

The Role of Traditional CMOs in the Digital Era

Lucius Klobucnik & Daniel Campello
Queiroz

EIPIN – IS Research Paper No. 19-05

www.eipin-innovationsociety.org



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 721733

EIPIN Innovation Society

(March 2017 - January 2021)

European IP Institutes Network

Cooperation among IP Institutions and students in Europe since 1999.

EIPIN Innovation Society

- Multidisciplinary and **holistic research programme** on role of IP in the innovative lifecycle
- **Co-supervision** of doctoral research leading to **joint doctorate degrees** from two EIPIN partners
- Tailor-made **training programme** prepares a new type of IP researcher who is able to ascertain and articulate the complexities of the IP system.



Partner organisations



IP as a complex adaptive system

- IP developed from a mere legal title into a **complex adaptive system**
- IP functions as a
 - Business tool for value creation
 - Vehicle for investment
 - Relationship between right holders, users and society
- Ambition: to **enhance Europe's capacity to foster** innovation-based sustainable economic growth globally
- Research objective: to provide **reliable conclusions** on how to deal with the adaptive complexities of innovation cycles that **secure economic benefits** and **uphold justice** in the innovation society.

Research results

- 15 **PhD theses**, published as monographs
- International peer-reviewed **articles**
- **Presentations** at international conferences
- Bi-yearly **conferences** on the four areas of research
- **Training** activities on methodology, research and transferrable skills
- Presentations and publications on establishment and management of **joint doctoral degree structures**

The Role of Traditional CMOs in the Digital Era

Authors: Lucius Klobucnik & Daniel Campello Queiroz

1. Introduction

The digital era of music consumption has created either challenges or unique opportunities for the music business. On the one hand, the surge of digital consumption of music has disrupted the music business, crashed the physical industry and changed the game. However, music consumption through digital service providers (DSPs) has created a wider access to millions of all kinds of musical works as well as musical works incorporated in other products, such as music in audio-visual products. Within this context, the digital era is considered a unique challenge for the traditional rights management system shaped by collective management organizations (CMOs), not only because this system was built to deal with the traditional way to consume music, but also regarding the transparency and representation issues brought by the digital era.

The emergence of CMOs in the music industry has closely been connected to new forms of exploitation and distribution technologies. Until the digital era, they have been able to provide a helping hand to right holders in monitoring use of their works and distributing remuneration as well as to users of copyright protected works who can, in many cases, apply and receive a blanket license for number of works without having to clear rights with every single right holder. The most important example where the blanket license system works is in the broadcasting world; in general terms, TVs and Radio companies around the world – the former over the latter nowadays – has been the main revenue source to the music industry in many countries. The advent of disruptive digital technologies, however, brought the possibility of rapid dissemination of copyright protected works via the Internet in virtually infinite numbers, creating a key and critique moment with regard to the role of CMOs in this scenario.

Taking all these factors into consideration, this article aims to address questions regarding the role of CMOs in the digital era. Questions such as “to what extent the role of the CMOs were disrupted because of the digital era?” and “are CMOs innovative enough to deal with the digital era in the same way as DSPs?” inspired us to write this piece in which we aim to map the current landscape rather than find all answers.

2. The Digital Era and Disruptive Innovations

Entertainment industries, in particular music industry, were hesitant to embrace the disruptive technologies by adapting their business models to new technological reality. Moreover, the legal framework, the institutional ambient, the governance structure and the control mechanisms have not been adapted to the changed environment and changed needs of right holders and users¹. As a consequence, DSPs were particularly affected by insufficient legislative action and this resulted in increased popularity of illicit business models which caused huge revenue losses not only to right holders, but to the music industry as a whole. Fortunately, despite of these insufficient conditions in the legal environment, over the past years tables turned and DSPs have generated half of the total global music revenue². While disruptive digital technologies have not made the music industry less complex, they have brought enormous benefits for consumers in terms of access as well as for right owners in terms of direct, rapid and transparent accounting³. In the light of music industry's move from physical sales towards business models providing constant access to vast amount of works, some have predicted the end of collecting societies.

