

PERFORMING RIGHTS SOCIETIES
IN
THE DIGITAL ENVIRONMENT

A THESIS SUBMITTED TO THE
STANFORD PROGRAM IN INTERNATIONAL LEGAL STUDIES
AT THE STANFORD LAW SCHOOL,
STANFORD UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
MASTER IN THE SCIENCE OF LAW

by
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May 2006

ABSTRACT

Copyright has always been confronted by technological innovations. The Internet is the latest step in this evolution. While scholars have written extensively on the substantive issues raised by the Internet and the possible application of copyright in the digital age, performing rights societies remain absent from the discussions. Yet, copyrights would be of little value without the collective management performed by these societies. During a forum on copyright management that was held in 1986 at the World Intellectual Property Organization (WIPO) in Geneva, Dr Arpad Bosh, the then Director General of WIPO, stated that “With galloping technological developments, collective administration of such rights is becoming an ever more important way of exercising copyright and neighbouring rights. Taking into account its increasing importance, much more attention should be paid to it, both at the national and at the international levels”. The goal of this paper is to address this concern. Based upon a non random sample of interviews that were conducted in December 2005 and January 2006 with 7 performing rights societies (4 European, 2 North American and 1 Japanese), this exploratory research aims at finding how performing rights societies operate in the digital environment regarding the ubiquitous nature of the Internet, and what their concerns and perspectives are for the future.

ACKNOWLEDGMENTS

While the name of the author is the only one to be mentioned on the cover sheet of a paper, its writing would not be possible without the intervention of several people, who therefore deserve special thanking:

- Professor Paul Goldstein and Manuel Gomez, who accepted to be my advisors for this paper and to share their experience with me;
- The performing rights societies' representatives, without the support of whom this paper would never have been possible: Fred Koenigsberg (ASCAP), Jo Dimona and John Coletta (BMI), Alexander Wolf (GEMA), Seiji Odaki (JASRAC), Louis Vuchelen and Sébastien Witmeur (SABAM), Laurence Bony and David El Sayegh (SACEM), Jean Cavalli and Vincent Salvadé (SUISA);
- Jesse Cuevas (JD candidate at Stanford Law School) for his careful reading and comments on the paper;
- The Swiss Benevolent Society of New York, without the financial support of whom the conduct of interviews in several countries would not have been possible.

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INTRODUCTION

Since England passed the first copyright act, the Statute of Anne in 1710¹, copyright has always been confronted by technological innovations. The tremendous impact of the Internet and its related technological innovations are the latest step in this evolution. Thanks to the Internet, works can now be disseminated throughout the globe simultaneously at any given time and reproductions can be made without investment or loss of quality. For these reasons, the Internet raises several questions about the applicability of copyright to the digital environment. Quite logically, these issues have led to passionate and disputed discussions among legal scholars², and caused governments to adopt new treaties³, an EU directive⁴ and national legislation implementing these international agreements.

So far the music industry has been the most concerned with the online exploitation of copyrighted works. The importance of digital music is growing each year. According to Charlie Mc Creevy, European commissioner for internal market and services, “The digital market for music was worth USD 330 millions in 2004 – estimates expect it to double in 2005. Analysts predict that digital sales could reach 25% of record company revenues in five years. 50 million portable music players were sold in 2004, including 10 million iPods”⁵. According to the International Confederation of Societies of Authors and Composers

¹ <http://www.copyrighthistory.com/anne.html>. While the Statute of Ann is often said to have been enacted in 1709, a careful reading of the Act on this website clearly shows that the Act actually was actually enacted in 1710.

² See, among others : in the US : JESSICA LITMAN, DIGITAL COPYRIGHT (2001); in France: ANDRE LUCAS, DROIT D’AUTEUR ET NUMERIQUE (1998); in Switzerland: LUKAS BÜHLER, URHEBERRECHT IM INTERNET (1999); in Belgium: SEVERINE DUSSOLLIER, DROIT D’AUTEUR ET PROTECTION DES OEUVRES DANS L’UNIVERS NUMERIQUE – DROITS ET EXCEPTIONS A LA LUMIERE DES DISPOSITIFS DE VERROUILLAGE DES ŒUVRES (2005) ; in Germany : STEFAN BECHTOLD, VOM URHEBER- ZUM INFORMATIONSRECHT (2002).

³ WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), known as “Internet Treaties” (<http://www.wipo.int/treaties/en/ip/wct/> and <http://www.wipo.int/treaties/en/ip/wppt/>). On these treaties, see: MIHALY FICSOR, THE LAW OF COPYRIGHT AND INTERNET (2002).

⁴ Directive 2001/29/EC of the European Parliament and of Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereafter: EC Directive on the Information Society), available at (<http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>).

⁵ http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf.

(CISAC)⁶, 150 billion musical works were transmitted illegally on the Internet in 2003 (while there were “only” 3 billion in 1999 and 36 billion in 2000)⁷. While CISAC does not yet have any figure for 2003, the estimated loss in 2001 for the music industry was of USD 4.3 billion⁸. Such figures raise important questions as to the management of these works.

Managing the online exploitation of copyrighted works involves several layers of stakeholders. The first layer consists of the right holders, and they shall be defined more accurately later on when I give a general overview of the music industry⁹; the second is the users, i.e., the ones who are supposed to request the authorization to exploit the copyrighted works, in our case the websites’ owners; the third layer is the computing industry, which designs the software facilitating the widespread dissemination and/or exchange of copyrighted works on the Internet as well as the technical protecting devices; the fourth layer is composed of the consumers, who use the Internet to play the copyrighted works, and the final layer consists of the collective societies, who manage the exploitation of these works on behalf of the right holders.

At first glance, a global study on the management of copyrighted works involving all the stakeholders could appear to be the most relevant. Such a study would however suffer several shortcomings. First, all these layers involve different categories of players. For instance, users develop their activities based upon different business models: iTunes, an online music store, differs from KaZaa, a p2p system, which differs in turn from web-broadcasters, i.e., online radio or television stations. One may thus doubt the validity of any selected sample. Besides, a study taking all the stakeholders into account might be diluted by trying to represent too many divergent opinions. A focus on collective societies makes sense

⁶ As of 2004, CISAC numbers 210 authors’ societies from 109 countries and indirectly represents more than 2 million creators within all the artistic repertoires: music, drama, literature, audio-visual works, graphic and visual arts (<http://www.cisac.org>).

⁷ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=FR&Alias=MAN-AR-05>.

⁸ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=MAN-AR-05>. These figures can of course be disputed and have actually been disputed. See in particular Felix Oberholzer and Koleman Strumpf, according to whom file sharing would not have any statistically significant effect on purchases of the average music album and that file sharing probably increases aggregate welfare due to increased dissemination of music (*The Effect of File Sharing on Record Sales. An Empirical Analysis*, at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf).

⁹ See *infra* Part I: The Musical Industry: how does it work?

for several reasons. First, scholars have yet to address the issue of copyright management from the standpoint of collective societies. True, several scholars have discussed copyright management on the Internet. However, most publications have been and are focused on the enactment and implementation of legal provisions related to digital rights management (DRM) as a consequence of the adoption of the Internet Treaties¹⁰. Strangely enough, the question of how collective societies operate in the digital environment remain absent from any debate among legal scholars. No empirical research has ever been conducted in this area. In the very first sentence of his seminal book on collective administration of copyrights, David Sinacore-Guinn writes: “Despite the obvious importance of collective rights administration and organizations, publications on the legal aspects of the activities of collective societies and the concepts that govern them are rare”¹¹. I would add that publications on collective societies in the digital environment are almost nonexistent. The time has come to fill that void. Secondly, we shall see that, from a methodological point of view, collective societies are structured upon a similar model everywhere around the world¹². All of them are facing the same problems on the Internet. To find a representative sample is thus much easier.

The core of this paper is based upon several interviews that were conducted between December 2005 and January 2006 with executives of the following collective societies: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), *die Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA), *la Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM), *la Société Suisse pour les droits des auteurs d’oeuvres musicales* (SUISA), *la Société Belge des Auteurs, Compositeurs et Editeurs* (SABAM) as well as the

¹⁰ See for instance : in Switzerland : Jacques de Werra, *The Legal System of Technological Protection Measures under the WIPO Treaties, the DMCA, the European Union Directives and other National Legislations* (Japan, Australia), 189 RIDA 66 (2001); in the US: Jane Ginsburg, *News from the US: Development in US Copyright Since the Digital Millenium Copyright Act*, Part I, 196 RIDA 127 (2003) and Part II, 197 RIDA 77 (2003); in Belgium: SÉVERINE DUSSOLLIER, *DROIT D’AUTEUR ET PROTECTION DES OEUVRES DANS L’UNIVERS NUMÉRIQUE – DROITS ET EXCEPTIONS À LA LUMIÈRE DES DISPOSITIFS DE VERROUILLAGE DES ŒUVRES* (2005).

¹¹ DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS* xli (1993).

¹² See *infra* Part II: Did you say collective societies ?

Japanese Society for Rights of Authors, Composers and Publishers (JASRAC)¹³. This selection is based upon the following criteria: The United States, Europe and Japan are the primary consumers of musical works¹⁴, and the paper focuses on countries having a similar level of copyright protection. Considering recent developments within the European Union¹⁵, it also makes sense to take into consideration not only large European collective societies such as GEMA and SACEM, but also small ones such as SUIA and SABAM.

This paper is divided into four parts: the first one provides a general overview of the music industry (I). The second one introduces the reader to the world of collective societies (II). In the third part, I recount the ways technological innovations have affected the music industry in the past (III). The fourth part, core of my paper, describes the ways performing rights societies currently operate regarding the exploitation of musical works on the Internet (IV).

I. HOW DOES THE MUSIC INDUSTRY WORK?

One does not need to be an expert in the music industry to realize that authors do not monitor the exploitation of their own works. This exploitation involves numerous players. To understand the interests at stake and the role played by collective societies, it is important to know who is actually doing what. The following section gives you a brief overview of how the music industry works¹⁶.

Imagine for a second that you are a songwriter. Imagine that you manage to write a melody and some lyrics you are satisfied with. You now own copyrights upon your work. As

¹³ All interviews but for JASRAC were conducted face-to-face. An interview questionnaire was sent to JASRAC.

¹⁴ According to data collected by Jürgen Meier and Armin Vogel, *The Music Industry in the 21st Century – Facing the Digital Challenge* 18 (2002), at <http://www.screendigest.com/reports/mi2104/NSMH-5SDK6M/sample.pdf>, market shares regarding music consumption in the world were divided as follows in 2002: 38.8% for the United States, 29.8% for the European Union and Switzerland (with 6.6% for Germany and 4.6% for France) and 17.7% for Japan. By comparison, China's market share for music consumption only amounted to 0.5% (lower than the 0.7% allocated to Switzerland for instance) despite 30.3% of worldwide population.

¹⁵ See *infra* Part IV A 1: How Do Performing Rights Societies Operate in the Digital Environment – Authorized Distribution Channels: Online Music Stores – From the Sydney Agreement to the EU Recommendation.

¹⁶ This part is mainly based upon the two following books : DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* (5th ed. 2003); WILLIAM W. FISHER III, *PROMISES TO KEEP* 38-59 (2004).

to the online exploitation of your work, the most significant economic exclusive rights you enjoy are¹⁷: first, the right to reproduce your work, in any manner or form¹⁸, as well as to make adaptations out of it. Secondly, as an author, you have the exclusive right to communicate and distribute your work to the public¹⁹. Thirdly, you have the exclusive right to publicly perform your work²⁰ as well as to broadcast it²¹. The development of new technologies also led to a need to clarify the scope of the rights of distribution and performance. Thanks to the Internet, consumers suddenly have the power to view performances of copyrighted works on demand in the privacy of their homes; since these performances can happen at any time and place chosen by them, disputes arose as to know whether these types of transmissions were covered by copyrights and, if so, which right was at issue. To put an end to these discussions, article 8 of the WIPO Copyright Treaty (WCT), transcribed in article 3 of the EC Directive on the Information Society, provides that, without prejudice to the provisions of articles 11 and 11bis of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including making their works available

¹⁷ I shall not focus here on the distinction between moral and economic rights, first of all because it would compel me to make a distinction between the United States and the other countries, secondly because moral rights do not play a significant role with regards to the online exploitation of musical works. *See* however the decision that was rendered by the *Tribunal de Grande Instance de Paris* on November 3, 2003, where the Court ruled that the unauthorized reproduction of a music from the French artist MC Solaar as a ring tone infringed his right of integrity (available at: <http://www.legalis.net>).

¹⁸ On the international level: art. 9.1 of the Berne Convention. One may add that, according to Art. 9 TRIPS, all TRIPS Member States have to comply with articles 1 to 21 of the Berne Convention. On the national level: art. 16 of the German Copyright Act; art. 1 § 1 of the Belgium Copyright Act; art. L 122-1, L 122-3 and L 122-4 of the French Copyright Act; art. 21 of the Japanese Copyright Act; art. 10.2 lit. a of the Swiss Copyright Act; § 106 (1) of the US Copyright Act.

¹⁹ On the international level: art. 6 WCT. On the national level: art. 17 of the German Copyright Act; art. 1 § 1 of the Belgium Copyright Act; art. L 122-2 of the French Copyright Act; art. 10.2 lit. b of the Swiss Copyright Act; § 106 (3) of the US Copyright Act.

²⁰ On the international level: art. 11 of the Berne Convention. On the national level: art. 19.2 of the German Copyright Act; art. L 122-1 and 122-2 of the French Copyright Act; art. 22 of the Japanese Copyright Act; art. 10.2 lit. c of the Swiss Copyright Act; § 106 (4) of the US Copyright Act.

²¹ On the international level: art. 11bis of the Berne Convention. On the national level: art. 48 *et seq.* of the Belgium Copyright Act; art. 20-22 of the German Copyright Act; art. 23 of the Japanese Copyright Act; art. 10.2 lit. d of the Swiss Copyright Act; § 106 (6) of the US Copyright Act.

to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them²².

In spite of these exclusive rights, you are still pretty far from having your song performed anywhere. To take care of business, you will need to get in touch with a publisher and assign all of your rights to it. Theoretically, you could assign only part of your rights since they are divisible²³, but in practice, all the rights are assigned at once to the publisher²⁴. While your publisher has a clear interest in having your work performed so as to get his share, he also has a clear interest in setting your royalty as low as possible. In the United States, the publisher traditionally splits all income 50/50 with the writer²⁵; according to SUIA, the situation differs in Europe, where the share of publishers related to the right of performance is usually limited to a third, with a possible increase to a half in presence of a subpublisher. Today, hundreds of minor publishing companies coexist with the major publishing companies, Warner/Chappell, EMI, Universal, BMG, Sony/ATV as well as Famous Music (owned by Paramount Communications, Inc.)²⁶.

Once you have a publisher, the first thing he will do is try to find an artist that will perform your song. After selecting a decent singer, the performance of your song will have to be recorded and distributed. To record your song, the publisher will have to contract with a recording company. There are currently four major labels which own all the major distributors: Sony/BMG; EMI Group; Universal Music Group and Warner Music Group²⁷. As you may notice, and as pointed out by Sinacore-Guinn, “In recent years many major music

²² As to Art. 8 WCT, see: Jane C. Ginsburg, *The (new?) right of making available to the public*, in INTELLECTUAL PROPERTY IN THE MILLENNIUM – ESSAYS IN HONOUR OF WILLIAM R. CORNISH 234 *et seq.* (2004). This provision was transposed in the German and Belgium Copyright Acts respectively at art. 19a and 1 § 1. Section 24 of the Preamble of the EC Directive on the Information Society provides that “the right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts”.

²³ SINACORE-GUINN, *supra* note 11, at 147.

²⁴ FISHER, *supra* note 16, at 47.

²⁵ PASSMAN, *supra* note 16, at 202. This principle was retained in article 7 II lit. d of CISAC model contract (see ULRICH UCHTENHAGEN, LA GESTION COLLECTIVE DU DROIT D’AUTEUR DANS LA VIE MUSICALE 88 § 472 [2005]).

²⁶ PASSMAN, *supra* note 16, at 205. For a listing of the members of the Music Publisher’s Association, see <http://www.mpa.org/agency/publishers.html>.

²⁷ Information provided by SUIA.

publishers have been acquired or developed by large music users, such as phonogram producers and motion picture studios. Indeed, the conglomeratization of entertainment has resulted in the formation of multinational corporations that embody music publishing, phonogram production, and audiovisual works production”²⁸. In other words, if you assign your rights to a major publisher, it may end up controlling the entire process from the manufacturing of the record to the distribution of your work in retail stores. Obviously, this gives important leverage to these majors when they negotiate with authors; this conglomeratization also increases the need for collective societies to defend their members’ interests.

To record and distribute your song, the recording company needs a licence because, in the absence of such an authorization, your reproduction right would be infringed; such a licence is called a “mechanical licence”²⁹. Theoretically, an independent publisher could directly negotiate these licences with the recording industry. In practice, publishers are usually members of collective societies which deliver these licences on their behalf, because the cost of hiring some staff to grant licences and police them would be higher than the fees charged by collective societies³⁰.

There is an important distinction to make between European countries, Japan and the United States. In Europe and Japan, most performing rights societies deliver licenses both for the rights of reproduction, distribution and public performance³¹. To get a “mechanical licence” and be allowed to record and distribute a piece of music in the United States, the

²⁸ SINACORE-GUINN, *supra* note 11, at 766.

²⁹ According to the Harry Fox Agency, “mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs), including uses on phonorecords (i.e. CDs, records, tapes, and certain digital configurations). The Harry Fox Agency was established to license, collect, and distribute royalties on behalf of U.S. publishers that own and/or control the rights to musical compositions. Simply stated, if you want to record and distribute a song that was written by someone else, or if your business requires the distribution of music that was written by others, you must obtain a mechanical license” (<http://www.harryfox.com/public/FAQ.jsp>). In other words, a “mechanical licence” covers both the exclusive rights of reproduction and of distribution.

³⁰ PASSMAN, *supra* note 16, at 208. This is however not always the case in the United States.

³¹ In 1993, SINACORE-GUINN, *supra* note 11, at 5, wrote that 53 societies administered both the nondramatic musical performing rights as well as the right to mechanically reproduce and synchronize musical works. An additional 15 societies had however been separately founded to administer mechanical and synchronization rights. See UCHTENHAGEN, *supra* note 25, at 16 § 36; MIHALY FICSOR, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 49 § 106 (2003).

recording company will have to ask for permission from another entity than the performing rights societies, namely the Harry Fox Agency, a wholly owned subsidiary of the National Music Publishers Association (NMPA)³².

