal online services make available a multi-million-song offer, far more than what is available in the biggest record stores, and at prices that are more competitive than those of CDs.

According to the website www.pro-music.org, they are at least 24 legal services of online music in the UK.

There are pay-per-download services (e.g.: iTunes, Amazon, Bleep, Tesco, etc.) with different pricing policies. The price for individual songs ranges from 29p to 80p. The consumer also has a choice as regards the sound quality of the songs (MP3 and WAV) and as regards the song being DRM-free or not.

There are subscription services with free streaming and limited permanent downloads (with or without DRMs) per month (e.g. eMusic, Napster and SkySongs). There are free advertisement-based streaming services and additional premium options, such as commercial-free streaming and downloads (e.g. Spotify, We7). There are even all-you-can-eat services bundled to goods or services. These services, such as Nokia Comes with Music, allow consumers who purchase a mobile phone with this option to make an unlimited number of permanent downloads during one year for free. Virgin Media, on the other hand, is about to launch service, which will be bundled to Internet subscriptions.

In spite of all this increasing choice, the European Information Technology Observatory estimates that there will be over 9.8 billion illegal downloads of music files in 2009 in the UK alone.[37] That is an increase of 22.5% from 2008. In 2010 the EITO estimates that illegal downloads will reach 11.3 billion, a 15.3% increase.

The situation is similar in other European markets. France, for example, has a similar choice of legal offers, which includes some of the same services available in the UK (e.g.: iTunes, Amazon, eMusic, Spotify, Nokia Comes with Music, etc.) and some created in France (e.g.: Deezer, Fnac, Virgin Mega, Neuf Musique, Orange Music). The offer is therefore quite substantial there, too. Germany also has a wide array of legal services that consumers can choose from, again with services available in other Member States (e.g.: iTunes, Amazon, eMusic, Spotify, Nokia Comes with Music, Deezer, etc.) and services set-up in Germany (e.g.: Finetunes, Freenet, AOL Musik, Magix, T-Mobile, etc).

However, there, too, the number of illegal downloads has not ceased to increase. EITO estimates that in France, there will be 7.7 billion illegal downloads of music files in 2009, an 18.5% increase from 2008 (8.9 billion in 2010, an increase of 15.6%). The estimates for Germany are equally dramatic: 11.4 billion illegal downloads in 2009 (22.6% increase from 2008) and 13.2 billion in 2010 (15.8% increase over 2009).[38]

The situation is similar in other European countries, where illegal downloads outnumber legal ones by 20 to 1 on average. In countries like Spain, for example, legal downloads of music files account for just 0.1% of total downloads.

This situation is not only detrimental for rights holders. Music services, which do take out licences, need to operate without the unfair competition of illegal free access to music.

There is therefore clear evidence that the provision of legal services alone will not reverse the situation and that adequate copyright protection is indispensable.

GESAC is therefore puzzled that enforcement of copyright in the Internet is not considered one of the main challenges listed in the Reflection Document and that no EU action to improve enforcement is suggested.

GESAC believes that a society in which copyright is adequately protected provides for the necessary incentives for market operators to develop sustainable services that satisfy consumer demands. Such a framework would allow for the currently niche market of legitimate online content services to grow exponentially, increasing the content available, reducing the costs of service providers thanks to increased economies of scale, and thus increasing accessibility for the consumer. Like in any other field of business, the lack of protection of property rights (including intellectual property) and investment reduces the incentives to enter the market and for the market to develop itself and reach its full potential both at national and pan-European levels.

[37] European Information Tehcnology Observatory, 2006 Yearbook.

[38] Please note that EITO's estimates were made before the adoption of the HADOPI Law. The application of this law could provoke a decrease of the figures for France. The same could happen if the UK finally adopts legislation to facilitate copyright enforcement in the Internet.