However, this prediction turned out to be wrong⁴ and collecting societies are still an integral part of the music industry. Nonetheless, because of the changes brought by disruptive technologies, CMOs should react accordingly to meet the new needs of right holders as well as DSPs, particularly with regard to data processing and digital revenue distribution. In the course of the past years, revenue from both physical sales and digital downloads has declined rapidly⁵. While (legal) downloading was considered in the time of its emergence as a breakthrough, because it for the first time provided music in a non-physical form, in reality it only mirrored the business model of physical sales. Although bearing some significant differences, such as the ability to transfer a digital file to several devices and possibility to purchase single songs, it followed the same model of ownership as physical sales model.

However, it has not been able to effectively tackle the question of online piracy, since illicit online download-to-own models were able to offer users essentially the same services. It comes rather without a surprise that downloading revenue has recently been declining (at an

¹ DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 2014 recital 8.

² IFPI, 'Global Music Report 2017: Annual State of the Industry' 6.

³ Bill Colitre, 'Streaming Revenue' [2017] Los Angeles Lawyer 20, 22.

⁴ Kung-Chung Liu and Reto M. Hilty (eds), *Remuneration of Copyright Owners - Regulatory Challenges of New Business Models*, vol 27 (Springer-Verlag GmbH 2017) vi.

⁵ IFPI (n 2).

even faster pace than physical sales revenue) and downloading services are poised to completely disappear in the future⁶. Unlike download-to-own services, online music streaming services bring significant challenges to the music industry and especially to CMOs. Streaming services employ a business model which is not ownership-based, but rather access-based which explains the popularity of streaming services and the constant growth of streaming revenue.

Consumer behaviour has undoubtedly changed. For instance, some consumers prefer to have constant access to large repertoire without the need to own/ download particular tracks and they can stream more music than they would if they had to pay for each individual track. It must be emphasized that DSPs have on several occasions been praised for contributing to the decline of online piracy⁷; however, on the other hand, DSPs face accusations (particularly from artists) for their failure to pay royalties⁸. As a consequence, some artists⁹ have boycotted DSPs because they have been worried about their income¹⁰.

Nonetheless, not only DSPs are to blame. In order to meet demands of their customers in providing constant access to large repertoire (including newest music) in multiple territories, DSPs require cooperation with CMOs in a speedy manner. CMOs' operations have been highly criticized because of their opacity and their inability to respond to the needs of the online environment¹¹. For example, in the US¹² as well as in Europe¹³, digital music streaming services need around 2 years to obtain licences necessary for their operation, a period that might be too long for DSPs to succeed in highly competitive and dynamic digital music market and to attract customers.

Moreover, DSPs face extremely high transaction costs in order to gain license for a large catalogue of works¹⁴. These factors deter further development of the digital music industry and

⁶ Charles Arthur, 'Will Spotify Kill the Music Download?' *The Guardian* (Summer 2018) <<https://www.theguardian.com/business/2016/dec/26/spotify-music-download-apple-itunes-streaming-vinyl>>.

⁷ Jasmine A Braxton, 'Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing' (2013) 36 *Hastings Comm. & Ent. LJ* 193, 206.

⁸ Frances Lewis, 'Slipping through the Cracks: How Digital Music Streaming Cuts Corners on Artists' Royalty Revenues Globally' (2017) 43 *Brook. J. Int'l L.* 297, 309.

⁹ Hannah Ellis-Petersen, 'Taylor Swift Takes a Stand over Spotify Music Royalties' (*the Guardian*, 5 November 2014) <<http://www.theguardian.com/music/2014/nov/04/taylor-swift-spotify-streaming-album-sales-snub>> accessed 10 March 2018.

¹⁰ Charlotte Hassan, 'Reasons Why Some Artists Absolutely Hate Spotify...' *Digital Music News* (21 May 2016) <<https://www.digitalmusicnews.com/2016/03/21/why-artists-pull-their-music-from-spotify-but-not-youtube/>>.

¹¹ Heritiana Ranaivoson, Maria Iglesias and Anna Vondracek, 'The Costs of Licensing for Online Music Services: An Explanatory Analysis for European Services' (2013) 21 *Mich. St. U. Coll. L. Int'l L. Rev.* 665, 673.

¹² John Seabrook, 'Spotify: Friend or Foe?' [2014] *The New Yorker* <<https://www.newyorker.com/magazine/2014/11/24/revenue-streams>> accessed 10 March 2018.