To publicly perform your work without infringing your exclusive right, users will have to get your authorization, i.e. a license covering this exclusive right. While this license will usually³³ be delivered in Europe by the society which granted the mechanical license, this is not the case in the United States, where performing rights societies coexist next to the Harry Fox Agency. In other words, to secure the right to publicly perform your work, users interested in performing your composition will have to get a second license either from ASCAP³⁴ or BMI³⁵, depending upon the one to which you, or more likely your publisher, is affiliated³⁶. Your publisher could in theory negotiate with the different users, however, as put by Professor Fisher, “It would be difficult and costly for each music publisher to negotiate contracts with each radio station that wishes to broadcast songs in the publisher’s repertoire”³⁷, so that they adhere to the one or the other of these performing rights societies to act on their behalf. If you want to see your musical works exploited online, your users will be the websites’ owners. The applicable rates will then differ from one type of usage to the other, both in Europe and in the United States. Quite understandably, there is a difference between music performances where the public listens, such as in a concert hall, or when the music is only played as background support for another primary activity, such as in a restaurant or in a hotel. Such differences justify different applicable rates.

³² <http://www.harryfox.com/index.jsp>. UCHTENHAGEN, *supra* note 25, at 16 § 37. I shall not deal in this paper with the synchronization license, i.e. the reproduction of music in audiovisual works, as this paper does not deal with audiovisual works at all. On this type of license, *see*: James Kendrick, *Synchronization Rights – Television Programs*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 116 *et seq.* (2002); PASSMAN, *supra* note 16, at 225-227; SINACORE-GUINN, *supra* note 11, at 761.

³³ There are a couple of exceptions such as France, where SDRM delivers mechanical licenses, and United Kingdom, where MCPS delivers these licenses. However, both work in close collaboration with their respective performing right society, i.e. SACEM and PRS.

³⁴ <http://www.ASCAP.com>.

³⁵ <http://www.bmi.com>.

³⁶ The third performing right society, SESAC (<http://www.sesac.com>) delivers a global licence that covers both the performing right and mechanical one. Its role on the market nevertheless remains minor with a mere 1% of the market share.

³⁷ FISHER, *supra* note 16, at 50; *see also*: FICSOR, *supra* note 31, at 16-17 § 17-19.

After this brief overview of the music industry from the creation of a work to its distribution on the market, it is time to focus on collective societies themselves.

II. DID YOU SAY COLLECTIVE SOCIETIES?

A. Introduction

1847. The reign of Louis-Philippe was coming to an end. Charles Baudelaire had published his first translations of Edgar Allan Poe's works and Honoré de Balzac was about to finish his *Comédie Humaine*. The music industry was still far from being an "industry". This was still a time when technology played a much lesser role, and when Giuseppe Verdi could see his works performed publicly in *Teatro alla Scala*. The same applied to Ernest Bourget, whose fame could not be compared to that of Verdi but who, still, also owned copyrights in his works. On one evening in March 1847, Ernest Bourget was sitting at the terrace of the *café-théâtre* "Les Ambassadeurs" on the Champs-Élysées and enjoying a glass of *eau sucrée*. While drinking, Ernest Bourget heard the performance of his composition "Les Bluettes" in the café. Considering that he had no reason to allow the performance of his work without compensation, he offered to authorize the owner of the café to perform his work in return for his drink. The owner refused, Ernest Bourget sued him in front of the *Tribunal de Commerce de la Seine* and won the case³⁸. The story would have remained an anecdote if it had not led to the creation in 1851 of the *Société des Auteurs, Compositeurs et Editeurs de Musique*, better known as SACEM³⁹, whose main mission is to monitor the works of its members and distribute the amounts received from the exploitation of these works among these members. The concept of performing rights society was born⁴⁰.

³⁸ This story is depicted by several authors. See for instance: David Peeperkorn, *Collecting for "Bluettes"*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 11 *et seq.* (1989); FICSOR, *supra* note 31, at 19 § 28.

³⁹ <http://www.SACEM.fr>.

⁴⁰ Actually, the SACEM was not the first collective society in history. In 1791, Beaumarchais had founded the Société des Auteurs et Compositeurs Dramatiques (SACD) to represent the interests of dramatic authors and composers to theater owners with respect to performances of their works. In 1837, Honoré de Balzac, Alexandre Dumas, Georges Sand and Victor Hugo had created the Société des Gens de Lettres de France (SGDL). The latter one however protects the interests of writers without being a collective society *stricto sensu*.

Performing right societies quickly spread around Europe: The *Societa Italiana degli Autori ed Editori* (SIAE) was created in 1882, the *Anstalt für musikalisches Aufführungsrecht* in Germany in 1903⁴¹. In 1911, SACEM created an office in the United States in an attempt to enlist American Composers. Americans however had no desire to enroll in a French society and, on a rainy October night in 1913, nine composers and music publishers led by Nathan Burkan created the American Society of Composers, Authors and Publishers, better known as ASCAP⁴².

After performing right societies were flourishing in many countries⁴³, it became clear that organization on an international basis was required. One way to do it could have been to open foreign offices with foreign jurisdictions, as SACEM had tried to do in 1911 in the United States. However, such a solution would have required each user to request a license from each foreign office to be able to perform that office's repertoire; it thus had significant transaction cost and was fairly unpopular among authors⁴⁴. A preferred approach that quickly developed and is still being used was for collective societies to enter into reciprocal representation agreements with each other⁴⁵. According to these agreements, each society agrees to represent the interests of the other within its respective territory; instead of monitoring its sole repertoire, each collective society thus administers a worldwide repertoire on its territory.

In order to coordinate their work, 18 performing rights societies founded the International Confederation of Authors and Composers (CISAC) in 1926⁴⁶, whose model contract has been used since its adoption in 1936 for most if not all reciprocal agreements concluded among the performing rights societies⁴⁷. Eighty years after its creation, CISAC

⁴¹ SINACORE-GUINN, *supra* note 11, at 84.

⁴² PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 54-55 (rev. ed. 2003); I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Organizations, Revisited*, 50 J. COPR. SOC'Y 355, 376 *et seq.* (2003).

⁴³ See SINACORE-GUINN, *supra* note 11, at 85.

⁴⁴ UCHTENHAGEN, *supra* note 25, at 125 § 672.

⁴⁵ See on these agreements : SINACORE-GUINN, *supra* note 11, at 645 *et seq.*

⁴⁶ <http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-HISTORY&Lang2=EN>. See for more information on CISAC: UCHTENHAGEN, *supra* note 25, at 110 *et seq.*, § 582 *et seq.*

⁴⁷ UCHTENHAGEN, *supra* note 25, at 113 *et seq.* § 597 *et seq.* ; FICSOR, *supra* note 31, at 42 § 87.

now has 210 members from over 109 countries⁴⁸. In December 1990, European collective societies decided that time had come for them to create a group that would be a link between them and the European institutions. That group is called the European Grouping of Societies of Authors and Composers (GESAC) and currently counts 34 of the largest author's societies in the European Union, Norway and Switzerland, representing nearly 500'000 authors, not only in the area of music, but also graphic and plastic arts, literary, dramatic and audiovisual works⁴⁹.

Performing rights societies have significant economic power. ASCAP currently counts over 230,000 U.S. composers, songwriters, lyricists, and music publishers as affiliates. Through agreements with affiliated international societies, it also represents hundreds of thousands of music creators worldwide⁵⁰. ASCAP revenues for 2005 amounted to USD 749 millions⁵¹. Collective societies worldwide collected over USD 5 billions in 2003, with 90% of these revenues coming from the music industry⁵².

B. Nature and membership

According to Sinacore-Guinn, "collective societies" can be defined as "a legally cognizable entity whose objectives are to represent the economic and moral interests of creative rights owners and whose function is to administer, using transactional techniques of a greater or lesser degree of collectivization, the economic and moral rights of a significant proportion of a nation's creative rights owners in their works"⁵³. Performing rights societies are just one type of copyright collective societies and specifically monitor the public performances of musical works.

⁴⁸ <http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-MEMBER>.

⁴⁹ <http://www.gesac.org/eng/gesac/default.htm>.

⁵⁰ <http://www.ASCAP.com/about/>.

⁵¹ http://www.ascap.com/press/2006/031306_financial.html.

⁵² <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-CISAC>.

⁵³ SINACORE-GUINN, *supra* note 11, at 10 and 194.

With the exception of the United States, collective societies are all regulated by both provisions in national legislation⁵⁴ and by their bylaws. While the US Copyright Act does not specifically discuss performing rights societies, they operate under consent decrees, for reasons that shall be explained below. Due to the fact that performing rights societies owe their origins to the actions of individual authors in major industrial nations, they are all private organizations owned and controlled by their affiliated right owners⁵⁵; for instance, the board of directors of ASCAP is composed of 24 directors, 12 of whom are writer members and 12 of whom are publisher members⁵⁶. The legal status of these societies may vary however; while ASCAP, JASRAC and GEMA are non-profit associations, BMI, SACEM and SUIA are corporate entities.

With the exception once again of the United States, where three performing rights societies coexist, ASCAP, BMI and SESAC⁵⁷, most collective societies operate as *de facto* or *de jure*⁵⁸ monopolies within their territory⁵⁹. This monopolistic situation has at least three major advantages⁶⁰: first, it enables collective societies to grow large enough to effectively represent their members on a national scale and defend their interests; second, it allows the appropriate infrastructure to effectively monitor the exploitation of members' works throughout the country; and third, users can get a license from a single society rather than

⁵⁴ Art. 65-78 of the Belgium Copyright Act, as well as the Royal Decree of April, 6, 1995; Art. L 321-1 to L 321-13 of the French Copyright Act; The German Copyright Administration Law; The Japanese Law on Intermediary Business Concerning Copyright; Art. 40-60 of the Swiss Copyright Act.

⁵⁵ FICSOR, *supra* note 31, at 40 § 79 *et seq.*, 136 § 365 *et seq.*; SINACORE-GUINN, *supra* note 11, at 16, who however mentions that collective societies are public entities in the developing countries. *See* for instance the Algerian *Office national des droits d'auteur et des droits voisins* (ONDA), <http://www.onda.dz/onda.asp>.

⁵⁶ Art. IV Section 1 of the Articles of Association of ASCAP.

⁵⁷ For a brief overview of each of these societies, *see*: James Kendrick, *A Short History of Collective Licensing – Musical Compositions – The American Experience*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 30 *et seq.* (2002); DAVID SINACORE-GUINN, INTERNATIONAL GUIDE TO COLLECTIVE ADMINISTRATION ORGANIZATIONS 532 *et seq.* (1993).

⁵⁸ Such is the case for instance of Switzerland, where Art. 42.2 of the Swiss Copyright Act provides that “authorization shall be granted as a rule to one society only for each category of works and to one society for neighboring rights”.

⁵⁹ Robert du Bois, *Principles of tariffs and distribution; some remarks on the most important activities of authors' rights societies*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 68, 71 (1989); SINACORE-GUINN, *supra* note 11, at 16; UCHTENHAGEN, *supra* note 25, at 19-20, § 57 *et seq.*; Herman Cohen Jehoram, *The Future of Copyright Collecting Societies*, 3 E.I.P.R. 134, 135 (2001).

⁶⁰ SINACORE-GUINN, *supra* note 11, at 222 *et seq.*, and FICSOR, *supra* note 31, at 135 § 362 share the same view.

having to ask for permission from several entities. Broad support was expressed in favor of the dominant if not exclusive position of collective societies during the hearing related to collective management that took place in Brussels in November 2000⁶¹.

However, monopolistic or dominant positions also raise some concerns. One may wonder whether collective societies are allowed to refuse applicants. As a matter of principle, applicants have to fulfill the requirements contained in the bylaws, i.e., for performing rights societies, to be an author, composer or publisher. May nationality requirements be used to exclude prospective members? The answer depends upon the countries. Before 1971, GEMA used to have bylaws that prohibited the affiliation of non-German citizens. In a decision rendered on June 2, 1971⁶², the European Court of Justice ruled that those bylaws were infringing article 86 of the EC Treaty by denying nationals of other Member States the right to join GEMA. In addition, the Court ruled that Member States had to allow affiliates to limit the grant of their rights to certain territories as well as entrust the management of their rights in different territories to different societies. Similarly, affiliates had to have the right to limit the grant of their rights to certain categories of rights, and to hand over the administration of other categories of rights to other societies. This ruling was confirmed three years later in *BRT v. SABAM and Fonior*, in which the European Court of Justice ruled that collective societies had to ensure a balance in their internal rules between “the requirements of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights”⁶³.

While very few authors have actually taken advantage of the new provisions to join different societies for different categories of rights and/or territories⁶⁴, the situation remains that any EU author is entitled to join any EU collective society due to the principle of free

⁶¹ http://europa.eu.int/comm/internal_market/copyright/management/hearing-collective-mgmt_en.htm. See also remarks made by Mihaly Ficsor and Gerhard Pfennig in response to Axel aus der Mühlen, in WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 91-92 (1998).

⁶² *GEMA I*, decision of June 20, 1971, OJ L 134/15. See Jan Corbet, *Author's societies in Europe*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 22, 26 (1989).

⁶³ Case 127/73, [1974] ECR 313.

⁶⁴ Corbet, *supra* note 62, at 26.

movement of persons. However, this principle does not apply in other countries, which still require a certain relation with their country as a precondition: SUISA for instance requests its members to demonstrate a close relation with Switzerland, either through citizenship, residence or in some other way⁶⁵; going further, JASRAC requests any member to be a resident of Japan and to have the center of his/her activities in Japan⁶⁶.

Considering their dominant position, collective societies have to operate based upon the principle of fair and equitable treatment; in other words, they have no right to treat applicants placed in similar positions in a different way⁶⁷. Once an applicant fulfills the requirements stated in the bylaws, it is almost impossible for a collective society to refuse an application⁶⁸. This being said, the issue is only theoretical, because in practice, collective societies are eager to have as many members as possible to increase their repertoire.

Authors, composers and publishers never have an obligation to adhere to a collective society, even though affiliation will often be unavoidable with respect to those rights that by nature or statute cannot be administered individually⁶⁹. This is one of the main issues addressed by the consent decrees under which both ASCAP and BMI operate. To understand how these decrees were enacted, one has to go back to the 1940s. As radio had become more and more successful in the 1930s, ASCAP, then the sole performing right society in the United States, had expressed its will to increase its license fees so as to collect more substantial royalties. Broadcasters claimed that ASCAP was abusing its monopolistic position. Since ASCAP licenses were to expire on December, 31, 1940, broadcasters decided to fight against the society on its own territory, and to create a new performing rights society

⁶⁵ Art. 5.1 of the Statutes of SUISA (http://www.SUISA.ch/home_f.htm).

⁶⁶ <http://www.JASRAC.or.jp/ejhp/membership/index.html>.

⁶⁷ See SINACORE-GUINN, *supra* note 11, at 341-342. Art. 45.2 of the Swiss Copyright Act expressly provides that “they [the collecting societies] shall administer the rights in accordance with fixed rules and with the requirements of equal treatment”.

⁶⁸ On this issue in more detail, see SINACORE-GUINN, *supra* note 11, at 303 *et seq.*

⁶⁹ SINACORE-GUINN, *supra* note 11, at 289; UCHTENHAGEN, *supra* note 25, at 34 § 144; John Morton, Remark in WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 35 (1998), according to whom “from the point of view of musicians, [...] it is [...] unrealistic to regard the collective management of rights as exceptional”, and Gerard Gabella in the same volume, at 37.

on their own: that society was Broadcast Music, Inc. (BMI). Meanwhile, the Justice Department had filed an antitrust suit against ASCAP and was willing to file a new one against both ASCAP and BMI in 1941, alleging eight violations of the Sherman Act. Both BMI and ASCAP settled the cases⁷⁰. The consent decrees are the result of these settlements⁷¹. In its fourth provision, which points out the voluntarily basis of any collective management, the 2001 consent decree enjoins and restrains ASCAP from “limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance”. In other words, performing rights can never be assigned on an exclusive basis in the United States⁷².

The situation differs in Europe, where rights are usually assigned on an exclusive basis to the societies. These exclusive assignments have been challenged there as well however. In 1993, the Irish rock band U2 and their publishers challenged PRS’ rules, according to which their live performance right had to be assigned on an exclusive basis⁷³. According to the band, they would be better served if they were able to administer this right on their own for at least two reasons: self-administration would obviate the need to pay any administrative and social

⁷⁰ GOLDSTEIN, *supra* note 42, at 58-60; Kendrick, *supra* note 51, at 31 and 34; UCHTENHAGEN, *supra* note 25, at 20 § 62.

⁷¹ For ASCAP: *United States v. ASCAP*, 1940-1943 Trade Cases (CCH), 56,104 (S.D.N.Y. 1941), amended by 1950-1951 Trade cases (CCH), 62,595 (S.D.N.Y. 1950), amended by 1960 Trade Cases (CCH), 69,912 (S.D.N.Y. 1960), amended by 2001 Civil Action (WCC) 41,1395 (S.D.N.Y. 2001). For BMI: *United States v. BMI*, 1940-1943 Trade Cases (CCH) 56,0966 (E.D. Wis. 1941); 1966 Trade Cases (CCH) 71,941 (S.D.N.Y. 1966). On these consent decrees, see: Alfred Schlesinger, *Collecting Societies and United States Anti-Trust Law*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 85 *et seq.* (1989); Koenigsberg, *supra* note 42, at 382 *et seq.*

⁷² Andre Schmidt, *Contracts and Powers of Representation of Collecting Societies*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 54, 57-58 (1989); Koenigsberg, *supra* note 42, at 379.

⁷³ PRS is an acronym for the UK performing rights society. The following explanations are based upon the two following contributions: Crispin Evans & Nathalie Larrieu, *Collective Licensing Today (non digital media) – Performing Rights: The Licensor Experience – Live Performances: the PRS Experience*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 61 *et seq.* (2002); Euan Lawson, *Collective Licensing Today (non digital media) – Performing Rights: The Licensee Experience – Live Performances: Collecting Societies and the Public Performance Right*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 89, 92 *et seq.* (2002).

deductions⁷⁴, and they would get paid for their performances much faster than the three year period they faced at PRS. PRS refused to forego the assignment, believing that self-administration was not only impossible but contrary to the band's interests. Confronted with this refusal, U2 brought an action before the High Court of Justice for abuse of dominant position by PRS in February 1994. The proceedings were delayed due to an investigation that began on October 13, 1994 under the auspices of the British Monopolies and Mergers Commission. In February 1996, the Commission determined that the exclusive assignment was not mandated by the members' interests and was in violation of *GEMA* and *BRT* mentioned previously. Based upon this outcome, the parties finally settled. As a result, PRS amended its statutes and introduced a general scheme under which it would grant each member a license for live performances upon request wherever and whenever the performance takes place; in addition, PRS engaged itself to pay the royalties directly to the publishers and writers within 30 days of the date of the concert. On August 6, 2002, the European Commission confirmed the opinion of the British Monopolies and Mergers Commission in *Banghalter*, and held that a mandatory assignment of all the author's rights, including as to their online exploitation, would amount to an abuse of dominant position within the meaning of article 82(a) of the E.C. Treaty⁷⁵. Therefore, while nobody has ever contested the right for members to leave a society and adhere to another one⁷⁶, *U2* and *Banghalter* made it clear that authors also have the right not to adhere to any performing right society at all.