GESAC understands that enforcement of copyright in the Internet is a controversial issue with heated debates both at national and EU level. However, this issue absolutely needs to be addressed and it is the duty of the new Commission to fulfil its responsibilities about it.

4.2 Collaboration with ISPs

The Reflection Document includes one point on ISP collaboration,[39] but this collaboration is limited to providing more options for rights holders to develop new business models.

In some EU countries, ISPs already act as online content providers, bundling the provision of broadband access to music downloads or television programs. This is the case in the UK with Virgin Media and its soon-to-be-launched service, Denmark with TDC or France and other EU countries with IP television services. These initiatives are indeed licensed by authors' societies, as they are always ready to grant licenses to facilitate the set-up of any business model that generates an adequate income for their members.

However, ISPs also have a role to play in discouraging customers from infringement and stopping the dissemination of infringing content, as the Communication on Creative Content Online rightly points out.

It cannot be disputed that gaining access to music and audiovisual content using P2P software is an incentive to consumers to subscribe to high speed and expensive Internet access and consequently generates a huge amount of income for ISPs, while in many cases resulting in copyright infringements. However, ISPs also have a strong interest in the normalization of their businesses and of the transactions of their subscribers.

Moreover, ISPs are in a key position to provide information to consumers on copyright and to take measures to prevent or terminate copyright infringements by their subscribers.

In those circumstances the liability limitation granted by article 12 of the 2000 E-Commerce Directive has become obsolete and needs a review.

In this framework GESAC welcomes the creation of the Working Group on Illegal Up and Downloading, which is chaired by the Head of Directorate D (Knowledge-Based Economy) of DG MARKT, Mrs. Margot Fröhlinger and hopes that this initiative will bring positive results, in parallel with similar discussions developed at national level in several Member States (e.g.: France, UK, Spain, etc.).

GESAC wishes finally to emphasize that those discussions made clear that voluntary agreements are difficult to achieve or ineffective and that the intervention of public authorities, in those conditions, appear necessary.

[39] Page20.

4.3 Alternative Forms of Remuneration for Rights Holders

The Reflection Document raises the issue of introducing alternative forms of remuneration, which would either exist alongside traditional copyright licensing or replace such licensing between rights holders and users altogether.[40]

It brings up the idea that ISPs would owe rights holders compensation for mass reproductions and dissemination of copyright protected works undertaken by their customers.

The Reflection Document refers to a proposal made by GESAC member, SACEM, on this issue, and the latter wishes to clarify the following:

- This proposal has to be considered in the context of the current French legal framework and the recent adoption of the HADOPI law with the intention to improve copyright enforcement in the Internet;
- This proposal should not be considered as an alternative form of remuneration, SACEM being not advocating for file sharing between private individuals being legalised through an Internet flat fee scheme but claiming compensation for rights holders for file sharing remaining illegal but which cannot be policed, regulated and controlled;
- Such compensation being calculated in consideration of the level of copyright infringements in the Internet and adapted in consideration of the evolution of such level, would be a further incentive for ISPs to do their best to reduce illegal up and downloading as much as possible.

4.4 Extended or Mandatory Collective Management for the Making Available Right and an Additional Right to Equitable Remuneration for Online Uses

The Reflection Document suggests as an additional way of improving the protection of rights holders to introduce an extended or mandatory collective management system for the administration of the making available right of authors and performers and the provision of an additional unwaivable right to equitable remuneration for the making available right of authors and performers.[41]

The Reflection Document does not indicate clearly if these two proposals have to be addressed separately or if it is one single proposal consisting of two elements that go hand in hand.

GESAC is prepared to contribute to the discussions that the Commission would organize concerning the introduction of an extended or mandatory collective management system for the making available right.

As regards the second proposal, GESAC is not sure to understand clearly the practical implications that such an unwaivable right would bring for authors as the existence of the exclusive rights recognized to authors already provides them with the power to secure an adequate income from legitimate operators. That notwithstanding, GESAC is here again

[40] Page 19.
[41] Page 20.

prepared to contribute to the discussions that the Commission would wish to organize on such topic.