¹³ Vrije Universiteit Brussel KEA European Affairs, 'Licensing Music Works and Transaction Costs in Europe' 4.

¹⁴ *ibid* 51.

may prevent new players, especially (innovative) start-ups from entering the market. Consequently, DSPs often choose expediency over legal compliance by offering music to their customers without clearing all rights involved. Such a practice leads not only to an increased risk of litigation for DSPs¹⁵ but also to underpayment of right holders' royalties. CMOs can provide a way from this undesirable situation by offering innovative approach to DSPs, for instance by embracing new technologies for usage monitoring and royalty distribution as well as providing all necessary services and data for DSPs to enable swift online rights clearance.

3. Challenges and Opportunities for Collective Management Organizations

3.1 Lack of Legal Definition of Streaming and its Impact on DSPs and CMOs

It is widely understood that the current legal framework creates uncertainties for the DSPs. New forms of exploitation of copyright protected works in the digital world lacked legislative definition. Rights of reproduction, distribution and communication to the public could satisfy the needs of physical market; however, the same is not true with regard to digital exploitation, since it is not clear whether all or only some or those rights are involved in case of downloading or streaming. The lack of legislative underpinning was first realized on international level by the World Intellectual Property Organization (WIPO), reflecting the efforts to build rules to deal with the online world in two treaties¹⁶, referred to as “WIPO Internet Treaties”¹⁷.

Although the fact that nowadays this issue is almost solved in most countries, one important issue with regard to the use of works and phonograms on the Internet – either by download or streaming – was due to the implementation of the “making available right” created by the WIPO Internet Treaties. During the negotiation of these treaties, there were concerns that authors and artists would not be sufficiently remunerated in light of the advent of digital interactive, on-demand transmissions. In one of the most relevant studies about the making available right entitled “The making available right in the United States”, the US Copyright Office explains the background and how the umbrella solution was created:

¹⁵ Ben Beaumont-Thomas and Dominic Rushe, ‘Spotify Sued for \$1.6bn in Unpaid Royalties as It Reportedly Files for IPO’ (3 January 2018) <<http://www.theguardian.com/technology/2018/jan/03/spotify-sued-for-16bn-in-unpaid-royalties>> accessed 26 January 2018.

¹⁶ ‘WIPO Copyright Treaty’ 9; ‘WIPO Performances and Phonograms Treaty’ 13.

¹⁷ ‘WIPO Internet Treaties’ <http://www.wipo.int/copyright/en/activities/internet_treaties.html> accessed 18 April 2018.

“(…) the member states debated two competing bundles of exclusive rights through which to provide this protection – either the right of reproduction plus a broad right of distribution, or reproduction plus the Berne Convention’s right of communication to the public. The United States argued that the distribution right properly encompassed digital transmissions, but several other countries preferred to cover such transmissions through a communication-to-the-public right. The European Community was a strong proponent of the latter view and proposed draft treaty language that housed an author’s right to make works available by wire or wireless means within the right of communication to the public.”¹⁸

It became clear, during the negotiations of the treaties, that neither the United States’ nor the European Community’s choices would be adopted by all member states. Consequently, a compromise in form of the so-called “umbrella solution” was adopted and incorporated into the WCT and WPPT. The “umbrella solution”¹⁹ is a rule created in order to fulfil Berne Convention’s gaps about which rights are involved in online content consumption such as download and streaming, and in what proportion they would be implemented. Since then, the member states have started to create proportions for each right –distribution, reproduction and communication to the public rights – within their territories. For this reason, each member state has a different percentage for each type of rights regarding either streaming or download. As stated, the “umbrella solution” provided “treaty members with flexibility in how they implement the exclusive right to authorize on-demand and interactive digital transmissions into national law.”²⁰

Therefore, existing copyright divisibility means that DSPs have to seek licenses for multiple exclusive rights when performing a single act of online dissemination, such as streaming. Because the Internet and digital technologies have increasingly transformed the clear distinction between different uses and accompanying rights, issues concerning overlapping rights are increasingly common²¹. Some argue that copyright divisibility not only creates enormous transaction costs but also increases the risk of court litigation for DSPs since the same act may infringe different exclusive rights simultaneously²².

¹⁸ United States Copyright Office, ‘Making Available Right in the United States, A Report of the Register of Copyrights’.