Considering the monopolistic or at least dominant position occupied by European performing rights societies, antitrust analysis plays a significant role in the way these societies perform their duties. Antitrust suits against performing rights societies have been filed in both

⁷⁴ As to these deductions, see *infra* Part II D: Did you Say Collective Societies - Accounting and distributing royalties.

⁷⁵ *Banghalter and Homem Christo v. SACEM*, decision of August 6, 2002, case COMP/C2/37.219, available at <http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf>.

⁷⁶ According to UCHTENHAGEN, *supra* note 25, at 48 § 226, SUIA, which administers the worldwide register of composers, authors and editors technically called CAE/IPI (standing for “*Compositeurs, Auteurs, Editeurs*”/Interested Party Information), would transfer over 100'000 affiliations from one society to another each year.

Europe⁷⁷ and the United States⁷⁸. In most countries, the governmental control is not limited to judicial supervision however. Additional regulation usually comes from two sources: first, the control of copyright royalty tribunals over rate schedules, such as in Germany, Switzerland or the United States⁷⁹. While these tribunals only intervene when stakeholders cannot reach an agreement in Germany and in the United States, it always has to approve the rate schedules in Switzerland; in practice, such approval is automatic when stakeholders have reached a consensus. Neither Belgium nor Japanese laws require any governmental approval of the rates, but both countries nevertheless communicate their rates to public entities: to the Ministry of Economical Affairs in Belgium⁸⁰, and to the Agency for Cultural Affairs in Japan⁸¹. Secondly, in all countries under scrutiny but the United States, the operations of performing rights societies are supervised by a public entity⁸².

After having discussed the nature and legal framework under which performing rights societies operate, we now turn more specifically to their duties.

⁷⁷ See Jean-Francois Bellis, *Collecting societies and EEC law*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 78 *et seq.* (1989). For instance: *BRT v. SABAM and Fonior*, Case 127/73 [1974] ECR 313; *Greenwich Films v. SACEM*, Case 22/79, [1979] ECR 3275; *GVL v. Commission*, Case 7/82, [1983] ECR 483; *Musik Vertriebs Membran v. GEMA*, Case 55/88, [1981] ECR 147.

⁷⁸ *CBS v. ASCAP*, 400 F.Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2nd Cir. 1977), *rev'd*, *BMI v. CBS*, 441 U.S. 1 (1979); *BMI v. Moor-Law, Inc.*, 527 F.Supp. 758 (D.Del 1981), *aff'd mem.*, 691 F.2d (3d Cir. 1982); *ASCAP v. Showtime*, 912 F.2d 563 (2nd Cir. 1990); *Nat'l Cable Television Ass'n v. BMI*, 772 F.Supp. 614 (D.D.C. 1991).

⁷⁹ Art. 14 of the German Copyright Administration Law; Art. 46.3 of the Swiss Copyright Act; § 801 of the US Copyright Act. See as to these tribunals: SINACORE-GUINN, *supra* note 11, at 428 *et seq.*

⁸⁰ Interview with SABAM (December, 22, 2005).

⁸¹ SINACORE-GUINN, *supra* note 11, at 431.

⁸² These entities can vary: the Patent Office in Germany (Art. 18 of the German Copyright Administration Law); the Federal Institute of Intellectual Property in Switzerland (Art. 52 of the Swiss Copyright Act); the Ministry of Justice in Belgium (Art. 76 of the Belgium Copyright Act); the Ministry of Culture and a special Commission in France (Art. L 321-3, L 321-9, L 321-12 and L 321-13 of the French Copyright Act). See on this control: du Bois, *supra* note 59, at 71-72; Nanette Rigg, *A Short History of Collective Licensing – Musical Compositions – The European Perspective: Collective Management of Rights in Europe From 1777 to 2002. Why is it necessary?*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 18, 24-25 (2002); FICSOR, *supra* note 31, at 144 *et seq.* § 395 *et seq.*; SINACORE-GUINN, *supra* note 11, at 519 *et seq.*; UCHTENHAGEN, *supra* note 25, at 12-13 §§ 11 *et seq.*

C. *Granting Licenses*

Once you, or probably your publisher, have assigned your rights to a performing rights society⁸³, your main interest obviously is to see your works performed. The primary task of these societies will therefore be to grant licenses to users interested in performing your works.

The licenses granted by performing rights societies have one specific feature: they cover the whole repertoire monitored by the society, i.e. both its members' repertoire as well as those of its sister societies based upon the executed reciprocal agreements. The delivery of a license for some musical works at the exclusion of others is therefore impossible⁸⁴. Such licenses are called "blanket licenses". In other words, users will be allowed to exploit "any of the works in the collective's repertoire upon payment of a fixed fee, without distinction as to the actual works used"⁸⁵. While this may be at the advantage of most users, others might be interested in a couple of works only and thus unwilling to pay for the whole repertoire. Such was the case in particular of local television stations in the United States during the 1980s. These stations considered blanket licenses to be an unreasonable restraint of trade, and therefore brought an antitrust suit in the United States District Court for the Southern District of New-York. The District Court ruled in favor of the local television stations. On appeal, the Court reversed and ruled that blanket licenses were not an unreasonable restraint on trade where the opportunity to acquire individual rights through program license, direct license, or source license was realistically available to the station, as in this case⁸⁶. In Europe, the French

⁸³ I shall not analyze here whether the transfer of the rights has to be defined as an assignment or a license, because the situation depends upon each country. What matters here is the fact that performing rights societies will exercise the author's rights. On the distinction between assignment and licensing, *see* SINACORE-GUINN, *supra* note 11, at 147 *et seq.*

⁸⁴ Certain countries, in particular the United States, allow the deliverance of "per program licenses" which, as their name indicates, consists of licenses for a particular program only. However, there again, the license covers the worldwide repertoire (FICSOR, *supra* note 31, at 43 § 89; SINACORE-GUINN, *supra* note 11, at 388).

⁸⁵ du Bois, *supra* note 59, at 69; Gunnar W.G. Karnell, *Collecting societies in music*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 15, 17 (1989); SINACORE-GUINN, *supra* note 11, at 20-21, and at 382 *et seq.*; Koenigsberg, *supra* note 42, at 375 and 387; UCHTENHAGEN, *supra* note 25, at 19-20 § 53 *et seq.*; FICSOR, *supra* note 31, at 43 § 88.

⁸⁶ *Buffalo Broadcasting Co v. ASCAP*, 744 F.2d 917 (2nd Cir. 1984).

Cour de cassation also ruled in 1985 and 1987 that the delivery of blanket licenses by SACEM did not amount to an abuse of dominant position⁸⁷.

The policies and operations of performing rights societies are governed by the principal of fair and equal treatment⁸⁸, meaning they are not allowed to treat similar users in similar positions differently. In *Tournier*, The European Court of Justice made it clear that collecting societies may not engage in a concerted action having the effect of systematically refusing to grant direct access to their repertoires to users located in foreign territories, a possible justification for such a refusal being the impracticality of setting up a monitoring system in the foreign territory⁸⁹. In its article 11.1, the German Copyright Administration Law even provides that “collecting societies shall be required to grant exploitation rights or authorizations to any person so requesting on equitable terms in respect of the rights they administer”.

To avoid any discrimination, performing right societies will try and negotiate rates schedules with diverse categories of users for the different types of exploitations possible⁹⁰. Several criteria are relevant to these negotiations⁹¹. First, performing rights societies will try to find out whether existing rate schedules can apply to a new channel of distribution, a criterion which obviously plays an important role on the Internet; for instance, the rate schedules applied to webcasting are the same as the ones for radio broadcasting. When there is no similar existing business model on the market, which was the case for music on demand a few years ago, the societies will try to consider the royalty rates charged by sister societies for similar types of licenses in foreign countries⁹². Considering the global reach of the exploitation, especially on the Internet, performing rights societies cannot ignore the rates that have been set by their sister societies. Users may not understand why rates would significantly differ from one country to another for a similar business model, and societies

⁸⁷ *SARL Le Xénon v. SACEM*, Cass. civ. I, decision of April 16, 1985; *Société Générale de la Ferme c. SACEM*, Cass. civ. I, decision of June 23, 1987.

⁸⁸ UCHTENHAGEN, *supra* note 25, at 32-33 § 133 *et seq.*, as well as 61-62 § 301 *et seq.* and 85-86 § 455 *et seq.*

⁸⁹ *Ministère Public v. Tournier*, decision of July 13, 1989, case 395/87, ECR (1989) 2521.

⁹⁰ FICSOR, *supra* note 31, at 44 § 90; Koenigsberg, *supra* note 42, at 385.

⁹¹ *See*, in general, du Bois, *supra* note 59, at 74; SINACORE-GUINN, *supra* note 11, at 412 *et seq.*

⁹² UCHTENHAGEN, *supra* note 25, at 74 § 387.

would find it hard to justify such differences. More than that, the European Court of Justice expressly ruled in 1989 in *Lucazeau* that the imposition of significantly higher tariffs than those applicable in other Member States would constitute an abuse of dominant position, unless the differences are justified by objective and relevant factors⁹³. For these reasons, rates for music on demand appear to be similar if not identical in most countries⁹⁴. Second, the rates will depend upon the type of exploitation; a user who features music as a primary attraction, for instance in a concert hall, will obviously pay more for a musical performing rights license than a user who supplies music as background for its customers, such as in a restaurant or a hotel; in other words, “a collective will analyze each industry according to how it uses the creative work, how it earns its income, and what it can afford”⁹⁵. Finally, performing rights societies will negotiate these rates keeping in mind a traditional rule of thumb recommended by CISAC since 1954⁹⁶, according to which the maker of a work participates with ten percent of the profits of that work⁹⁷; this rule is even expressly mentioned in article 60.2 of the Swiss Copyright Act⁹⁸.

⁹³ *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811.

⁹⁴ See *infra* Part IV A 4: How Do Performing Rights Societies Operate in the Digital Environment – Authorized Distribution Channels – Current Practice of Performing Rights Societies.

⁹⁵ SINACORE-GUINN, *supra* note 11, at 414. The performance of music in restaurants and cafés was held to be for profit in 1917; see *Herbert v. Shanley Co.*, 242 U.S. 591, 591, 37 S.Ct. 232 (1917) and its depiction by GOLDSTEIN, *supra* note 42, at 55-56.

⁹⁶ UCHTENHAGEN, *supra* note 25, at 71 § 367.

⁹⁷ As to this rule, see : UCHTENHAGEN, *supra* note 25, at 69 *et seq.*, § 354 *et seq.* One will then have to apply this rule depending upon several circumstances. For instance, for public concerts, performing rights societies will have to evaluate the amount of music which is copyrighted and the one which belongs to the public domain. When protected musical works are performed during a third of a concert, the rate will be of 3.3%. If half the time of a radio broadcasting is devoted to the performance of protected musical works, the appropriate rate will amount to 5% (i.e. 10% of 50%) of the gross income of the radio broadcaster.

⁹⁸ Both the Swiss and US Copyright Act try to provide some guidance in the establishment of these rate schedules. Art. 60 of the Swiss Copyright Act reads as follows: “1. When determining compensation, account shall be taken of: (a) the proceeds obtained from use of the work, performance, phonogram or videogram or broadcast or, subsidiarily, the outlay involved in the use; (b) the nature and quantity of the works, performances, phonograms or videograms or broadcasts used; (c) the ratio of protected to unprotected works, performances, phonograms or videograms or broadcasts, and other services; 2. Compensation shall normally amount to a maximum of 10 percent of the proceeds from or cost of utilization for authors’ rights and a maximum of 3 percent for neighboring rights; however, it shall be determined in such a way that, subject to economic administration, the entitled persons receive equitable remuneration”. Section 801 (b) 1 of the US Copyright Act provides that: “[...]. The rates applicable [...] shall be calculated to achieve the following objectives: (a) to maximize the availability of creative works to the public; (b) to afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; (c) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to

Needless to say, numerous rate schedules coexist, covering a wide range of performances depending either upon the type of location, such as nightclubs, concerts, restaurants, hotels, or the type of media used, such as radio, television, cable, analog or digital players, blank tapes, CDs or DVDs, cell phones or the Internet⁹⁹. For instance, in 2006, GEMA counted more than 70 different rate schedules¹⁰⁰.

Let us imagine that our user has finally sifted through the rate schedules and found the one he was interested in, so that he now has a license to perform your musical work. Your work can finally be heard by the user's customers. However, just like Ernest Bourget in 1847, you probably do not intend to have your work performed for free. How will the performing rights society to which your rights have been assigned account for and distribute your royalties?

D. Accounting and Distributing Royalties

At regular intervals, the periodicity of which depends upon the licensing terms of each collective society¹⁰¹, users will have to complete report forms recording the use they made of the repertoire. The forms differ depending upon the collective society as well as the type of activities carried out¹⁰². There is no international standard for reporting requirements which can differ for each society and each country. To make sure that users comply with these

the opening of new markets for creative expression and media for their communication; (d) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices”.

⁹⁹ ASCAP: <http://www.ASCAP.com/licensing/generallicensing.html>; BMI: <http://www.bmi.com/licensing/>; GEMA: <http://www.GEMA.de/engl/customers/>; JASRAC: <http://www.JASRAC.or.jp/ejhp/provisions/pdf/tariffs02.pdf>; SABAM: <http://www.SABAM.be/website/fr/home.htm>; SACEM: <http://www.SACEM.fr/portailSACEM/jsp/ep/home.do?tabId=2>; SUISA: http://www.SUISA.ch/home_f.htm (see “utilisateurs”, then “tarifs”).

¹⁰⁰ <http://www.GEMA.de/engl/customers/schnellsuche.shtml>.

¹⁰¹ The periodicity of the report forms delivered by users to performing rights societies should not be mistaken with the periodicity of the distribution of royalties. To take an example, ASCAP distributes the royalties to the writers and publishers 8 times a year (4 times for the domestic distribution and 4 times for the international distribution) (<http://www.ascap.com/about/payment/distribution.html>); SUISA does it 14 times a year.

¹⁰² For examples of report forms, see: ASCAP: <http://www.ascap.com/licensing/generalreports.html>; BMI: <http://www.bmi.com/licensing/forms/Hotel%20report.pdf> (regarding public performances in hotels); SABAM: <http://www.sabam.be/website/fr/012005.htm>.

requirements, performing right societies maintain staffs of inspectors to identify potential users and audit users' accounting from time to time¹⁰³.

Considering the fact that performing rights societies deliver blanket licenses, they will receive from users a global amount of money that will have to be allocated as fairly as possible to the different rights holders. Before this allocation actually takes place, societies will take a certain percentage of royalties to cover their costs¹⁰⁴; these costs may vary in a range from 10-20% of the collected amount. After having covered their expenses, performing rights societies will distribute the remaining royalties among the rights holders. To do this, they basically have two options. They can request the users to keep records of all the works used in a given period of time; this method is feasible when the amount of works involved is limited¹⁰⁵. European performing rights societies tend to rely on complete census as much as can be. This is not the system chosen in the United States however, where performing rights societies consider that it would be prohibitively costly for several types of activities to keep track of all the works that have been performed; such a complete census is in particular unpopular for mass uses of works, because of the substantial transaction costs of assembling information on those uses¹⁰⁶. Thus, as explained by ASCAP, it will conduct a complete count of performances in a medium whenever the cost of collecting and processing accurate performance information is a low enough percentage of the revenues generated by that medium¹⁰⁷. As an alternative, US performing rights societies have developed sampling methods that are designed to be a statistically accurate representation of performances in a medium¹⁰⁸.

¹⁰³ SINACORE-GUINN, *supra* note 11, at 442-443.

¹⁰⁴ As to these administrative costs and expenses, *see* SINACORE-GUINN, *supra* note 11, at 448 *et seq.*; UCHTENHAGEN, *supra* note 25, at 105 § 558 *et seq.*

¹⁰⁵ For instance, a theatre will have no problem keeping records of all the movies that have been played during a year and for how long. According to Ficsor, a complete census generally takes place for concerts, recitals of classical music and certain other live concerts and events (FICSOR, *supra* note 31, at 46 § 97).

¹⁰⁶ SINACORE-GUINN, *supra* note 11, at 444.

¹⁰⁷ <http://www.ascap.com/about/payment/keepingtrack.html>. This is for instance possible in the licensing of mechanical rights, where the Harry Fox Agency can require the exact number of copies of phonograms sold that embody the works.

¹⁰⁸ According to Massarsky, while presenting some advantages, these sampling methods would nevertheless suffer four main drawbacks : first of all, it obviously misses all of the performances of a work; secondly, it can overcompensate certain performances through the statistical multiplier effect that extrapolates the sample to the

Generally speaking, distribution rules are fairly complicated. As an example, the German rules cover more than a hundred pages...For obvious reasons, I shall not go into the details of these regulations. While these methods may vary from one type of activity to another and from one performing rights society to another, they can be summarized as follows:

Whether they apply a complete census or sampling method, performing rights societies will try to break down their market according to revenue sources. These classifications may vary from one society to another: while SUISA has identified twelve primary sources of revenues, such as national public network, private networks, cable networks, etc.¹⁰⁹, GEMA has identified twenty¹¹⁰. All these revenue sources will allow the creation of royalty pools such as television, radio, concert, motion picture or foreign income¹¹¹. The creation of these pools are based upon what ASCAP traditionally refers to as the “follow the dollar principle”, according to which the money collected from particular source of revenues is paid out to members for performances of their works on television and money collected from radio stations is paid out for radio performances¹¹².

Once these royalty pools have been precisely identified, the next step in accounting for and distributing royalty income will be to identify the number of times each work has been performed in a given pool. To do this, performing rights societies correlate the data obtained through their monitoring with their own documentation; this process is known as *rendez-vous*

universal value; thirdly, it can misappropriate the ranking of certain performances, in particular the activity of songs that are just below the hit level; finally, certain genres such as Latino or Country create poor proxies under the sample method since they should be subdivided into several categories (tropical, Mexican, tejano and pop for instance as far as Latino music is concerned) (Barry Massarsky, *Collective Licensing Today [non digital media] – Performing Rights: The Licensor Experience – Feature Broadcasts: the “Great” Debate Surrounding PRO Radio Sampling*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 67, 70-71 [2002]). These concerns are shared by Ficsor, who also points out the fact that performing rights societies may influence the distribution of remuneration in favour of certain categories of works (FICSOR, *supra* note 31, at 46 § 98).