4.5 Governance and Transparency of Collective Management Societies

The Reflection Document also suggests that measures on governance and transparency of collective management organisations be introduced.[42]

We would like to point out that many of the issues concerning governance and transparency have already been addressed at Community level.

The 2005 Recommendation already addresses many aspects on governance and transparency, such as entrustment of rights, information on repertoire, deductions, equitable distribution of royalties, representation in the decision making process and accountability.

Moreover, DG Competition has also dealt with matters regarding restrictions to become a member or to exercise members' rights within a collecting society, particularly on the grounds of nationality, as well as to the possibility of limiting the management of all or certain rights, in order to entrust them to a different collecting society or to manage them directly. The existing case-law on this matter are the GEMA I, GEMA II[43], the Phil Collins case[44] and the Daft Punk cases.[45]

In addition, authors' societies have made important efforts of self-regulation on this matter.

The GESAC – ICMP Common Declaration, for example, contains clear rules on the possibility of music publishers to become members and to participate to the decision-making process within the society. This Common Declaration contains also specific provisions allowing rights holders not to entrust their rights to collecting societies concerning online interactive and non-interactive exploitations.

Authors' societies member of CISAC also adopted in 2007 the Professional Rules for Musical Societies and in 2009 the Professional Rules for Dramatic, Literary and Audiovisual Societies. These documents set minimum quality standards on governance and membership, transparency, licensing, collections, documentation and distribution. The Professional Rules also include provisions for the settlement of disputes between authors' societies and their members or sister societies.

[42] Page 20.
[43] Commission Decision of 2 July 1972 (IV/26.760 - GEMA). 72/268/CEE.
[44] ECJ of 20 October 1993, C 92/ 92 and C 326/ 92, ECR 1993, 5145 – Phil Collins.
[45] COMP/37.219 - Banghalter & de Homem Christo / SACEM.

ANNEX I

Collective Cross-Border Management of Online Rights: Historical Background

As indicated in Point 2.1.1, licences for the world repertoire for multi-territory – worldwide in fact – exploitations were available until 2004 and European authors' societies were in a position to act as one-stop-shops for these licenses. This was possible thanks to the system of reciprocal representation agreements between authors' societies that had been timely adjusted to the digital environment through the Santiago and Barcelona agreements.

In fact, this was not the first time that reciprocal representation agreements were adapted to exploitations that had an international dimension. In 1987 Authors' Societies concluded the Sydney agreement providing amendments to their reciprocal representation agreements to deal with satellite broadcasting. Those amendments provided that when the satellite footprint covered several countries, the representation rights conferred in the representation agreement to the society located in the country where the uplink of the signal took place would be valid for all the countries within the footprint of the satellite. Authors' Societies, by introducing these amendments in their bilateral agreements, actively promoted the grant of multi-territorial licenses covering the world repertoire.

The Santiago and Barcelona agreements followed the same approach. The authors' society of the country where the online content provider had its economic residence was in a position to grant a license covering its repertoire and the repertoire of its sister societies – in practice the world repertoire – for a worldwide online exploitation (authority allocation clause).

- The Non-Acceptance of the Santiago and Barcelona Agreements

The first intervention by the Commission in the field of cross-border management of online rights happened in 2004, when it did not clear the Santiago and Barcelona agreements. In fact, DG COMP expressed its concerns that the authority allocation clause included in the Santiago and Barcelona agreements would be contrary to competition rules. DG COMP applied a policy in line with the Simulcasting Decision,[46] which dealt with the licensing of Internet simulcasting exploitations by collective management organizations of phonogram producers.