¹⁹ Jean-Paul Triaille and others, *Study on the Application of Directive 2001* (European Commission 2013) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:KM0113039:EN:HTML>> accessed 10 April 2018.

²⁰ United States Copyright Office (n 18).

²¹ Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Third Edition, Wolters Kluwer 2016).

²² Marshall A Leaffer, *Understanding Copyright Law* (5th edn, LexisNexis 2010) 294.

Although some legislative acts have reacted to digital dissemination by classifying the right of “making available to the public” as a type of more general right of communication to the public²³, digital technologies have made copyright fragmentation more common and legally confusing²⁴. The single act of streaming has not been legally defined and has been considered a “bundle of rights” including two or three types of exclusive economic rights²⁵: right of distribution, right of reproduction, and right of communication to the public. All these rights together are, in most countries, understood as the bundle of rights created by the WIPO Internet Treaties and named as the “making available right”. DSPs thus have to obtain license for each right separately and on some occasions question whether certain rights are included in services they offer, especially with regard to streaming²⁶. Although the “umbrella solution” was created by the WIPO Internet Treaties, discrepancies still exist not only with regard to which rights are included in the act of streaming, but also with regard to how splits between mechanical and performing rights are regulated for the act of streaming. The consequence of the “umbrella solution”, as stated, is that these splits are regulated in different countries differently. For this reason, authors and publishers receive different amount of remuneration for the same stream in different countries.

Furthermore, different rights are usually owned by different rights holders and DSPs are thus required to obtain multiple authorizations. These rights are usually managed by different CMOs which are normally organized to manage only one specific right which means a necessity for DSPs to negotiate with multiple CMOs in order to clear licenses for the same act of streaming. Even without a further need for legislative amendments, a helping hand to address DSPs licensing needs might be offered from downstream perspective by CMOs. Despite the existence of closer collaboration between CMOs in form of hubs, CMOs are still unable or unwilling to address the demands of DSPs. DSPs still lack information concerning inter alia the scope of licenses, territorial coverage of licenses, withdrawn rights, license tariffs, scope of

²³ ‘WIPO Copyright Treaty’ (n 16) 8; DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 para 3. 1.

²⁴ Jeffrey W Natke, ‘Collapsing Copyright Divisibility: A Proposal for Situational or Medium Specific Indivisibility’ 2007 51, 495–498.

²⁵ Dr Tilman Lüder, ‘The Next Ten Years in E.U. Copyright: Making Markets Work’ 18 61, 14; Jyh-An Lee, ‘Overlapping Rights in Different Business Models’, *Remuneration of Copyright Owners* (Springer-Verlag GmbH 2017) 8.

²⁶ ‘Spotify Questions Whether Mechanical Royalties Are Even Due on a Stream | Complete Music Update’ <<http://www.completemusicupdate.com/article/spotify-questions-whether-mechanical-royalties-are-even-due-on-a-stream/>> accessed 28 February 2018.

repertoire and lack licensing forms' translations²⁷. If CMOs fail to collaborate closer and publish more information for the benefit of DSPs, DSPs will not only face high transaction costs but also insecurity as to whether their acquired licenses cover all necessary rights. We are convinced that CMOs do have capacities to provide tools for DSPs to navigate the licensing market easier.

3.2 Response of CMOs to DSPs' Licensing Problems

Although CMOs have been accused of a failure to react promptly to the emergence of DSPs, a claim that CMOs have not been willing to accommodate to the needs of DSPs would be misplaced. CMOs have engaged in closer cooperation in order to address licensing problems faced by DSPs in an increasingly international and borderless music market. This cooperation resulted in the formation of major CMO joint ventures or licensing hubs on the European level, acting as one-stop-shop for online licensing of musical works. These joint ventures, consisting either only of national CMOs (such as International Copyright Enterprise (ICE) and Armonia Online) or in a form of national CMOs cooperating with major record labels (such as SOLAR and PEDL), aim to facilitate the pan-European licensing by offering a single point of entry for the use of repertoires that they represent. These joint ventures help DSPs cope with the issue of fragmentation since they aggregate the repertoires and provide a single license for multiple territories, thereby reducing DSPs' transaction costs. New centralized licensing services created by CMOs bring considerable advantages not only to DSPs²⁸ but also to right holders, such as artists and songwriters by bringing more revenue stream, improving online matching and processing services²⁹, information accuracy and transparency as well as unification of rates and tariffs for DSPs.