¹⁰⁹ Art. 4.1 Distribution Rules of SUISA

¹¹⁰ Art. VIII *Ausführungsbestimmungen zum Verteilungsplan der GEMA für das Aufführungs- und Senderecht*.

¹¹¹ SINACORE-GUINN, *supra* note 11, at 468. These were the pools used in 1991 by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN).

¹¹² Kendrick, *supra* note 57, at 32. See on these pools: UCHTENHAGEN, *supra* note 25, at 93-94 § 502 *et seq.*

and is handled by computers. In practice, “a title match process requires that users report their uses via a computer readable data carrier compatible with the computer system owned and operated by the collective and formatted in conformity with the collective’s data records. The collective will then use a specially designed software to perform the *rendez-vous*”¹¹³.

From then on, one has to make a distinction between the complete census model usually referred to by European performing rights societies, and the sampling model used by the US societies:

European performing rights societies consider the length of time a musical work has been performed as the main criterion to calculate the shares of royalties to be distributed to the rights holders. In other words, for performances on radio or television stations for instance, the societies will take into account the length of the broadcasting and the number of times the musical work has been performed.

Example¹¹⁴

Let us imagine that a broadcaster pays an annual fee of USD 200’000 for the use of copyrighted works. If his report mentions a total of 142’027 works performed for a total lapse of time of 454’486 minutes, each minute performed will have a value of USD 0.44 (200’000/454’486). If your work has been performed for a total of 17 minutes by this broadcaster, your royalty will amount to USD 7.48.

In most cases, United States performing rights societies will not measure the actual use of each musical work within a given pool. Instead, a certain number of credit value will be given to each musical work. To weigh these credits, several criteria are used, such as the genre of the music and the place where it is played, because “The economic value of a featured musical performance is greater to a user than is the value that user might attach to the use of music as background for either a commercial or a dramatic program”¹¹⁵. ASCAP’s distribution rules are very detailed as to how different types of use are weighed differently¹¹⁶;

¹¹³ SINACORE-GUINN, *supra* note 11, at 460; UCHTENHAGEN, *supra* note 25, at 91 *et seq.* § 488 *et seq.*

¹¹⁴ See UCHTENHAGEN, *supra* note 25, at 95 § 508.

¹¹⁵ SINACORE-GUINN, *supra* note 11, at 466.

¹¹⁶ As to ASCAP sampling method in particular, *see*: Koenigsberg, *supra* note 42, at 394 *et seq.*

while the duration of the performance is taken into consideration as in Europe¹¹⁷, section VI of ASCAP's distribution rules make a distinction between musical works performed as "theme", "background music", "jingle", "cue music", "bridge music" or "feature performance"¹¹⁸. The time of the day when the music was performed is also taken into account for television programs¹¹⁹. Once a credit value has been assigned to all of the works in a given pool, the total number of credits will be divided into the amount of royalties collected in this pool to create a monetary value for each credit¹²⁰.

Example

Let us imagine that, luckily for you, your musical work becomes a "hit". It is performed nationwide several times a day on numerous radio stations, totaling a number of 10'000 performances in three months. Let us imagine that the applicable distribution rules consider that the performance of a musical work on radio carries 2 credits¹²¹. Consequently, your number of credits for the performances of that particular work on radio stations will be 20'000 (10'000 x 2). Let us imagine that the total number of credits in the radio pool amounts to 1 million. If the global amount of royalties collected from the users assigned in this radio pool is of USD 5 million, the monetary value for each credit will be USD 5. Since you have 20'000 credits in the radio pool, you are entitled to recover USD 100'000 from that pool (i.e. 20'000 x 5).

The truth is that, whether in Europe or in the United States, you will never recover this global amount. First of all, as mentioned previously, performing rights societies will deduct a certain percentage of the collected royalties to cover their administrative costs and expenses. Secondly, collective societies play an important role in the areas of social, educational and

¹¹⁷ See Art. VII lit. E and F Distribution Rules of ASCAP (Weighing Formula); Art. 53 Distribution Rules of SACEM; Art. 3.2.1 Distribution Rules of SUIISA; Art. X to XII *Ausführungsbestimmungen zum Verteilungsplan der GEMA für das Aufführungs- und Senderecht*. For a criticism of ASCAP's subjective value judgment basis for valuing different types of music instead of focusing mainly on an objective durational basis as European performing rights societies, see Paul Katz, *Collective Licensing Today (non digital media) – Performing Rights: The Licensor Experience – Background Uses: Collective Licensing of Background Music Today*, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 73, 75 (2002).

¹¹⁸ http://www.ascap.com/reference/drd_rev060705.pdf.

¹¹⁹ Art. VII lit. D Distribution Rules of ASCAP.

¹²⁰ du Bois, *supra* note 59, at 76; SINACORE-GUINN, *supra* note 11, at 468.

¹²¹ The example is hypothetical and no distinction is made here between national or local radio stations or the time of the day when the work is performed, which might in reality be weighed differently depending upon the applicable rules.

cultural activities, especially in Europe. These societies are indeed concerned with the protection of their domestic repertoire and cultural diversity. To protect and encourage their own members, performing rights societies have thus developed and implemented pension and welfare plans that are subsidized thanks to a deduction upon the amount of royalties collected¹²². While this social deduction may seem justified, it is fairly controversial in the international arena. One of the principal problems is that funds are taken from the total amount of royalties collected, including foreign owners who usually generate far more money than domestic members; yet, domestic affiliates will ultimately be the only ones to enjoy the benefits of these funds, at the exclusion of foreign authors who have to suffer this deduction from their income without any compensation in return¹²³. Thus, as strange as it may seem, while the need for financial support from performing rights societies is partly due to the predominance of the US repertoire¹²⁴, the fund itself happens to be mainly funded thanks to the exploitation of this foreign repertoire. As a compromise, the CISAC Model Contract allows each society to deduct up to ten percent of the sums that would otherwise be payable to a foreign collective for use in social, cultural and educational programs¹²⁵. This deduction did not remain unchallenged; in 1994, the British Academy of Songwriters, Composers and Authors, joined by PRS in 1996, complained that GEMA's deductions from non-German repertoire was in breach of European antitrust legislation as the deductions discriminated against non-German authors¹²⁶. PRS however never brought its complaint into Court¹²⁷ and,

¹²² On these issues, *see du Bois, supra* note 59, at 75; Rigg, *supra* note 82, at 25-26; SINACORE-GUINN, *supra* note 11, at 477 *et seq.*; Peter Lerche, *Rechtsfragen der Verwirklichung kultureller und sozialer Aufgaben bei der kollektiven Wahrnehmung von Urheberrechten, insbesondere im Blick auf den sogen. 10%-Abzug der GEMA*, in GEMA Jahrbuch 1997/1998, available at http://www.gema.de/kommunikation/jahrbuch/jahr_97_98/feature/teilec.shtml#iii4b, who considers that such a deduction does not infringe the principle of national treatment, first of all because this principle cannot be opposed to performing rights societies as private entities, secondly because this deduction is not related to the exercise of an exclusive right that would be covered by the TRIPS Agreement or the Berne Convention; UCHTENHAGEN, *supra* note 25, at 33 § 139 *et seq.*, as well as 129 *et seq.*, § 688 *et seq.*; FICSOR, *supra* note 31, at 47 § 99; Cohen Jehoram, *supra* note 59, at 137; André Chabeau, Remark in WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 110 (1998).

¹²³ SINACORE-GUINN, *supra* note 11, at 39 and 641.

¹²⁴ Corbet, *supra* note 62, at 25, indeed writes: "The more widespread domination of the international repertoire has dangerous implications for both regional and local culture and even threatens its very existence. The societies have therefore realised that they must move away from their cold managerial role and involve themselves in safeguarding their cultural heritage".

¹²⁵ Art. 8 II CISAC Model Contract of Reciprocal Representation between Public Performing Rights Societies.

¹²⁶ Rigg, *supra* note 82, at 26.

today, most if not all collective societies still deduct close to ten percent of the collected royalties for social purposes¹²⁸.

Example:

Let us go back to our previous example and imagine that the collective society deducts 10% of the collected royalties to cover its administrative costs and expenses, plus 10% for its social funds. The allocation among the right holders will take place upon the remaining amount, i.e. USD 80'000.

This does still not mean that you will be entitled to recover the entire USD 80'000. One has to find out how many people have rights upon the musical works performed. In most cases, a musical composition involves at least three categories of right holders: you as a composer, a music arranger and a lyricist. The three of you will be entitled to receive a certain share of the royalties. Statutory rules regulating the distribution among rights holders are exceptional. Such an example can be found at § 114 (g) of the US Copyright Act, which however deals with sound recordings at the exclusion of musical works; according to this provision, 45% of the money paid by noninteractive webcasters for the right to broadcast sound recordings over the Internet must be paid to featured artists, 2.5% to nonfeatured musicians, 2.5% to nonfeatured vocalists and the remaining 50% to the companies holding the sound-recording copyrights¹²⁹. In most cases, unless you have an agreement stipulating the way the distribution should be made among yourselves regarding your musical work, and such agreements are allowed - which is not the case in all countries - the distribution rules of the concerned performing rights society will apply. In practice, rights holders usually voluntarily submit themselves to the default distribution rules¹³⁰. Since each performing rights society is free to adopt its own distribution rules¹³¹, these rules will vary depending upon the

¹²⁷ Information provided by GEMA.

¹²⁸ Art. XVII Section 1 lit. b Articles of Association of ASCAP; § 1.4 lit. a Distribution Rules of GEMA; Art. 33 Statutes of SACEM; Art. 8.3.6 Statutes of SUIA;

¹²⁹ According to FISHER, *supra* note 16, 185, such statutory rules would also be found in the Greek legislation.

¹³⁰ According to SUIA, its distribution rules apply in 95% of the cases. Same opinion: UCHTENHAGEN, *supra* note 25, at 31 § 119.

¹³¹ Art. 7 II CISAC Model Contract.

type of use and the concerned society¹³². If we refer to our example and admit, hypothetically, that the amount has to be shared equally with your arranger and lyricist, which is the default rule of SACEM distribution scheme, you will be entitled to receive USD 26'666. Once you get your money you will still have to share it with your publisher, in accordance with the agreement you have with him.

You now know the different steps you need to take to have your work performed, and the way your royalties will be calculated by the performing rights society. Time has come to explore how technology has interacted with copyright over the last decades.

III. DOES TECHNOLOGY REALLY MATTER?

Yes, it does, and to a great extent. According to Sinacore-Guinn, “Historically, with each technological advance a conflict has arisen between the entrepreneurs who are seeking to exploit that technology and the creative rights owners whose works are to be exploited by that technology”¹³³. In this third part, I shall retrace how technological innovations have influenced judicial interpretation of Copyright Laws and its amendments (A), before focusing on issues raised by the development of the Internet (B).

A. *From Piano Rolls to the Internet*

Until the middle of the 19th century, technology had an insignificant effect on the application of copyright law. Most works were performed publicly, and audience would buy the musical scores of Franz Schubert to play them in the privacy of their homes after having heard the *Great Symphony* performed in a concert hall in Vienna. The sales of musical scores first led the US Congress to extend federal copyright protection to original musical

¹³² See § 4 Distribution Rules of Gema (default rule: 7/12 composer, 1/12 arranger; 4/12 lyricist) ; Art. 9 Statutes of SACEM and Art. 54 Distribution Rules of SACEM (default rule: 1/3 to each one); Art. 2.1.2 and 2.1.3 Distribution Rules of SUIA.

¹³³ SINACORE-GUINN, *supra* note 11, at 206.

compositions in 1831; from then on, authors had the exclusive right to sell copies of their musical scores¹³⁴.

Between 1831 and 1909, numerous machines were invented to allow the mechanical reproduction of these musical compositions¹³⁵. One in particular received the attention of the rights holders: the piano roll. Piano rolls were used in conjunction with mechanical piano players invented in 1863 by Forneaux and were presented to the public for the first time at the Philadelphia Centennial Exhibition in 1876¹³⁶. They consisted of perforated sheets that were passed over ducts connected to moving parts of the mechanism, so that air pressure would be admitted to these ducts and operate pneumatic devices to sound the notes. The perforations could be arranged to produce almost any melody¹³⁷. By 1902, between 70 and 75'000 of mechanical piano players were in use in the United States, and more than a million musical rolls were being made each year¹³⁸. As manufacturers reaped large profits and the sales of musical scores decreased, composers became increasingly concerned. Composers thought they should share in these profits, but did not know whether their copyright applied to this new technology.

The question of whether piano roll manufacturing infringed the copyright of musical compositions was first addressed in Europe. In 1899, the English Courts ruled that piano rolls did not infringe the English copyright act protecting sheets of music¹³⁹. On appeal, the Court confirmed: “the plaintiffs are entitled to copyright in three sheets of music. What does it mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music, *i.e.*, of the bars, notes, and other printed words and signs on those sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such

¹³⁴ See *Goldstein v. California*, 412 U.S. 546, 564, 93 S.Ct. 2303, 2313 (1973).

¹³⁵ *Id.*

¹³⁶ Peter Gouzouasis, *Fluency in General Music and Arts Technologies*, 4 ACTION, CRITISICM & THEORY FOR MUSIC EDUCATION 9 (2005), at http://www.siue.edu/MUSIC/ACTPAPERS/v4/Gouzouasis4_2.pdf.

¹³⁷ *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1, 28 S.Ct. 319, 52 L.Ed. 655 (1908).

¹³⁸ *Id.*

¹³⁹ *Boosey v. Whight*, [1899] 1 Ch. 836, 80 L.T.N.S. 561.

sheets; nor to any mechanism for the production of such sounds of music”¹⁴⁰. In other words, there was a legal distinction between the writing composition and the sound recording of that composition; while the former gave rise to an exclusive right, the latter did not.

The situation was initially resolved similarly in France. At the turn of the century, Philippe Marquet brought an action on behalf of the Union Chamber of Music Publishers against several manufacturers, alleging copyright violations for piano roll production. The Court dismissed the claim, but in 1901, a so-called Viviés and Celestin Joubert, a publisher, brought a similar case against Pathé that they won on appeal in 1903. The right of mechanical reproduction was thus born in France and began to spread around the globe¹⁴¹. While the German Supreme Court would have to wait until 1952 to state that the unauthorized reproduction of vinyl records on magnetic recording tapes and their performances infringes the exclusive rights of music composers¹⁴², the German Legislature had already clearly expressed this view in 1910, when it stated that the exclusive right of the composer was not limited to the unauthorized mechanical reproduction of the wording of the musical composition, a view then shared by the Common law Courts, but extended to its sounding as well¹⁴³; in other words, the reproduction right covered the ears as well as the eyes.

Over the Atlantic Ocean, White-Smith Publishing Company was unaware of these developments when it heard in 1908 that Apollo Company was engaged in the sale of piano players and musical rolls that reproduced its musical works. White-Smith brought an action in front of the District Court for the Southern District of New-York for copyright infringement. After both the District Court and the Court of Appeals of the Second Circuit had dismissed the claim, the Supreme Court granted *certiorari*¹⁴⁴. White-Smith alleged that the intention of the copyright act was “to protect the intellectual conception which has resulted in the compilation of notes which, when properly played, produce the melody which is the real

¹⁴⁰ *Boosey v. Whight*, [1900] 1 Ch. 122, 81 L.T.N.S. 265.

¹⁴¹ See as to the legal actions taken by Marquet and Viviés: Claude Lemesle, *La longue marche du droit d’auteur*, at <http://membres.lycos.fr/spirales/histdrht.html>; UCHTENHAGEN, *supra* note 25, at 120 §§ 637 *et seq.*

¹⁴² BGH, decision of November 21, 1952 – Aktz.: I ZR 56/52 (*Überspielen von Schallplatten auf Magnettonbänder*), in *GRUR* 03/1953, at 140, 142.

¹⁴³ *GRUR* 03/1953, at 142.

¹⁴⁴ *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1, 28 S.Ct. 319, 52 L.Ed. 655 (1908).

invention of the composer”. For White-Smith, “this is the thing which Congress intended to protect, and [that] the protection covers all means of expression of the order of notes which produce the air of melody which the composer has invented. Music, [...], is intended for the ear as writing is for the eye, and that [it] is the intention of the copyright act to prevent the multiplication of every means of reproducing the music of the composer to the ear”. As the German Legislature would state two years later, White-Smith thus considered that its exclusive right covered both the ear and the eye.

Unfortunately, such was not the opinion of the Supreme Court, which instead relied on its decision in *Boosey v. Wight*. Delivering the opinion of a unanimous Court, Justice Day stuck to the idea that “a copy is that which comes so near to the original as to give to every person seeing it the idea created by the original”. In other words, what mattered was whether the musical roll could be perceived as a copy of the musical composition for the eye, and not for the ear: “when the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies, [...]. It is not susceptible of being copied until it has been put in a form which others can see and read”. For these reasons, the Supreme Court held that piano rolls used in conjunction with mechanical piano players to reproduce the sounds of copyrighted musical compositions did not infringe the copyright in such compositions. However, in stating that Congress would have had numerous occasions to amend the copyright if it had wanted, the Supreme Court clearly signalled that it was time for the legislature to address this topic.

Congress responded the following year when it overturned *White-Smith* and gave songwriters control over “mechanical” reproductions of their songs in the 1909 amendment to the Copyright Act¹⁴⁵. According to the then section 1(e) of the Copyright Act, any person complying with the provision of the Act had the exclusive right not only to perform the copyrighted work publicly for profit, but also to make any form of recording of the musical

¹⁴⁵ See LITMAN, *supra* note 2, at 38 *et seq.*

composition in which the thought of the author might be recorded and from which it might be read or reproduced. In other words, from then on, one who had copyrighted a musical composition had the exclusive right to make the first reproduction of the composition on a phonogram. In practice, the provision conferred a clear monopoly on one piano roll manufacturer which dominated the market and had acquired the exclusive rights to produce mechanical copies of most popular musical works at that time: the Aeolian Company. This company did not wait for long before suing other manufacturers of piano rolls for copyright infringement¹⁴⁶. Fearing that the Aeolian Company might drive its competitors out of business and then raise prices for piano rolls, Congress added a second phrase to section 1(e), according to which once a composer had chosen to license one manufacturer to make mechanical reproductions, others were allowed to record the composition upon payment of a specified royalty¹⁴⁷: the compulsory license was born¹⁴⁸.