Authors' societies considered the authority allocation clause to be a fundamental part of the agreements, without which there would be a risk of race to the bottom of tariffs, since users would be in a position to forum-shop looking for the cheapest license and the weakest legal framework. As the Commission rightly put it in a different initiative, the Communication on Creative Content Online, a "*licensing system that results in a 'race to the bottom' on licensing rates that apply for online services, would be highly detrimental to the livelihood of musical*

[46] Commission Decision of 8 October 2002 (Case No COMP/C2/38.014 — IFPI 'Simulcasting') 2003/300/EC.

writers and composers, the survival of collecting societies and, in consequence, cultural diversity."[47]

In those circumstances, the Santiago and Barcelona agreements were not extended beyond their expiration date of 31st December 2004. After that date, authors' societies were only able to grant licenses covering the world repertoire for online exploitations limited to their territory of activity or licenses for worldwide online exploitations, but limited to the society's own repertoire.

- The 2005 Recommendation

At the beginning of 2005, authors' societies started to work on a model that would again allow for them to grant licenses of the world repertoire for multi-territory online exploitations. The idea was to find a model that would avoid a race to the bottom of tariffs and that would, at the same time, address DG COMP's concerns.

However, in October 2005, DG MARKT issued the 2005 Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services[48] (the 2005 Recommendation).

The intention of the Commission was to encourage "*multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders*."[49]

DG MARKT's approach departed from what had been the tradition of decades of collective management of rights. It proposed a model in which rights holders would give EU-wide licenses directly to online users for their own repertoire without including such repertoire into the network of reciprocal representation agreements, thus without recourse to other sister societies acting as intermediaries. As indicated in its Impact Assessment, the Commission wanted the market to move away from reciprocal representation agreements and predicted that the market would evolve in such a way that there would only be a "*limited amount of (three or four) powerful CRMs for online licensing".*[50]

The 2005 Recommendation therefore gave clear encouragement to the fragmentation of repertoires.

The most significant outcome of the Recommendation was the withdrawal by the international music publishers of their so-called Anglo-American repertoires mechanical rights from the traditional network of collecting societies in order to license these rights directly to users on a multi-territorial basis through the management of one or several collecting societies chosen by them.

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[47] Staff Working Paper Accompanying the Communication on Creative Content Online in the Internal Market, p. 25.
[48] Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).
[49] Recital (8) of the Recommendation.
[50] Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright. Page 42.

- The CISAC Decision[51]

Barely four months after the Recommendation was adopted,[52] GESAC's sister umbrella organization, CISAC, and its EEA affiliates received a Statement of Objections from DG COMP concerning, i.a., the network effects of reciprocal representation agreements as regards public performance rights for Internet, satellite and cable exploitations.

In its Decision adopted on 16th July 2008, the Commission considers as an anti competitive concerted practice that authors' societies limit, through reciprocal representation agreements, the right to licence their repertoire to the domestic territory of the other contracting collecting society. However, contrary to DG MARKT's thesis, DG COMP made clear that it did not "*call into question reciprocal representation agreements*," just *"the degree of participation of each collecting society within this system."* Consequently, the Commission orders to collecting societies to renegotiate on a purely bilateral basis their reciprocal representation agreements.[53]

It is noteworthy to observe that the Decision states that authors' societies "*remain at liberty to continue the current system of fixing royalties or to otherwise introduce other models which protect royalty payments."* The Decision's aim is not to "*facilitate a race to the bottom in authors' royalty payments",* but to "*encourage competition on the level of administration fees charged to the authors"*

The bottom line is that since 2004, it has become unclear from copyright and competition law perspective according to what rules authors' societies should manage their international representations. The result of these evolutions is an increased complexity and cost in the negotiation, licensing and administration of rights, and in some cases uncertainty about the scope of the representation of rights.

[51] Commission Decision of 16 July 2008 (Case COMP/C2/38.698 – CISAC).
[52] The Recommendation was adopted in October 2005 and DG COMP sent the Statement of Objections to CISAC and its affiliates in January 2006.
[53] The Commission Decision on the CISAC case is under appeal before the European Court of Justice.