In spite of the fact that it seems indisputable that licensing joint ventures will make it easier for online music platforms to obtain licenses, they need to offer cross-border music services to consumers, drawbacks connected to their functioning do exist. The European Commission has for many years tried to break down the monopoly of national CMOs and closely scrutinized reciprocal representation agreements among European CMOs as being anti-competitive.

²⁷ Morten Hviid, Simone Schroff and John Street, 'Regulating Collective Management Organisations by Competition An Incomplete Answer to the Licensing Problem?' (2016) 7 JIPITEC 256, 263–265.

²⁸ 'New Technology at ICE to Speed up Copyright Data Processing - M Magazine' (*M magazine: PRS for Music online magazine*, 13 November 2017) <<https://www.m-magazine.co.uk/news/new-technology-ice-speed-copyright-data-processing/>> accessed 11 March 2018.

²⁹ 'Pan-European Licensing Hub ICE Introduced, Simplifying Process for Digital Services' (*Billboard*) <<https://www.billboard.com/articles/business/6752813/ice-licensing-hub-prs-for-music-stim-gema>> accessed 19 February 2018.

However, neither licensing hubs are able to bring solutions immune to competition concerns. In the case of ICE, the European Commission was concerned that the creation of joint venture would prevent some of the existing cooperation initiatives from succeeding and by bundling different types of copyright administration services make it difficult for its own customers to take their data to a competitor³⁰. Although ICE subsequently received clearance from the European Commission, major joint ventures' market power is constantly growing, especially in the light of ever more CMOs (and even hubs) joining the incumbent hubs. Some critical views suggest that even if national monopolies are effectively dismantled, the current system is prone to creation of new oligopolies³¹ arising out of the creation of "specialized CMOs", since they only provide licenses for online dissemination of musical works.

3.3 Innovative Services Embraced by CMOs

With the growing popularity of streaming services, usage monitoring, data processing and tracking as well as subsequent royalty distribution have become more challenging than ever. CMOs have to deal with large amount of data in a speedy manner and they have to reach for new technologies that were not necessary with regard to analogue distribution. Examples of these new technologies employed by CMOs include blockchain technology and cryptocurrencies to manage and track online payments through value chain directly from fans to music creators³².

While originally developed for tracking secure financial transactions, blockchain offers exciting possibilities for media and monetization of rights, including streaming revenues. Blockchain technology can not only connect rights owners directly to consumers but also monitor the flow of money from rights owners to the end artists and helps track digital rights.³³ Also, blockchain based technologies can tackle a long-standing issue with music industry metadata, transparency and accuracy of data-problems that have become more serious since

³⁰ European Commission, 'Press Release - Mergers: Commission Approves Joint Venture for Cross-Border Licensing of Online Music between PRSfM, STIM and GEMA, Subject to Commitments Brussels, 16 June 2015'.

³¹ Emanuela Arezzo, 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU' [2015] Max Planck Institute for Innovation and Competition 534, 22; Peter Gyertyanfy, 'Collective Management of Music Rights in Europe after the CISAC Decision' (2010) 41 59, 79.

³² Music 4.5 / 2Pears, 'Pan-National Licensing and Reporting across Europe Virginie Berger, C...' (20:45:56 UTC) 23 <<https://www.slideshare.net/music4point5/pannational-licensing-and-reporting-across-europe-virginie-berger-ceo-armonia>> accessed 11 March 2018.

³³ 'Using Blockchain For Media Rights Management And Ad Revenues' (*Digitalist Magazine*, 19 December 2017) <<http://www.digitalistmag.com/digital-economy/2017/12/19/using-blockchain-for-media-rights-management-ad-revenues-05644369>> accessed 18 February 2018.

online music distribution has become increasingly decentralized with the rise in digital channels. Some CMOs believe that blockchain will create new opportunities for digital service providers, increase accuracy of royalty payments and release value for right holders. These CMOs have committed to cooperation in exploring the potential of blockchain technology in order to make their services more suitable for digital exploitation.³⁴

However, arguments against the use of blockchain in music industry have also been submitted, particularly on the grounds that blockchain is not capable of handling such large amounts of data and is very costly. Moreover, it might benefit only some players in the music industry, not including DSPs.³⁵ While blockchain can bring promising developments especially in data processing and royalty payments, thereby benefiting small right holders, it requires participation of all relevant market players (e.g. PROs, record labels etc).