The popularity of mechanical pianos reached its peak in the early 1920s. After the Depression, sales never recovered due to new alternatives invented at the end of the 20th century which proved to be less cumbersome and expensive. One of these innovations had been presented some twenty years ago at the 1900 Paris Universal Exposition. At the feet of the tower built by Gustave Eiffel for the event, a podium had been prepared so as to allow

¹⁴⁶ *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912), where the District Court for the Western District of New-York held that licensees had standing to maintain a suit in equity to enjoin subsequent makers from copying their records.

¹⁴⁷ The relevant passage of 17 U.S.C. § 1(e) read as follows: “[...] and as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical works, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof”.

¹⁴⁸ A similar compulsory license could be found in article 17 of the Swiss Copyright Act of 1922. *Stricto sensu*, one has to make a distinction between two categories of nonvoluntary licensing schemes: the first one is the statutory license, according to which the protected work can be freely used on condition that the user pays a fee, fixed by competent authority, to the body designated by that authority and distributed in accordance with the rules established by the latter. Strictly speaking, the provision enacted by the Congress in 1909 was therefore a statutory license. A second type of nonvoluntary license is a compulsory licence *stricto sensu*, according to which the copyright owner is required to grant a license, without depriving him of his right to negotiate the terms of the authorization, which the proviso that the administrative or judicial authorities will fix the amount of remuneration if no amicable agreement can be reached between the parties (SINACORE-GUINN, *supra* note 11, at 136, 151 *et seq.* as well as 371 *et seq.*). As to the US compulsory licenses: Robert Cassler, *Copyright Compulsory Licenses – Are They Coming or Going?*, 37 J. COPR. SOC’Y 231 *et seq.* (1990).

Thomas Edison to present his latest invention: the phonogram. Only five years before, Guglielmo Marconi had invented the radio. These truly ingenious inventions presented a grave new threat for musical composers.

The idea of hearing voices sent through the air was made possible with the development of radio in the 1930s. Copyright theorists again had to ask themselves whether a transmission over the air could be considered a public performance made for profit. In the affirmative, radio broadcasters would have to obtain an authorization; in the negative, musical composers were likely to forego significant economical advantage. Fortunately for musical composers, they could rely on the legal road map in *Herbert* in 1914, where the Supreme Court held that the free rendition of a musical work in restaurants was a public performance made for profit since these performances were “part of a total for which the public pays”¹⁴⁹. Witmark & Sons could therefore be confident when, in 1923, they brought a copyright claim in front of the District Court of the District of New Jersey against L. Bamberger & Company for performing their musical composition “Mother Machree” over radio station without their authorization¹⁵⁰. Referring to *Herbert*, Judge Lynch indeed ruled that the broadcasting of musical composition was publicly performed for an indirect profit as it was part of the business system¹⁵¹. The fact that the broadcasting of one’s song might be seen as a form of advertising did not have any influence upon the fact that it was up to the right holder to decide upon the way he wanted his music to be performed based upon his “exclusive right to publish and vend, as well as to perform”¹⁵². Understanding the economic importance of radio broadcasting for its members, ASCAP, which benefited from a monopolistic position at that time, expressed its will to increase its rates as soon as its licenses would expire on December 31, 1940. This led to a reaction from the broadcasters, who organized themselves in a group that eventually became BMI, as well as to an investigation of the Justice Department that resulted in the adoption of the various consent decrees previously mentioned¹⁵³.

¹⁴⁹ *Herbert v. Shanley*, 242 U.S. 591, 37 S.Ct. 232 (1917). See GOLDSTEIN, *supra* note 42, at 55-56.

¹⁵⁰ *Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (1923).

¹⁵¹ 291 F. 779 (1923).

¹⁵² 291 F. 780 (1923).

¹⁵³ See *supra* Part II A: Did you say collective societies? – Nature and Membership. See GOLDSTEIN, *supra* note 42, at 58 *et seq.*

While a radio broadcast of live music was thus considered a public performance, such was not the case for broadcasting phonograph records. Unlike the British Copyright Act of 1911, which already granted an exclusive right to manufacturers of “perforated rolls and other contrivances by means of which sounds may be mechanically reproduced”¹⁵⁴, the 1909 amendment to the US Copyright Act did not confer an exclusive reproduction right upon the sound recording itself. As stated by the Report of the Committee on Patents, which accompanied the House of Representatives amendment bill: “it is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices”¹⁵⁵. In other words, sound recordings themselves were not copyrightable and could only be protected through state unfair competition law¹⁵⁶.

This issue was not crucial as long as sound recordings remained a minor market. However, it quickly gained importance with the development of magnetic recording methods, such as tape recorders, blank cassettes and cartridges in the 1950s and 1960s. For a couple of years, the issue of whether recording devices were covered by section 1(e) of the Copyright Act turned on the wording of that provision. The statute indeed provided that anyone who properly invokes the license provision “may make similar use of the copyrighted works”. In the *Duchess* case¹⁵⁷, the Court of Appeals of the Ninth Circuit held that the mere duplication of musical works by pirates could not be considered as “similar”, but rather identical; consequently, one could only require a compulsory license provided it put its own efforts in the recording by hiring musicians, artists and technicians rather than merely “steal the genius

¹⁵⁴ GAVIN MCFARLANE, COPYRIGHT: THE DEVELOPMENT AND EXERCISE OF THE PERFORMING RIGHT 132 (1980), who however adds that the right would only be extended to cover public performances of records in a decision of 1934, *Gramophone Company v. Carwardine* ([1934] 1 Ch. 450), that would eventually be codified in the 1956 British Copyright Act.

¹⁵⁵ H.R.Rep., No. 2222, 60th Cong., 2nd Sess. 10.

¹⁵⁶ See *Metropolitan Opean Ass’n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483; *Id.*, 279 App. Div. 632, 107 N.Y.S.2d 795; *Capitol Records v. Mercury Records Corporation*, 221 F.2d 657 (1955).

¹⁵⁷ *Duchess Music Corporation v. Martin Stern*, 458 F.2d 1305 (9th Cir. 1972), *cert. denied*, 409 U.S. 847, 93 S.Ct. 52, 34 L.Ed.2d 88 (1972).

and talent of others”¹⁵⁸. However, the opinion was not unanimous and induced a strong dissent from Judge Gibbons; referring to the 1970 edition of Nimmer on Copyright, he argued that “assuming such a record pirate duly serves a notice of intent to use, and pays the compulsory license royalties, the somewhat astounding result is that he is not an infringer under the Copyright Act. The only portion of that which he has recorded which is protectible under the Copyright Act is the musical composition itself, and that he is authorized to use for recording purposes upon payment of the statutory royalties. All of the other elements contained in the original record which he has without authority duplicated are not copyrightable, and hence his use of such other elements does not give rise to an action for copyright infringement”¹⁵⁹. While the Supreme Court accepted in *Goldstein* that recordings were not protected under federal copyright law¹⁶⁰, the situation was not satisfactory any longer and, in 1971, spurred to action by the growth of record piracy, Congress amended section 5 of the Copyright Act to include sound recordings fixed on or after February 15, 1972 among the enumerated categories of protected works. Sound recordings were thus finally protected as copyrighted works in the United States.

Recognition of an exclusive right to sound recordings and, consequently, the need to require a mechanical license to copy these recordings led to the creation of a new kind of user: the phonogram producer. As seen previously¹⁶¹, collective societies took different approaches to respond to this development¹⁶². Some societies, such as GEMA, JASRAC, SABAM or SUISA simply expanded their operations to administer this new right on behalf of their members. Others, such as SACEM, created a new organization to administer it; the French

¹⁵⁸ 458 F.2d 1311 (1972).

¹⁵⁹ 458 F.2d 1312 (1972).

¹⁶⁰ *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, L.Ed.2d 163 (1973). While the decision was rendered in 1973, it was based upon facts that had occurred prior to the 1971 amendment that gave protection to sound recordings as such.

¹⁶¹ See *supra* Part I: The Musical Industry: How does it work?.

¹⁶² See SINACORE-GUINN, *supra* note 11, at 274-275; FICSOR, *supra* note 31, at 49 § 106. More accurately, UCHTENHAGEN, *supra* note 25, at 120 *et seq.* § 640 *et seq.*, recounts that each country originally created a separate entity from the existing performing right society; over time, and due to financial constraints, most of them either merged with existing collective societies (Belgium, Germany, Switzerland), or were at least partially owned by these societies (France).

organization, founded in 1935, is called the *Société pour l'administration du droit de reproduction mécanique* (SDRM) and is primarily owned by SACEM¹⁶³.

Since the early 1960s, the phonograph was no longer the sole medium available for mass-market performance of musical works. In 1962, the Philips Company invented and released the first audio-cassette¹⁶⁴. These tapes had originally been designed for businessmen, to be used in conjunction with dictation machines, and the consumer demand for blank tape for personal music-recording had been unanticipated¹⁶⁵. For the first time in history, consumers could easily make copies of musical works. Teenagers in particular quickly seized the opportunity. The danger represented by analog copies and the risk of piracy was perceived differently from one side of the Atlantic Ocean to the other.

While the Recording Industry Association of America (RIAA) “estimated that it lost USD 1.5 billion in retail revenues because of home taping, and a 1990 study commissioned by the recording industry estimated that home taping diminished commercial sales by over 322 million units per year”¹⁶⁶, this loss of profits was still considered tolerable by the industry, which did not press the legislature to deal with the private copy issue at that time. The situation was however felt differently in Germany. Unlike the United States, where limitations and exceptions to the exclusive rights are provided by the broad notion of fair use¹⁶⁷, continental copyright legislations provide an exhaustive list of exceptions to these rights. Since 1901, the German Copyright Law contained a private copy exception that allowed German consumers to reproduce copyrighted works for their personal use. However, the exception had originally been introduced for social purposes to enable theatres and chorus to perform works more easily¹⁶⁸. The legislature could not expect that it would once be used by consumers to make in mass copies of copyrighted works. Such was at least the opinion of

¹⁶³ <http://www.sdrm.fr>.

¹⁶⁴ Mary Bellis, *Sound Recording History*, at <http://inventors.about.com/library/inventors/blsoundrecording.htm>.

¹⁶⁵ *Id.*

¹⁶⁶ FISHER, *supra* note 16, at 84.

¹⁶⁷ 17 U.S.C. § 107.

¹⁶⁸ BGH, decision of June 24, 1955 – Aktz. : I ZR 88/54 (*Mikrokopien*), in *GRUR* 11/1955, at 546, 547.

GEMA, which, in 1964, decided to file a complaint on behalf of its members for copyright infringement against the manufacturers of tape recorders¹⁶⁹.

Following an argument that would be mirrored forty years later by the United States Courts regarding p2p claims, the German District Court (*Landgericht*) held that manufacturers, though not direct infringers, had contributed to these infringements by providing consumers with devices that were substantially used to infringe copyrights; as a remedy, the District Court enjoined the manufacturers from providing GEMA with the names and contact details of the purchasers¹⁷⁰. The German Supreme Court however partially reversed. Basing its argument on German tort law principles, it held that the manufacturers were directly liable for copyright infringement, as the sales of tape recorders were within a link of causation with the harm suffered by the right holders¹⁷¹. The Supreme Court also ruled that, in selling their devices, the manufacturers had implicitly admitted the fact that their products might primarily be used by consumers to copy musical works¹⁷². The Supreme Court nevertheless considered that an injunction prohibiting further sales of tape recorders would have amounted to an abusive exercise of rights, first of all because GEMA had tolerated these sales for several years before bringing an action into Court, and secondly because a significant number of consumers did not use tape recorders to infringe GEMA's rights, but as mere dictation machines¹⁷³. Consequently, to order manufacturers to provide GEMA with the contact details of all purchasers was an inappropriate remedy, since many did not engage in unlawful conducts. The Supreme Court however conceded that GEMA had a right to receive fair remuneration for the private exploitation of its member's works, for instance through a remuneration deducted from the price of tape recorders¹⁷⁴.

Using a tool that had been regularly used by the United States Supreme Court since *White-Smith*, the German Supreme Court was thus indirectly putting pressure upon the

¹⁶⁹ BGH, decision of May 29, 1964 – Aktz. : Ib ZR 4/63 (*Personalausweise*), in *GRUR* 02/1965, at 104.

¹⁷⁰ *GRUR* 02/1965, at 104, 105.

¹⁷¹ *GRUR* 02/1965, at 104-107.

¹⁷² *GRUR* 02/1965, at 104, 105.

¹⁷³ *GRUR* 02/1965, at 104, 107-108.

¹⁷⁴ *GRUR* 02/1965, at 104, 108.

German Parliament to enact a levy on the sale of sound and video recording equipment, since individual claims against private home taping were unenforceable in practice. The German Legislature reacted as promptly as the US Congress had done after *White-Smith*, since a levy system was introduced in the German Copyright Act of 1965, one year after the Supreme Court had rendered its judgment¹⁷⁵. At that time, the Parliament's Judiciary Committee nevertheless expressly refused to introduce an additional levy to be paid by the producers of blank tapes on the ground that one could not distinguish whether such blank tapes would only serve dictation purposes or the recording of protected works¹⁷⁶. Such a levy was introduced twenty years later. Two factors encouraged this change of position: first, the average price of recording equipment was far lower in 1985 than in 1965, thus leading to a significant decrease of royalties; secondly, there had been a rapid increase of private home taping over the years, so that some liability could now be assumed not only by producers of recording equipments, but also by those of blank tapes and cassettes¹⁷⁷. Unsurprisingly, as stated by Professor Hugenholtz, "the argument put forward in 1965, according to which it would be unjust to put a levy on blank material because no distinction can be made between blank material used for purposes affecting copyright and those used for other purposes, was simply put aside in 1985"¹⁷⁸. In the following years, most continental countries followed the German model and granted authors, publishers, performers as well as phonogram and video producers, a

¹⁷⁵ Bernt Hugenholtz/Lucie Guibault/Sjoerd van Geffen, *The Future of Levies in a Digital Environment*, 11-12, at <http://www.ivir.nl/publications/other/DRM&levies-report.pdf> (2003); Lucie Guibault/Natali Helberger, *Copyright Law and Consumer Protection*, 4, at <http://www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf> (2005).

¹⁷⁶ Hugenholtz et al., *supra* note 175, at 12 ; Guibault/Helberger, *supra* note 175, at 4.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* As to the private levy system in Germany before the implementation of the EC Directive, see Reinhold Kreile, *Einnahme und Verteilung der gesetzlichen Geräte- und Leerkassettenvergütung für private Vervielfältigung in Deutschland*, in GEMA Jahrbuch 2001/2002, available at http://www.gema.de/kommunikation/jahrbuch/jahr_01_02/themadesjahres.shtml.

remuneration right for the private use of their works¹⁷⁹; such was the case of France in 1985, Switzerland in 1992 and Belgium in 1994¹⁸⁰.

While the private copy issue had thus been dealt in Europe with the introduction of remuneration rights, the question remained opened in the United States. The US music industry had not joined the fight against home audio taping, but the movie industry took a different view as far as home video taping was concerned. Even though this paper shall not discuss audiovisual works and synchronization rights, the development of the audiovisual taping industry led to a decision rendered in 1984 by the United States Supreme Court that would shape the way in which Courts address the legal challenges they later faced with the *peer-to-peer* (p2p) phenomenon. While the first videotape recorder had been invented in 1951 by Charles P. Ginsburg of the Ampex Corporation, its massive use started around 1976 with the introduction by JVC and Panasonic of the first videotape in a large cassette format called Video Home System (VHS)¹⁸¹. Politically, the movie industry was poorly positioned to require the legislative to introduce some form of liability for home videotaping, since Congress had finally managed to reach the end of a fifteen-year revision effort for the 1976 Copyright Act¹⁸². Taking the bull by its horns, Universal City Studios and Walt Disney Productions decided to bring a legal action against Sony Corporation of America in the federal district Court of Los Angeles, alleging that, by selling its Betamax video tape recorders, Sony was contributing to copyright infringement of the company's television motion pictures. Without knowing it, the studios were thus using an argument that had been conceived twenty years before in the German Courts. While the District Court dismissed the

¹⁷⁹ According to Hugenholtz et al., *supra* note 175, at 13, at least 42 countries would have a remuneration scheme for private copies, including countries from Central and East Europe (Belarus, Bulgaria Czech Republic, Estonia, Hungary, Kazakhstan, Latvia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, Ukraine and Uzbekistan), Africa (Algeria, Cameroon, Congo, Gabon, Kenya, Mauritius and Nigeria), Ecuador, Paraguay, Iceland and Israel. Ireland, Luxembourg and the United Kingdom would be the only EU Members not to have enacted such a scheme.

¹⁸⁰ As to the different approaches taken by civil and common law countries regarding private copies, *see* Andrew F. Christie, *Private copy licence and levy schemes: resolving the paradox of civilian and common law approaches*, in *INTELLECTUAL PROPERTY IN THE MILLENNIUM – ESSAYS IN HONOUR OF WILLIAM R. CORNISH* 248 *et seq.* (2004).

¹⁸¹ Mary Bellis, *The History of Video and Related Innovations*, at <http://inventors.about.com/library/inventors/blvideo.htm>.

¹⁸² GOLDSTEIN *supra* note 42, at 117.

claim¹⁸³, the Court of Appeals reversed and held that home video-recording did not constitute fair use¹⁸⁴. As taught by Professor Goldstein, “where the District Court had viewed copyright’s cup as half empty, the Court of Appeals now viewed it as half full”¹⁸⁵. Ultimately, the decision was to be taken up by the Supreme Court, in a year when more than four million video tape recorders were sold¹⁸⁶. After lengthy debates and a complete reversal¹⁸⁷, the Supreme Court finally held five to four that the sale of video tape recorders did not constitute contributory infringement of the studios’ copyrights¹⁸⁸. Delivering the decision for the Court, Justice Stevens considered that “the primary use of the machine for most owners was “time-shifting” – the practice of recording a program to view it once at a later time, and thereafter erasing it” rather than to build libraries of tapes¹⁸⁹. Ruling that “the question is thus whether the Betamax is capable of commercially significant noninfringing uses”¹⁹⁰, the Supreme Court considered that “Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses”¹⁹¹. Consequently, Sony’s sale of video tape recorders did not constitute contributory infringement of the studios’ exclusive rights.

Unlike Germany, where a levy system had been in place since 1965, private copies remained an issue of concern for the US entertainment industry after *Sony*. To make matters worse, the number of American homes with video tapes recorders had jumped from almost zero when the case had been filed to nine percent when the Supreme Court rendered its

¹⁸³ *Sony Corporation of America v. Universal City Studios*, 480 F.Supp. 429 (C.D. Cal. 1979).

¹⁸⁴ *Sony Corporation of America v. Universal City Studios*, 659 F.2d 963 (9th Cir. 1981).

¹⁸⁵ GOLDSTEIN, *supra* note 42, at 120.

¹⁸⁶ *Id.*.

¹⁸⁷ For a depiction of the debates that took place, see GOLDSTEIN, *supra* note 42, at 121 *et seq.*

¹⁸⁸ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 416, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

¹⁸⁹ 464 U.S. 423, 104 S.Ct. 779 (1984).

¹⁹⁰ 464 U.S. 442, 104 S.Ct. 789 (1984)

¹⁹¹ 464 U.S. 456, 104 S.Ct. 795-796 (1984).

judgment¹⁹². The issue would once again be at the forefront two years later, when Philips and Sony launched a new product in 1986: the digital audiotape recorder (DAT). Consumers could now make digital copies of musical works, which, in contrast to analog, did not deteriorate in sound quality with each subsequent copy. The DAT therefore made the recording industry face a significant and uncontrollable threat of competition from pirated copies.

At first, the RIAA threatened the manufacturers with legal action that would have delayed the introduction of these devices on the market for several years, whatever the result of the case¹⁹³. The RIAA and the manufacturers finally found an agreement during a meeting in Athens, according to which a signal called the “serial copyright management system” (SCMS) would be included in pre-recorded digital tapes to defeat the making of third-generations copies¹⁹⁴. The so-called Athens Agreement, however, suffered one devastating downside; the RIAA and the manufacturers had not taken into account the interests of an important category of stakeholders: the composers and music publishers. When Senator Dennis DeConcini introduced the Digital Audio Tape Recording Act, he faced opposition from composers and music publishers, because the bill did not provide any statutory royalty¹⁹⁵. The bill thus died at a time when Sony had decided to begin importing DAT recorders without any SCMS systems in the United States. In desperation, the new coalition filed a suit against the manufacturers, alleging that Sony’s importation contributorily infringed their copyrights. To avoid the hazards of legal proceedings, the manufacturers finally agreed to negotiate the terms of a statutory royalty¹⁹⁶. The ensuing negotiations resulted in the implementation in 1992 of the Audio Home Recording Act (AHRA), according to which manufacturers of blank digital audiotapes and digital audiotape equipment pay producers a statutory levy of three percent of the sales price in the case of tapes, two in the

¹⁹² GOLDSTEIN, *supra* note 42, at 128.

¹⁹³ FISHER, *supra* note 16, at 84; GOLDSTEIN, *supra* note 42, at 129.

¹⁹⁴ In other words, the machines could make copies of CDs, but not copies of copies of CDs.

¹⁹⁵ FISHER, *supra* note 16, at 85; GOLDSTEIN, *supra* note 42, at 130-131.

¹⁹⁶ FISHER, *supra* note 16, at 85; GOLDSTEIN, *supra* note 42, at 132.

case of equipment¹⁹⁷. In return, and assuming implementation of the SCMS, consumers are free to copy pre-recorded cassettes – analog or digital – for private non commercial use.

While promising, the AHRA partially missed its target. According to Professor Fisher, due to its narrow construction, it would only apply today to three types of equipment: DAT recorders, which are hardly sold anymore, minidisk recorders and CD burners designed as component of stereo systems, at the exclusion of the burners housed in personal computers¹⁹⁸. Due to its narrow construction, the AHRA thus proved ineffective to solve the issue of private copy for the musical industry on the long term.

As reflected by *Sony* and the process that led to the enactment of the AHRA, since the beginning of 1980s the entertainment industry was aware that new technologies were significantly increasing the possibilities of unauthorized copying of works, and that performances were moving from the public scene to private homes. It had thus become critical for the industry to insure that their exclusive rights would cover “one end” performances as well. To achieve that result, the entertainment industry did not limit itself to suing service providers or lobbying Congress but also sued content providers. Even though these suits were initiated by the movie industry, the issue of whether the exclusive right of public performance would be extended to cover performances taking place in private homes obviously mattered to the musical industry as well.

In 1984, the movie studios brought an action in front of the United States District Court for the Western District of Pennsylvania against Redd Horne, Inc., a video store that allowed its customers to choose a movie that would then be performed in private booths located in the store itself¹⁹⁹. The Court of Appeals, Third Circuit, confirmed the summary judgment that had been granted by the District Court in favour of the studios. According to section 101 of the Copyright Act, a work is performed publicly when performed “at a place

¹⁹⁷ In the same year, i.e. 1992, Japan introduced in article 30.2 of its Copyright Act a remuneration scheme for digital copying for private purposes (*see* Hugentholtz et al., *supra* note 175, at 13).

¹⁹⁸ FISHER, *supra* note 16, at 87. *See also* LITMAN, *supra* note 2, at 59 *et seq.*

¹⁹⁹ *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3rd Cir. 1984).

open to the public”. The fact that performances themselves occurred in private booths did not change the fact that they were actually taking place within the store, i.e. within a “place open to the public”²⁰⁰.

One year later, the movie studios won a new battle in front of the United States District Court, in Pennsylvania²⁰¹. This time the studios had focused their efforts on Aveco, Inc., a company that operated a business where customers could rent movies as well as rooms that could accommodate between 2 and 25 people to perform the chosen movies. In other words, unlike the situation in *Redd Horne*, users could either rent movies to have them performed at home, or rent private rooms within the store to watch them; in any case, the performance itself was initiated by the customers, not by the defendant²⁰². While Aveco, Inc. had argued that these features made its store a mere rental store, the District Court disagreed and ruled that, in any case, the possibility of in-store performance provided by the defendant already infringed the exclusive right of the plaintiffs; the fact that the customer himself initiated the performance was considered irrelevant for the Court. In its opinion, the exclusive right covered both the performance itself as well as the authorization to allow such a performance²⁰³.

In spite of these victories, the reasoning of the Courts was focused on the physical premises rather than on the transmission itself. The movie industry thus had to go further to get a ruling that would make the transmission itself to a “one end” user an infringement of copyrights. Confident after their recent success, the movie industry brought an action in front of the United States District Court for the Central District of California against Professional Real Estate Investors, Inc., which operated “La Mancha”, a hotel resort in Palm Springs²⁰⁴. This time, the facts were significantly different from *Redd Horne* and *Aveco*. During their stay, La Mancha hotel guests could rent movies from the lobby gift shop, bring the video cassette back to their room and watch it on their television set. Relying upon previously

²⁰⁰ 749 F.2d 159 (1984).

²⁰¹ *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 612 F.Supp. 315 (D.C.Pa. 1985).

²⁰² 612 F.Supp. 316-317 (D.C.Pa. 1985).

²⁰³ 612 F.Supp. 319 (D.C.Pa. 1985).

²⁰⁴ *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989).

successful arguments, the studios argued that “when La Mancha permits hotel guests to rent videodiscs for in-room viewing on hotel provided equipment, such actions constitute a public performance under either definitional clause of the Act”²⁰⁵. This time the District Court failed to agree and concluded that “movies were not performed publicly when hotel guests viewed them in the privacy of their rooms”²⁰⁶. On January 17, 1989, the Court of Appeals affirmed and held that “La Mancha’s operation differs from those in *Aveco* and *Redd Horne* because its “nature” is the providing of living accommodations and general hotel services, which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms. While the hotel may indeed be “open to the public”, a guest’s hotel room, once rented, is not”²⁰⁷. This part of the ruling, based upon a distinction between primary and secondary activities, may sound in contradiction with *Herbert*, where the Supreme Court had held that the free rendition of a musical work in restaurants was a public performance made for profit, since these performances were “part of a total for which the public pays”, even though they obviously merely represented a secondary activity²⁰⁸. In addition to this ruling, the Court of Appeals judged that the defendant could not be held to “communicate” the in-room performances. According to section 101 of the Copyright Act, “to “transmit” a performance or display is to communicate it by any device or process whereby images and sounds are received beyond the place from which they are sent”²⁰⁹. Such was not the case of the defendant which, according to the Court of Appeals, limited itself to provide the necessary devices to allow such a performance to take place; if transmission and reception occurred, they did so only within the guest room, and at the initiative of the guest, not of the defendant²¹⁰. This ruling was in clear contradiction with the opinion of the 3rd Circuit in *Aveco*, for which the issue of whether the customer himself initiated the transmission had – wrongfully - been considered irrelevant. In any case, considering the doubts surrounding the interpretation of the “transmit clause”, the Court of Appeals ended its decision by ruling that “in drawing this conclusion, we are aware that technology has often leapfrogged statutory

²⁰⁵ 866 F.2d 280 (9th Cir. 1989).

²⁰⁶ 866 F.2d 279 (9th Cir. 1989).

²⁰⁷ 866 F.2d 281 (9th Cir. 1989).

²⁰⁸ *Herbert v. Shanley*, 242 U.S. 591, 37 S.Ct. 232 (1917).

²⁰⁹ 866 F.2d 282 (9th Cir. 1989).

²¹⁰ 866 F.2d 281 (9th Cir. 1989).

schemes. Nevertheless, it is for Congress, not for the courts, to update the Copyright Act if it wishes to protect viewing of videodisc movies in guest rooms at La Mancha”²¹¹. This was a severe defeat for the movie industry, which abandoned its litigation strategy. If Congress did not come to the rescue of the movie industry this time, technology nevertheless did.

Two years after *La Mancha*, On Command had designed a system for the electronic delivery of movie video tapes in hotels; rather than having to go to the lobby to pick up their videos, guests could now operate the system from their room by screening and selecting a movie with their remote control at any time they wanted; once selected by a guest, the movie disappeared from the list and was unavailable to others²¹². On Command sought declaratory judgment that its system did not infringe the movie companies’ copyrights. Unlike the situation in *La Mancha* however, technology had changed the rules of the game. The only components of the system installed in the guest rooms were the remote control and a microprocessor in the television set; it was up to the hotel clerk to use a front desk terminal to initiate the transmission, not to the user anymore²¹³. Since a hotel was considered a public place and, consequently, guests were members of the public, one had to conclude that the transmission initiated from the front desk terminal to the rooms infringed the public performance right²¹⁴. Such was the opinion of the United States District Court, Northern District of California which, following the 9th Circuit argument held on November 14, 1991 that the electronic delivery of movie tape video signals to hotel rooms infringed the exclusive right of the right holders.

In spite of its efforts, the entertainment industry remained in an alarming situation in the early 1990s. Legal actions against content providers had been unable to prove that a transmission initiated and received by an end user amounted to an infringement of the public performance right²¹⁵; efforts against service providers had proved unsuccessful in *Sony* and

²¹¹ 866 F.2d 282 (9th Cir. 1989).

²¹² *On Command Video Corp. v. Columbia Pictures Industries, Inc.*, 777 F.Supp. 787, 788 (N.D.Cal. 1991).

²¹³ 777 F.Supp. 788 (N.D.Cal. 1991).

²¹⁴ 777 F.Supp. 790 (N.D.Cal. 1991).

²¹⁵ The entertainment industry ultimately won their battle through lobbying, with the enactment of the “right of making available” in Art. 8 WCT and Art. 10 and 14 WPPT.

the debate regarding the private exception remained open. This was all the more worrying for the entertainment industry than the new business models based on new technology were only a foretaste of what it was about to face with the advent of the digital age. Private performances initiated by consumers and digital private copying was about to become a way of life for millions of users thanks to the advent of a giant in technological evolution: the Internet.

B. ...and the Internet came

Concerned that current copyright laws and their judicial interpretation did not protect their interests in the digital age, the entertainment industry decided to turn to encryption mechanisms to control the digital exploitation of its works. However, to develop these technological platforms was one thing, but to make sure that nobody would circumvent them was another. These platforms thus only made sense if supported by provisions that would make it unlawful to circumvent them.

The most effective place for the entertainment industry to concentrate its efforts at this stage was the Information Infrastructure Task Force (IITF) that had been appointed by President Clinton in 1993, and its Working Group on Intellectual Property Rights chaired by Bruce Lehman²¹⁶. As a former copyright lobbyist, Lehman was receptive to the industry's concerns. In July 1994, he delivered a preliminary report called "Green Paper"²¹⁷, followed in September 1995 by a final report called "White Paper"²¹⁸, which recommended a legislative amendment to prohibit "the importation, manufacture or distribution of any device, product or component incorporated into a device or product, or the provision of any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without authority of the copyright owner or the law, any process, treatment, mechanism or

²¹⁶ FISHER, *supra* note 16, at 91; LITMAN, *supra* note 2, at 90 *et seq.*

²¹⁷ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (1994), at <http://www.ifla.org/documents/infopol/copyright/intlprop.txt>.

²¹⁸ Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995), at <http://www.uspto.gov/web/offices/com/doc/ipnii/> (see at page 20 of the Recommendations).

system which prevents or inhibits the violation of any of the exclusive rights under Section 106”. Surprisingly, Lehman faced opposition from a Congress particularly receptive to the arguments raised by librarians, law professors and consumer advocates. Lehman did not give up his fight, however. Having failed in the national arena, he focused his efforts on the international scene and flew in 1996 to Geneva as the United States delegate to the World Intellectual Property Organization (WIPO). Lehman proved to be more successful in Switzerland than he had been in the United States²¹⁹. In 1996, the WIPO Conference adopted two new treaties traditionally referred to as the “Internet Treaties”: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)²²⁰. Articles 11 of WCT and 18 of WPPT impose some obligations on the contracting parties regarding the protection of technological measures, according to which “contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”.

The implementation of the Internet treaties resulted in the enactment in 1998 of the Digital Millenium Copyright Act (DMCA), a rather complicated piece of legislation that prohibits the circumvention of access-protection devices as well as the sales of devices designed to help people circumvent copy-protection technology; the mere circumvention of copy-protection mechanisms by consumers for lawful purposes however remains legal²²¹. These lobbying efforts on behalf of the entertainment industry by Bruce Lehman thus finally

²¹⁹ See on the legislative process, both as to the adoption of the Internet treaties and of the DMCA: LITMAN, *supra* note 2, 122 *et seq.*, who nevertheless mentions that the solutions finally retained in the treaties were far less ambitious than Lehman intended them to be (129).

²²⁰ In March 2006, the WCT had come into force in 58 countries and the WPPT in 57. It is however worth noting that most European countries, among them Belgium, France and Germany, already bound by the EC Directive of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (see *supra* note 4), have only signed but not ratified the Treaties so far (<http://www.wipo.int/copyright/en/treaties.htm>).

²²¹ See section 1201 US Copyright Act. On the DMCA: Jane Ginsburg, *News from the US: Development in US Copyright Since the Digital Millenium Copyright Act*, Part I, 196 RIDA 127 *et seq.* (2003) and Part II, 197 RIDA 77 *et seq.* (2003); Jane C. Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J.L. & ARTS 11 *et seq.* (2005); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 COLUM. J.L. & ARTS 385 *et seq.* (2004).

succeeded and served as an example for other nations. The European Parliament followed suit on May 22, 2001, when it enacted a new directive on the harmonisation of certain aspects of copyright and related rights in the information society²²². Expressly referring to the Internet Treaties in the preamble of the directive²²³, the European Parliament and Council transposed the provisions of the Internet Treaties mentioned above in article 6 of the directive²²⁴. While few countries managed to respect the deadline initially set as December 22, 2002 to transpose the directive into their respective legislations²²⁵, most of them now comply with the directive²²⁶. While Japan, a Member State to the Internet Treaties, has transposed these provisions in its legislation, Switzerland's amendment process of the 1993 Copyright Act is still pending²²⁷. As put by Ficsor, these new obligations on the protection of technological measures and rights management information "may transform fundamentally the legal and technical conditions of protection, exercise and enforcement of copyright and related rights, including the collective and other joint forms thereof",²²⁸.

²²² Directive 2001/29/EC of the European Parliament and of Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/L_167/L_16720010622en00100019.pdf).

²²³ Section 15 of the preamble.

²²⁴ For a comparison of these provisions, in the details of which I shall not enter, see: Markus Fallenböck, *On the Technical Protection of Copyright: The Digital Millenium Copyright Act, the European Community Copyright Directive and Their Anticircumvention Provisions*, 7 INT. J. COMM. L. & POL. 42 *et seq.* (2002); Nora Braun, *The Interface between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community*, 11 E.I.P.R. 496 *et seq.* (2003); URS GASSER, *iTUNES: HOW COPYRIGHT, CONTRACT, AND TECHNOLOGY SHAPE THE BUSINESS OF DIGITAL MEDIA - A CASE STUDY* 35 *et seq.* (2004), at <http://ssrn.com/abstract=556802>; Martina Gillen/Gavin Sutter, *Legal Protection of Copy-Protection Mechanism*, 51 J. COPR. SOC'Y 729 *et seq.* (2004); Victoria Mcevedy, *The DMCA and the E-Commerce Directive*, 2 E.I.P.R. 65 *et seq.* (2002).

²²⁵ Art. 10 EC Directive on the Information Society.

²²⁶ As to this implementation, see, in particular: Urs Gasser/Michael Girsberger, *Transposing the Copyright Directive: Legal Protection of Technological Measures in EU Member States: A Genie Stuck in the Bottle?*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 149 *et seq.* (Christoph Beat Graber et al. ed., 2005); Catherine Mettraux Kauthen, *Implementation of the EU Copyright Directive's Provision on DRM/Technical Protection Measures (national perspectives)*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 185 *et seq.* (Christoph Beat Graber et al. ed., 2005); Jacques de Werra, *The Legal System of Technological Protection Measures under the WIPO Treaties, the DMCA, the European Union Directives and other National Legislations (Japan, Australia)*, 189 RIDA 66 (2001); Philippe Gilliéron, *La gestion numérique des droits dans les législations nationales*, sic ! 2004 281 *et seq.*

²²⁷ Catherine Mettraux Kauthen, *Implementation of WCT and WPPT Provisions on DRM/Technical Protection Measures in Switzerland*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 197 *et seq.* (Christoph Beat Graber et al. ed., 2005).

²²⁸ FICSOR, *supra* note 31, at 33 § 65.

The implementation of these provisions remains highly disputed, particularly in the United States, where the advocates of access to information see in it an infringement of the first Amendment²²⁹, and in France and Belgium, where these provisions are considered by some to unreasonably restrain the rights of consumers to perform the purchased work on whatever medium they want, and to violate the “right” to make a private copy of one’s work²³⁰. The truth remains that the enactment of the DMCA was a major step for the entertainment industry. Unfortunately for the industry, it could not prevent service providers from exploiting technological innovations to allow a widespread and unauthorized dissemination of musical works over the Internet. The Musical Instrument Digital Interface (MIDI), a set of instructions for a computer or synthesizer to play a certain musical composition, had already been used to make unauthorized copies of musical files by service providers, who had been held liable for copyright infringement both in France and in Germany in 2000²³¹. As long as the audio bandwidth needed was high and that broadband was unavailable, downloading even a single song however took hours. Downloading thus remained exceptional and, at least, did not raise any real concern to the musical industry. Things nevertheless changed in 2000 with the advent of the MPEG-1 Audio Layer 3 format, better known as MP3, a format that compresses the original sound data from a CD by a factor of 12 without losing sound quality²³². Service providers soon used this technology to enable their users to download musical files that were stored on their servers: music on demand was

²²⁹ *United States of America v. Elcom Ltd.*, 203 F.Supp.2d 1111 (N.D.Cal. 2002); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001); *Universal City Studios, Inc. v. Shawn C. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000). US Courts always ruled that the DMCA anti-circumvention provisions complied with the 1st Amendment.