Apart of exploring the possibilities of blockchain technologies, CMOs are using other ways to get to grips with digital disruption. These initiatives include investing in music start-ups, research partnerships, setting up innovation labs with companies and universities, opening up their data, and using artificial intelligence in processing data more efficiently³⁶. Some CMOs establish R&D platforms that focus on identifying key areas for adopting new technologies and developing processes, enabling a radical renewal of the current CMO model, increasing the speed of delivering music performance royalties to authors and publishers, and setting new industry standards for the service level of CMOs³⁷.

Taking into consideration that CMOs face a lot of competition and realize the need to be more efficient and innovative, the aforementioned initiatives testify that CMOs are actively searching for new, innovative ways to meet the needs of DSPs in navigating the shifting landscapes of pan-European hubs. If they are able to offer innovative solutions to DSPs' licensing problems, they will continue to play an indispensable role in the future of music licensing.

³⁴ 'ASCAP, SACEM, And PRS For Music Initiate Joint Blockchain Project To Improve Data Accuracy For Rightsholders' (*www.ascap.com*) <<http://www.ascap.com/press/2017/04-07-ascap-sacem-prs-blockchain>> accessed 11 March 2018.

³⁵ "'Blockchain Saving the Record Industry? I Don't See It...'" <<http://musically.com/2017/01/26/blockchain-saving-the-record-industry-i-dont-see-it/>> accessed 11 March 2018; 'How Can Blockchain Make a Real Impact on Music?' <<http://musically.com/2018/03/01/can-blockchain-make-real-impact-music/>> accessed 11 March 2018.

³⁶ 'Finnish Collecting Society Teosto Aims for Innovation' <<http://musically.com/2017/02/05/finnish-collecting-the-record-industry-i-dont-see-it/>> accessed 5 March 2018.

³⁷ 'Nordic Music Copyright Societies Launch Common R&D Initiative Polaris Futures Lab' (*Teosto*, 15 June 2017) <<https://www.teosto.fi/en/teosto/news/nordic-music-copyright-societies-launch-common-rd-initiative-polaris-futures-lab>> accessed 11 April 2018.

4. Withdrawn Mandates in the EU: Role of CMOs and Impact on DSPs

Following the European Commission Recommendation on Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services³⁸, some rights holders with large repertoire decided to withdraw their online rights from the system of reciprocal representation agreements and appoint only one of the European performing rights societies for the management of their online rights. This means that no other entity, apart from the one appointed, is allowed to issue online licenses for the repertoire of a particular rights holder for the whole EU. This approach was also reflected in the later Directive³⁹ currently in force. Although the European Commission and the European legislator wanted to address one of the most pressing issues of DSPs – fragmentation of rights – they did not quite succeed.

As a consequence, European licensing market for online music works has shifted from territorial fragmentation to repertoire-based fragmentation. Several entities were established in order to provide pan-European licenses for DSPs while each of the entities offers repertoires of one of the major record labels (e.g. SOLAR for Sony/ ATV Music Publishing, PEDL for Warner/Chappell) and the existence of these licensing hubs poses several questions. It remains unclear, in the light of the Collective Management Directive⁴⁰, whether licensing hubs have to fulfil the same obligations as CMOs, especially with regard to publication of information and transparency.

Moreover, it is an important question why these hubs do not have separate homepages with licensing facilities that can be contacted directly. Hubs have been criticised for failing to publish costs of pan-European licenses and range of their coverage and for contribution to information asymmetry by increasing the number or relevant players on the licensing market⁴¹. With an increase in number of players involved in online music licensing and deficiency in relevant information, DSPs fail to navigate the licensing system efficiently what leads not only to long and costly negotiations but also to higher risk of infringement. DSPs were arguably in a better position before the Recommendation was published. It remains to be seen how will licensing hubs be able to meet the future needs of DSPs and whether a legislative intervention concerning their functioning is necessary.

³⁸ European Commission, 'European Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC), OJ L 276/ 54'.

³⁹ DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 (n 1).