²³⁰ In France: *Universal Pictures Video France c. Que choisir*, *Cour de cassation*, decision of February 28, 2006 (where the Court ruled that a copy protection mechanism on a DVD might contradict the private copy exception; the exception does not necessarily conflict with a normal exploitation of the work in the digital environment, since rights holders can cover their costs through the sales of DVDs already); *Que choisir v. FNAC and Warner Music France*, TGI Paris, decision of January 10, 2006 (where the Court ruled that a copy protection mechanism preventing the possibility to make a private copy on any kind of support was illegal); *EMI v. CLCV*, *Cour d’appel Versailles*, decision of September 30, 2004 (where the Court ruled that EMI had to inform the consumers about the restrictions of usage put in place on its CDs). In Belgium: *Test-Achats v. Industrie du disque*, *Cour d’appel de Bruxelles*, decision of September 9, 2005 (ruling that the exception of private copy is not a right and can thus be phased out by the insertion of a copy-protection mechanism). All these cases are available at <http://www.droit-technologie.org>.

²³¹ In France : *Procureur de la République v. Maxi Music*, TGI Grasse, decision of November 11, 2000, available at <http://www.legalis.net> ; in Germany : LG Munich, decision of March 30, 2000 – Aktz. : 7 O 3625/98, available at <http://www.netlaw.de/urteile>.

²³² See <http://www.iis.fraunhofer.de/amm/techinf/layer3/>.

born, and the musical industry crusade was to follow. By most accounts, the predominant use of MP3 was the trafficking in illicit audio recordings. Following a pattern that was now common with the development of new technologies, the musical industry sued both the service providers that were providing the devices to reproduce and distribute the musical works, as well as the content providers that were offering copyrighted works to be downloaded on their websites.

At first, the RIAA decided to sue the service providers. Diamond Multimedia Systems, Inc. would be its target. In the end of the 1990s, this company had manufactured a device called the Rio portable music player. Prior to the invention of the Rio, MP3 users had no choice but to sit down at their computer and listen to their downloaded files through headphones or speakers, playing them from their hard drives. The Rio rendered these files portable and enabled consumers to download them from the computer to the device via a parallel port cable. The RIAA brought a legal action in front of the United States District Court for the Central District of California alleging that the Rio did not comply with the AHRA²³³. The issue was to know whether the Rio was a digital audio recording device subject to the restrictions of the AHRA. Judge Collins on the District Court answered that question in the affirmative. However, although plaintiffs had established a probability that the Rio was a “digital audio recording device”, they had not sufficiently demonstrated that it did not comply with the AHRA requirement regarding the serial copy management, which eventually led to a dismissal of the case. The RIAA appealed, and the Court of Appeals affirmed²³⁴. Unlike the District Court, the Court of Appeals however ruled that the AHRA did not apply to the Rio since it neither recorded directly from “digital music recordings” but from a computer hard drive, nor reproduced digital music recordings from transmissions²³⁵. From then on, it became clear for the musical industry that the AHRA, too narrowly constructed, would be of no support for them in the digital age any longer. Time had thus come to focus on the content providers.

²³³ *Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc.*, 29 F.Supp.2d 624 (C.D.Cal. 1998).

²³⁴ *Recording Industry Association of America, Inc. v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072 (9th Cir. 1999).

²³⁵ 180 F.3d 1080 (9th Cir. 1999).

One of the first to experience it was Michael Robertson. His website, MP3.com, enabled users to save their musical files on his server. To access the website, a subscriber had to either prove that he already owned the CD version of the recording by inserting it in his CD-ROM drive, or order a copy of the concerned CD from an affiliated online retailer. After having made sure that the user was the owner of the CD, Robertson placed copies of the relevant songs in the consumer's password-protected account, enabling him to stream the songs to any Internet-connected devices, at any time and place chosen by the user²³⁶. Robertson thought that he was unlikely to face any liability; after all, his activities could only enhance the rights holders' sales, since subscribers could not access MP3.com unless they had purchased or agreed to purchase their own CD copies of the recordings²³⁷. The recording industry disagreed and sued MP3.Com, Inc. in the United States District Court, Southern District of New-York.

On May 4, 2000, the District Court granted summary judgment in favour of the recording industry. To be able to replay for subscribers converted versions of their recordings, MP3.Com was making copies of these works, thus infringing the exclusive right of reproduction²³⁸. Indeed, although Robertson had licenses from ASCAP and BMI to transmit performances over the Internet, he hadn't obtained mechanical licenses from the Harry Fox Agency as to the reproduction of these musical works²³⁹. No fair use defence could apply, since Robertson's activities were clearly commercial²⁴⁰ and invaded plaintiff's statutory right to license their copyrighted sound recordings to others for reproduction²⁴¹. Having lost his battle in front of the court, Robertson tried to negotiate settlements with the plaintiffs; while four of the five majors agreed to an upfront payment of USD 20 million plus roughly half that amount per year in future license fees, Universal did not. Pressing its litigation advantage, Universal claimed that Robertson's infringement had been wilful and, consequently, that it

²³⁶ *UMG Recordings, Inc. v. MP3.COM, Inc.*, 92 F.Supp.2d 349, 350 (S.D.N.Y. 2000).

²³⁷ 92 F.Supp.2d 352 (S.D.N.Y. 2000).

²³⁸ 92 F.Supp.2d 350 (S.D.N.Y. 2000).

²³⁹ LITMAN, *supra* note 2, at 158.

²⁴⁰ While subscribers were not charged a fee, Robertson sought to attract a sufficiently large subscription base to draw advertising and otherwise make a profit.

²⁴¹ 92 F.Supp.2d 352 (S.D.N.Y. 2000).

was entitled to statutory damages. The Court agreed, ordering MP3.com to pay approximately USD 188 million in damages. Finally, Universal agreed to settle the case for an amount of USD 53 million plus warrants allowing Universal to purchase up to three million shares of MP3.com common stock²⁴². Supported by the Digital Future Coalition, the Electronic Frontier Foundation and a coalition of individual users, Robertson sought relief from Congress which, in September 2000, proposed a bill called the Music Owner's Licensing Act that would have legalized services like MP3.com; facing the opposition of the entertainment industry, the bill finally died in Committee²⁴³. Due to financial constraints, Robertson had no choice but to sell his company in May 2001 to Universal which put an end to the service. MP3.com was over²⁴⁴.

The approach taken by the United States District Court for the Southern District of New-York was confirmed on a worldwide basis the same year, both in France, where the *Tribunal de Grande Instance de Montpellier* ruled in a criminal case that the unauthorized downloading of MP3 files to be then ripped on CDs that were put on sale on the defendant's website obviously infringed copyrights²⁴⁵, as well as in China, where the Intermediate Popular Court of Beijing found it unlawful to download unauthorized MP3 musical files on February 21, 2000²⁴⁶.

The musical industry victory proved to be a Pyrrhic one. The business model that had been put in place by Michael Robertson had the advantage of making sure that the subscribers owned the CDs they wanted to download. In destroying this model, the industry was only leading to the development of new models where one might not have to prove that he had purchased the concerned CD. These new models came to life through peer-to-peer file

²⁴² FISHER, *supra* note 16, at 101.

²⁴³ FISHER, *supra* note 16, at 102. For the text of the bill, see http://www.eff.org/IP/Audio/hr5275_molra_2000_bill.html and more information with references at http://www.eff.org/IP/Audio/?f=20001019_eff_hr5275_alert.html.

²⁴⁴ FISHER, *supra* note 16, at 102.

²⁴⁵ *Procureur de la République v. Laurent D.*, TGI Montpellier, decision of September 24, 1999, available at <http://www.legalis.net>; see also *SACEM v. Monsieur V.R.*, Tribunal correctionnel Saint-Etienne, decision of December 6, 1999, available at <http://www.foruminternet.org/documents/jurisprudence/lire.phtml?id=216>.

²⁴⁶ Shukang Guo, *Schutz von Urheberrechten im Cyberspace – Neueste Entwicklungen in der Volksrepublik China*, in GRUR Int. 2001 1011, 1012-1013.

exchange systems (p2p). While Robertson was desperately trying to convince the musical industry that it would benefit from its business model, Shawn Fanning, an undergraduate student at Northeastern University, was working on a program that would substantially facilitate the exchange of MP3 files. The software he released was “MusicShare”, and the website where the software could be downloaded for free was Napster. After having downloaded the software and chosen a username and password, any subscriber could log onto the system and trade files. To do it, the user only had to use Napster search engine and was provided, in return, with a list of all the searched songs located in the “user libraries” of all of the other Napster subscribers connected to the system at that time²⁴⁷. Napster was a centralized sharing system, in the sense that all the musical files of all the users simultaneously appeared in a central “collective directory” of the website where the file names were uploaded. Between August 2000 and February 2001, the number of American who had downloaded music online increased by 40%, mainly thanks to the success of Napster²⁴⁸. In February 2001, 26.4 million individuals were using the system worldwide to illegally exchange billions of musical works²⁴⁹. While the figures may be disputed, the use of Napster undoubtedly led to significant financial losses for the musical industry.

In December 1999, A&M Records and seventeen other companies filed a lawsuit in the United States District Court of Northern District of California against Napster. On August 10, 2000, Judge Patel ruled that plaintiffs had established a prima facie case of contributory infringement and vicarious liability by Napster²⁵⁰. Direct infringements were obvious, since 87% of the exchanged files were copyrighted²⁵¹. Napster’s argument, according to which such downloading would constitute a fair use was rejected by Judge Patel who, in line with Judge Rakoff in *MP3.com*, ruled that Napster’s business model impeded the plaintiffs’ entry into the online market²⁵². Having retained that direct infringements were taking place, the Court considered that Napster was contributing to the infringement, since its internal documents

²⁴⁷ FISHER, *supra* note 16, at 111.

²⁴⁸ Mike Graziano/Lee Rainie, *The music downloading deluge* (April 2001, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_More_Music_Report.pdf.

²⁴⁹ <http://en.wikipedia.org/wiki/Napster>.

²⁵⁰ *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D.Cal. 2000).

²⁵¹ 224 F.Supp.2d 903 and 911 (N.D.Cal. 2000).

²⁵² 224 F.Supp.2d 914-915 (N.D.Cal. 2000).

demonstrated that its executives knew that subscribers were engaging in unauthorized downloading and uploading of copyrighted music but nevertheless sought to protect the use of the service²⁵³. Napster argued that the *Sony* case had to apply since its system was also capable of “substantial non infringing use”; such was not the opinion of the Court, which considered that “defendant fails to show that space-shifting²⁵⁴ constitutes a commercially significant use”²⁵⁵. While *Sony* only required a proof that the device was “capable” of substantial non infringing use, the District Court was thus enhancing the rule by requiring Napster to prove that it “had” substantial non infringing use. Such was the opinion of the Court of Appeals, which ruled that “we depart from the reasoning of the district court that Napster failed to demonstrate that its system is capable of commercially significant non infringing uses. The district court improperly confined the use analysis to current uses, ignoring the system’s capabilities. Consequently, the district court placed undue weight on the proportion of current infringing use as compared to current and future non infringing use”²⁵⁶. The Court of Appeals nevertheless confirmed Napster’s indirect liability²⁵⁷. Napster’s efforts to seek protection in the safe harbor provisions of the DMCA were rejected as it neither transmitted, nor routed nor provided connections for allegedly infringing material through its system” as required by section 512 (a), nor had implemented a copyright compliance policy as required by the DMCA. This point is worth mentioning since, on the other side of the Atlantic, the District Court of Hamburg, while admitting Napster’s liability, had ruled on March 26, 2001, that Napster could be assimilated as a search engine in compliance with the then applicable *Teledienstegesetz*²⁵⁸. In any case, even though several procedural steps were further needed to define the scope of the injunction²⁵⁹, Napster’s liability was a fact it could not get rid of any longer. After having tried to settle the case with the musical industry, Napster finally had to file for bankruptcy on June 3, 2002. This victory for the recording

²⁵³ 224 F.Supp.2d 903 and 918 (N.D.Cal. 2000).

²⁵⁴ Space-shifting would permit owners of some form of medium, such as a CD or a DVD, to convert that medium from one format to another, generally by converting an audiotape or CD into an electronic file stored on a computer.

²⁵⁵ 224 F.Supp.2d 916 (N.D.Cal. 2000).

²⁵⁶ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

²⁵⁷ 239 F.3d 1019-1024 (9th Cir. 2001).

²⁵⁸ LG Hamburg, decision of March 26, 2001 – Aktz.: 308 O 98/01, available at <http://www.netlaw.de/urteile>.

²⁵⁹ *A&M Records, Inc. v. Napster, Inc.*, 2001 WL 227083, 2001 WL 777005, 2001 WL789461 (N.D.Cal. 2001); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

industry was to be confirmed in cases that had been filed in the mean time against two other centralized sharing systems: Scour and Aimster²⁶⁰.

The musical industry had won a battle, but it was still far from having won the war. New systems soon developed, making it even harder for the right holders to stop the infringements. Napster indeed had a weakness that made it possible for the musical industry to prove an infringement of their rights: it was a centralized p2p system. In other words, the process by which one subscriber located a file on another subscriber's computer occurred through servers owned by Napster. This fact had been crucial in the appraisal of the Court, since it had implied a possible control of Napster over the dissemination of the works. Such a point of attachment does however not exist any longer in the second generation of p2p systems currently available. These systems are therefore called decentralized. In other words, systems such as KaZaa, eDonkey or Grokster do not have any central server, but provide users with software that enable them to directly download the musical files located on the hardware of other users connected at the same time.

The recording industry obviously filed several lawsuits against these systems, both in the United States and abroad. The crucial issue was to know whether the software provider could be held liable for the usage made by the individuals of its software, i.e. the illegal downloading of musical files. All attention was focused on the interpretation of *Sony* and the question to know whether these systems were capable of "substantial non infringing use"²⁶¹. Basing their defense upon this decision, the software providers consistently argued that their situation was similar to the one faced by Sony at that time and that, consequently, they could not be held liable for the exchange of illegal files taking place owing to their software. In a decision of November 21, 2001, the District Court of Amsterdam ruled to the release of the musical industry that *Sony* could not apply to KaZaa who had to be held liable for copyright

²⁶⁰ See FISHER, *supra* note 16, at 114. As to Aimster, see: *In re Aimster Copyright Litigation*, 252 F.Supp.2d 634, *aff'd*, 334 F.3d 643 (7th Cir. 2003).

²⁶¹ See *supra* Part III A: Does Technology Really Matter? - From Piano Rolls to the Internet.

infringement²⁶². KaZaa appealed, and was right to. In an opinion of March 28, 2002 that retained worldwide attention, the Court of Appeals of Amsterdam reversed and ruled that KaZaa had no way to control the content transmitted by virtue of its software and, consequently, could not be held liable as the software itself was capable of substantially non infringing uses²⁶³. With anxiety, the musical industry had no choice but to hope that the United States District Court, Central California that was to give its decision in a few months would judge otherwise. Such was however not the case. In a decision of April 25, 2003, Judge Wilson ruled in a similar way as the Dutch Court²⁶⁴.

These rulings were all the more worrying for the recording industry than, in July 2003, two thirds of those who downloaded music files or shared files admitted not to care about copyright infringement²⁶⁵. The mere interim injunction that had been granted in January 2003 by the Tokyo District Court, which had held a file sharing company liable for copyright infringement²⁶⁶, was obviously far from sufficient to secure the entertainment industry's interests. Facing this situation, the industry changed tactics and considered that it had no choice but to directly sue the consumers, whose copyright infringements could hardly be denied. Such actions had already started in November 2002 in Denmark, where the *Anti Pirat Gruppen* had sent a cease and desist letter to more than 150 users with a bill. Several similar actions launched by the RIAA followed worldwide²⁶⁷. Courts reacted differently to these types of actions. While Belgium ones proved to be responsive²⁶⁸, French ones were not

²⁶² *Buma Sterma v. Kazaa*, District Court of Amsterdam, decision of November 21, 2001 – case KG 01/2264 Odc, available at http://www.droit-technologie.org/jurisprudences/Rechtbank_Amsterdam_KaZaa_291101.pdf.

²⁶³ *Buma Sterma v. Kazaa*, Court of Appeals Amsterdam, decision of March 28, 2002 – case 1370/01 SKG, available at http://www.droit-technologie.org/jurisprudences/Gerechtshof_Amsterdam_Kazaa_280302.pdf.

²⁶⁴ *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 259 F.Supp.2d 1029 (C.D.Cal. 2003).

²⁶⁵ Amanda Lenhart/Mary Madden, *Music Downloading, File-sharing and Copyright* (July 2003, Pew Internet & American Life), at http://www.pewinternet.org/pdfs/PIP_Copyright_Memo.pdf.

²⁶⁶ <http://www.jasrac.or.jp/ejhp/release/2003/0129.html>. The decision was confirmed on appeal by the Tokyo High Court on March 31, 2005 (<http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-Jasrac-Napster>).

²⁶⁷ See FORUM DES DROITS DE L'INTERNET, *ETAT DES LIEUX SUR LE P2P ET LA MUSIQUE EN LIGNE EN FRANCE 19 et seq.* (2004), at <http://www.foruminternet.org/telechargement/documents/doss20040923-p2p.pdf>.

²⁶⁸ *M.P., I.F.P.I & SABAM v. X.*, TPI Brussels, decision of October 25, 2004 (criminal case, where the Court however blamed the IFPI for not having demonstrated that it owned 95% of the musical works downloaded and reduced damages in accordance), available at <http://www.droit-technologie.org>.

unanimous²⁶⁹. Canadian Courts seem opposed to criminalizing users; on March 31, 2005, the Supreme Court of Canada ruled on one hand that the downloading of copyrighted works was covered by the private copy exception, and on the other that the uploading could not be considered an infringement of the distribution right since the user does not take any active step but limits itself to place a copy of a musical work in a shared directory²⁷⁰. While suing consumers is considered to be bad business practice, the RIAA continued on filing lawsuits to that date²⁷¹, for many reasons: according to a Pew Report published in April 2005, a third of the former music downloaders would had stopped downloadings because of the suits, and 60% who had never tried music downloading said that the RIAA lawsuits would keep them from doing it. Users of KaZaa consistently dropped since May 2003, the date when the RIAA announced its intention to sue the users; from 35 million users in May 2003, figures dropped to 20 millions in February 2004²⁷². The report however rightfully admits that other factors came into play; the launching of iTunes in April 2003 is without doubt the most significant.