⁴⁰ *ibid.*

⁴¹ Morten Hviid, Simone Schroff and John Street (n 27) 268, 269.

5. Conclusion

It is uncontroversial, therefore, that CMOs have traditionally served to the benefit of both rights holders and users of copyright protected works. Their history has so far been a success story mainly because they have, over the decades, been able to facilitate reduction of transaction costs. Although their role has been throughout the years indispensable for the music industry, the emergence of digital service providers, the fast-growing streaming business, the users' licensing needs (which are not confined to national territories anymore) and the licensing process requiring authorizations for bundles of rights, pose huge challenges on the functioning of CMOs.

In this way, it is possible to say that the adaptation to digital world from CMOs could be faster, especially if one compares how adaptive DSPs have been to innovations. Moreover, CMOs have been struggling to receive their rights in some regions, especially within the under-developed countries. In Brazil, for instance, ECAD and its CMOs have had a long fight in court against OI FM⁴² and YouTube⁴³ to receive the communication to the public rights.

Nevertheless, we believe that CMOs do need to increase cooperation to respond to licensing needs of DSPs and they do have necessary means to do so. In order to create a suitable environment for this cooperation, law makers must clarify the “rules of the game”- in the institutionalist approach of the expression – that will apply in the digital transactions. Digital technologies and problems connected therewith (especially overlapping rights and fragmentation) may incentivize CMOs to form a close-knit community. Closer cooperation will not only benefit users (particularly DSPs) but help CMOs stay relevant in a dynamic licensing market for digital distribution of copyright protected works.

⁴² ‘Supremo Tribunal Federal STF - RECURSO EXTRAORDINÁRIO : RE 1056363 RJ - RIO DE JANEIRO 0174958-45.2009.8.19.0001’ (*Jusbrasil*) <<http://stf.jusbrasil.com.br/jurisprudencia/514455872/recurso-extraordinario-re-1056363-rj-rio-de-janeiro-0174958-4520098190001>> accessed 19 April 2018.

⁴³ Tiago Rogero, ‘Direitos autorais: YouTube entra em acordo com Ecad e Ubem, e ações são encerradas’ (*Ancelmo - O Globo*) <<https://blogs.oglobo.globo.com/ancelmo/post/direitos-autorais-ubem-entra-em-acordo-com-youtube-e-aco-es-sao-encerradas.html>> accessed 19 April 2018.

Collecting Management Organisations and Institutional Users



Lucius Klobučník

Project: ESR15

Research Question

1. Can the EU legislator solve or reduce problems of fragmentation of rights, right holders and repertoires faced by on-demand online music streaming services by further structural regulation of licensing entities or by finding alternative solutions to EU-wide licensing of online rights in musical works? Can this measure lead to easier entry into the EU digital music market for on-demand online music streaming services?
2. Where can examples of facilitating rights clearance for on-demand online music streaming services be found (offline broadcasting rights clearance system in the EU, cross-border licensing solutions for neighbouring rights or the US systems of mechanical rights licensing)?
3. If safe harbour rules are reformed in the EU, how should the relationship between licensing entities and Internet platform be defined with regard to music streaming? What kind of licenses will Internet platforms need and should they be treated differently from on-demand music streaming services?

Methodology

The following methodology is employed in order to answer the research questions:

- Doctrinal research
- Comparative analysis (regulation of CMOs in the US and EU, role of competition law regulation in other areas of IP)
- Empirical research methods: interviews with open questions for CMOs' legal departments and CISAC - CMO umbrella organisation; interviews with on-demand music streaming services and Internet platforms (user generated content platforms)
- Law & economics (market delineation, transaction costs - quantitative methods for measuring transaction costs, copyright <-> competition relationship)

Societal impact

This project aims to answer a question as to how can fragmentation of rights, right holders and repertoires be reduced in order to provide a fertile soil for diverse, innovative and profitable music streaming services providing wider choice of music services to European consumers. This is done by way of legislative and policy suggestions amending the current licensing system and CMO regulation connected therewith.



EIPIN Innovation Society

Coordinated by Maastricht University, Faculty of Law,
Bouillonstraat 3, 6211 LH Maastricht, The Netherlands
P.O. Box 616, 6200 MD Maastricht, The Netherlands
E: eipin-is-h2020@maastrichtuniversity.nl

www.eipin-innovationsociety.org