In the meantime that it started to sue consumers, the recording industry continued to fight service providers and appealed in *Grokster* to the Ninth Circuit Court of Appeals, which confirmed the prior decision. As a last resort, the industry filed a writ of *certiorari* that was granted by the Supreme Court. To the relief of the recording industry, the Supreme Court reversed. On June, 27, 2005, the Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other

²⁶⁹ *Ministère Public v. Claude L.C.*, TGI Vannes, decision of April 29, 2004 (liability admitted), available at <http://www.legalis.net>; *Industrie du disque c. Rodolphe*, TGI Meaux, decision of April 21, 2005 (liability admitted as far as downloading is concerned, denied as to the downloading), available at <http://www.droit-technologie.org> ; *Ministère public v. Didier T.*, TGI Bayonne, decision of November 15, 2005 (liability admitted), available at <http://www.legalis.net>; *Ministère public v. Anthony G.*, TGI Paris, decision of December 8, 2005 (liability denied as the use of the software does not allow the user to make a distinction between protected and unprotected content), available at <http://www.legalis.net>;

²⁷⁰ *BMG Canada, Inc. v. John Doe*, Federal Court of Canada, decision of March 31, 2004, available at http://www.eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040331_BMG_v_John_Doe.pdf.

²⁷¹ See, among others: <http://news.techwhack.com/2696/171204-riaa-files-more-lawsuits-against-p2p-users/> (December 17, 2005, regarding 751 new lawsuits filed by the RIAA against p2p users); <http://www.cdfreaks.com/news2.php?ID=12727> (November 25, 2005, regarding the filings of 2'100 lawsuits by the IFPI against users worldwide).

²⁷² Mary Madden/Lee Rainie, *The state of music downloading and file-sharing online* (April 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf; see also Mary Madden/Lee Rainie, *The impact of recording industry suits against music file swappers* (January 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf.

affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses"²⁷³. For obvious reasons, *Grokster* drew the attention of both the media and scholars. While the limited scope of this paper does not allow a deep analysis of the decision²⁷⁴, it remains fair to say that the Supreme Court was cautious in its ruling. The Supreme Court only recognized a liability based upon an inducement theory, and thus left opened the question to know whether a software provider that would not promote copyrights infringements would still be held liable. In other words, *Grokster* does not support a general statement according to which software providers would now be systematically liable for the use of their software to exchange musical files. According to CISAC, the impact of the case can however already be felt since ASCAP would have received several inquiries from entities involved with or interested in launching legitimate p2p and similar types of services²⁷⁵. On November 7, 2005, the defendant agreed to stop its service and to pay USD 50 millions in damages to the plaintiff companies after a rapid succession of several similar rulings having occurred in Australia²⁷⁶ Japan²⁷⁷, Korea and Taewan²⁷⁸.

Regardless of these lawsuits, the p2p phenomenon left no choice for the recording industry but to offer a more consumer friendly business model if it wanted to stop losing revenues. In 2001, Universal and Sony were the first to open their online music store with "Pressplay". EMI, AOL/Time, Warner and BMG followed with "MusicNet". However, the high prices charged by these companies and heavy usage limitations proved unlikely to raise

²⁷³ <http://www.law.cornell.edu/supct/pdf/04-480P.ZO>. The decision, 545 US __ (2005), is still unpublished offline.

²⁷⁴ See for instance : Urs Gasser/John G. Palfrey, *Catch-As-Catch-Can: A Case Note on Grokster* (2005), at <http://www.ssrn.com>.

²⁷⁵ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-Post-grokster>.

²⁷⁶ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-APRA-KAZ>.

²⁷⁷ *JASRAC v. MMO Japan Ltd.*, Tokyo High Court, decision of March 31, 2005, available at <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-Jasrac-Napster>.

²⁷⁸ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-accordGrokster>.

the interests of consumers. Far from having any deterrent effect, the percentage of consumers using p2p exchange files systems went on rising to reach its peak in May 2003 with 35 million users in a sole month²⁷⁹. On May 19, 2003, Sony and Universal finally gave up and sold “Pressplay” to Roxio, which used it as a base to relaunch the Napster online music store²⁸⁰. One month before, Apple had however launched in the United States a service that would prove the viability of online music sales and become a model; this model was iTunes. Unlike previous online music stores, iTunes has several advantages: it allows a free preview of 30 seconds per song for a price of USD 0.99 per download, respectively USD 9.99 for an album, an amount that reflected the projected price announced one year earlier by Jupiter Research, a market research firm²⁸¹. The system is easy to use and the *à la carte* pricing model makes the music store feel like p2p in certain ways, thanks to fast searching and a one click purchasing mechanism. The DRM used by Apple, called “FairPlay” has acceptable restraints: users can use the songs downloaded on five computers and can make unlimited CD burns of their songs²⁸². However, because it is a closed proprietary model, songs downloaded from iTunes can only be played on one type of portable devices: iPods. According to Gasser, the lack of interoperability is a key part of Apple’s business model as revenues would mostly be generated by the sales of iPods, not by iTunes Music Store. By charging relatively high prices for its portable players, Apple could thus afford to suffer moderate losses from iTunes²⁸³. Most importantly, unlike its predecessors, Apple had secured the participation of content providers before its release on the market. Thanks to the support of the majors and over 600 independent labels, iTunes proposes a catalogue of more than 2 millions songs. iTunes quickly expanded its services to other countries to cover Europe, Canada, Japan and

²⁷⁹ See *supra* note 272.

²⁸⁰ <http://en.wikipedia.org/wiki/Pressplay>.

²⁸¹ GASSER, *supra* note 224, at 9.

²⁸² GASSER, *supra* note 224, at 11, however points out that one can only burn the same exact playlist seven times in order to prevent mass-production of copies for illicit sales.

²⁸³ GASSER, *supra* note 224, at 11 and 45. It thus won’t come as a surprise to know that Apple strongly opposes the interoperability requirements, particularly in France where a foreseen amendment to the Copyright Act would compel it to disclose the relevant information to allow such interoperability (see <http://www.zdnet.fr/actualites/internet/0,39020774,39332900,00.htm>, of March 22, 2006).

Australia²⁸⁴. As of February 2006, iTunes had sold over 1 billion songs, i.e. more than 80% of worldwide online music sales²⁸⁵.

Having reached the end of our story, what should we remember for our purpose?

First, we have noticed that copyright and the collective management of copyright has often been a response to the introduction of new technologies.

Second, courts are reluctant to expand copyrights without the intervention of the legislature, but regularly provide signals that result in amendments of copyright laws. As stated by the Supreme Court in *Sony*: “Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary. [...]. The judiciary reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme”²⁸⁶.

Third, musical works are intrinsically linked with the media and reader devices that enable their performance. Once limited to written scores, the exclusive right of reproduction was extended in the early 1900s to the sounding of the works with the advent of piano rolls. The development of vinyl records led to the recognition of an exclusive right upon the medium itself, and to the advent of a new category of rights holders in the musical industry: the phonogram producers. While the proprietary model based upon the exercise of exclusive rights remained satisfactory as long as the exploitation of the media was the privilege of the recording industry and that performances primarily took place in the public arena, such was not the case any more when the sales of blank tapes and CDs made it possible for consumers to mass-produce copyrighted works in private homes. This shift from the public arena to private homes needed to be addressed in a different way, since rights holders were unable to control these new channels of distribution through their exclusive rights. To respond to the

²⁸⁴ http://en.wikipedia.org/wiki/iTunes_Music_Store.

²⁸⁵ *Id.* For a worldwide listing of the online music stores, see <http://www.pro-music.org/musiconline.htm>.

²⁸⁶ See for instance: *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 431, 104 S.Ct. 774, 783, 78 L.Ed.2d 574 (1984)

concerns of the industry without preventing further technological developments, Legislatures implemented non-voluntary licenses as a compromise, thus turning the proprietary model into a liability regime through the introduction of remuneration rights rather than exclusive rights.

Since the 1960s, revenues generated through the exploitation of copyrighted works thus find their origin in two sources: first, from licenses that are the result of an assignment of exclusive rights from rights holders to performing rights societies; second, from compulsory licenses that result in remuneration rights upon the sales of certain media and reader devices by these societies, without giving right holders the possibility to exercise their exclusive rights upon these types of exploitation.

Finally, the recent launch of online music stores is still far from eradicating p2p systems. While iTunes proves the viability of online music sales, it is still far from deterring all consumers from exchanging unauthorized musical files. Aggressive legal actions conducted by the RIAA and the launch of iTunes may have reduced the p2p; exchange of musical files however remains significant. In March 2005, a survey conducted by Pew Internet & American Life reported that 28% of internet users exchanged music and video files via email and instant messages, and that 19% of music and video downloaders had downloaded files from someone else's iPod or MP3 player²⁸⁷. The 1851 year when Ernest Bourget initiated the creation of SACEM is far away. Traditional channels of distribution and performance have been revisited. How do performing rights societies respond to these innovations? How do they fulfill their duties in this new environment? Time has come to let them speak.

²⁸⁷ Mary Madden/Lee Rainie, *Music and video downloading moves beyond P2P* (March 2005, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Filesharing_March05.pdf.

IV. HOW DO PERFORMING RIGHTS SOCIETIES OPERATE IN THE DIGITAL ENVIRONMENT?

A. *Authorized Distribution Channels: Online Music Stores*

1. From the Sydney Agreement to the EU Recommendation

Collective societies have been organized on a territorial basis since their inception, meaning that users²⁸⁸ have to acquire a separate license in each country where works will be performed. As discussed previously, cooperation occurs via reciprocal agreements that allow performing rights societies to monitor a worldwide repertoire in their territory²⁸⁹. This model was a viable solution in the analog era, but is outdated now that cross-border trading of copyrighted works has become the rule. The need to adapt existing structures to the specificities of the digital environment is particularly felt in the European Union, where users may have to seek permission from 25 different performing rights societies. In contrast, users in the United States only need licenses from ASCAP, BMI and SESAC. As stated by Charlie McCreevy, European Commissioner for Internal Market and Services, “Europe’s model of copyright clearance belongs more to the nineteenth century than to the 21st. Once upon a time it may have made sense for the member state to be the basic unit of division. The internet overturns that premise”²⁹⁰. For this reason, we shall focus our attention on European performing rights societies and refer to Japan and the United States for a comparative perspective.

This European focus does not mean that US performing rights societies do not feel constrained by their structures. ASCAP, BMI and the Harry Fox Agency actually tried to request an antitrust exemption for a “uni-license proposal” in 2005. This proposal would have

²⁸⁸ “Users” are defined as entities which have to require a license to exploit copyrighted works.

²⁸⁹ See *supra* Part II A: Did you Say Collective Societies – Introduction.

²⁹⁰

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/588&format=HTML&aged=0&language=EN&guiLanguage=en>.

led to the creation of an agency to deliver one license to digital users for performing and mechanical rights regarding musical works in the United States. The money collected would have been divided amongst the societies and then distributed to their respective members. Unfortunately, the stakeholders could not reach agreement about the applicable rate, because the societies felt that users' demands were "ludicrous". As a result, multiple licenses granted by multiple societies remains the model in the United States.

In spite of Mr McCreevy's words, Internet Age is not the first time that European collective societies have been confronted with cross-border trading in copyrighted works. A centralization trend already exists in the field of phonogram production; since large phonogram manufacturers are concentrating their production in a few countries, they are given "central licenses" by the society of the country where the production or distribution of these copies takes place²⁹¹. This is made possible thanks to negotiations among the different societies responsible for the granting of mechanical licenses.

The advent of direct broadcasting satellites in the 1980s also allowed transmission of copyrighted programs to several countries. To deal with these cross-border activities before the enactment of the E.C. Cable and Satellite Directive in 1993²⁹², CISAC adopted in 1987 an addendum to its model contract concerning direct broadcasting satellites, usually referred to as the Sydney Agreement²⁹³. According to this Agreement, licenses to broadcast the programs are delivered by the society of the originating country. If the broadcasts are communicated to several countries, the collective societies of the concerned countries have two alternatives: either agree that the license granted by the originating country is valid for all countries, or require that extraterritorial validity is subject to their approval, and then define the conditions under which such cross-border authorizations might be delivered for their respective country.

²⁹¹ FICSOR, *supra* note 31, at 124 § 334.

²⁹² Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, October 6, 1993, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0083&model=guichett. The Sydney Agreement is however wider in its scope as it is not limited to the European Union.

²⁹³ See FICSOR, *supra* note 31, at 111 *et seq.* § 305 *et seq.*

The Sydney Agreement was used as a model by the International Federation of the Phonographic Industry (IFPI) for the “Simulcast” Agreement in 2002²⁹⁴. The “Simulcast” Agreement intends to facilitate the grant of international licenses to radio and TV broadcasters to engage in simulcasting²⁹⁵. Given that simulcasting on the Internet involves the simultaneous transmission of a signal to several countries, a multi-license model seemed appropriate. The parties to the Agreement thus developed a “one stop shopping” license scheme, according to which simulcasters located in the European Economic Area (EEA) can obtain a multi-territorial license from any collective society in the EEA which is party to the Agreement, and then simulcast into the signatories’ territories²⁹⁶.

According to Article 81(1) of the E.C. Treaty, concerted practices among undertakings which may affect trade between Member States are however prohibited. Since collective societies are undertakings within the meaning of Article 81(1) of the E.C. Treaty due to their monopolistic position, the *Simulcast* Agreement was considered a concerted practice. However, Art. 81 (3) of the E.C. Treaty permits exemptions where the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Parties to the *Simulcast* Agreement requested such an exemption from the European Commission. The Commission decided that the Agreement, which gave rise to a new product, i.e., a multi-territorial simulcasting license, was responding to a need in the digital environment and was thus justified²⁹⁷. While granting the exemption, the Commission nevertheless required collective societies to disclose separately the amount charged to users for the copyright

²⁹⁴ Simulcasting, as defined by the parties to the agreement, is the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals.

²⁹⁵ Commission Decision of October 8, 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI “Simulcasting”), OJ L 107/59, April 30, 2003.

²⁹⁶ It is worth noting that Article 3.1 of the first version of the Agreement stated that the license had to be granted by the collective society of the country of origin, i.e., the one where the signal originated from. On June 21, 2002, however, the IFPI provided the Commission with an amended version of the Reciprocal Agreement, according to which broadcasters whose signals originated in the EEA could approach *any* collecting society in the EEA that was a party to the Agreement. The freedom to select the society is a key element for the European Commission as proved by the proceedings related to the Santiago Agreement described below.

²⁹⁷ OJ L 107/74, § 84-88.

royalty on one side, and for the administration fee on the other²⁹⁸. Implicitly, the Commission believed that by turning the traditional single license model into a multi-territorial one, users were to be able to choose among several collective societies that competed on cost and efficiency. The *Simulcast* decision proves that, since 2002, the desire to enhance competition among collective societies is a major priority in the European Commission's regulation of copyright management.

Due to different goals among CISAC's members, performing rights societies did not immediately reach an agreement similar to the Sydney Agreement to deal with the online exploitation of musical works. However, in 2000, five societies (BMI, BUMA (Netherlands), GEMA, PRS and SACEM) adopted an Agreement during CISAC Congress at Santiago de Chile, known as the Santiago Agreement²⁹⁹. According to the Agreement, users were allowed to get a multi-territorial license from the performing rights society in their country of economic residence, i.e., the country of their residence from which they conduct their activities. Over forty additional societies quickly joined the Santiago Agreement, and in September 2001, at its congress in Barcelona, BIEM's affiliates adopted an identical Agreement known as the "Barcelona Agreement" to deal with mechanical reproduction rights.

These agreements received unanimous support from performing rights societies, not only in Europe, but also in Japan and in the United States. While the Santiago and Barcelona Agreements were following the trend, initiated by the *Simulcast* Agreement, to allow multi-territorial licenses, they contained one main difference that would ultimately lead to their demise: unlike the *Simulcast* Agreement, users could not acquire a license from any performing rights society but had to seek permission from the society in their country of economic residence. In other words, enhanced competition among collective societies, as envisioned in the *Simulcast* Agreement, could not be achieved in the Santiago and Barcelona

²⁹⁸ OJ L 107/76-77, § 99 *et seq.* For an analysis of the decision, see Dorothea Senn, *Competition Law Aspects of Digital and Collective Rights Management Systems*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 123, 129 *et seq.* (Christoph Beat Graber et al. ed., 2005).

²⁹⁹ For more details on the Santiago Agreement, see: FICSOR, *supra* note 31, at 114 *et seq.* § 311 *et seq.*; Lucie Guibault, *A quand l'octroi de licences transfrontières pour l'utilisation de droits d'auteur et de droits voisins en Europe*, 8 *et seq.*, at <http://unesdoc.unesco.org/images/0014/001400/140025f.pdf>; Senn, *supra* note at 298, at 134-135.

Agreements because users were unable to choose their society. For this reason, on May 17, 2001, the Commission published a Notice on these Agreements and invited interested third parties to submit observations³⁰⁰. On the basis of the comments received, the Commission issued a Statement of Objections on April 29, 2004. In this Statement, the Commission ruled that the exclusive competence of a single society in any given case³⁰¹ did not create any incentive for performing rights societies to increase efficiency or reduce their costs. The cross-licensing arrangements foreseen in these Agreements thus led to an effective lock up of national territories, transposing into the Internet the national monopolies the societies had traditionally held in the offline world, monopolies that were no longer justified in the digital environment. For this reason, the Commission preliminarily ruled that the Santiago Agreements did not meet the conditions required by Article 81(3) of the EC Treaty. While most performing rights societies strongly opposed the ruling of the Commission, SABAM and BUMA did not; both agreed that the economic residency requirement infringed the freedom of movement mandated by the EC Treaty. In letters dated April 20 and May 10, 2005, BUMA and SABAM respectively declined to be a party to any licensing agreement for online use containing an economic residence clause³⁰².

The Commission ruling is only a preliminary one and proceedings are still pending. The investigations have currently been suspended due to the legislative process undertaken by another institution within the European Union, the Internal Market and Services Directorate General. While the Directorate General for Competition was investigating the Santiago and Barcelona Agreements, the Directorate General for Internal Market had indeed initiated a survey related to copyright management in the European Union³⁰³. For the Directorate, creating a regulatory framework for copyright management was a logical step after achieving substantive harmonization through the different directives³⁰⁴. The survey concluded that

³⁰⁰ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 – BUMA and COMP/C2/39151 SABAM (Santiago Agreement – COMP/C2/38126), OJ C 145/2, May 17, 2001.

³⁰¹ i.e. the one where the user has its actual and economic location.

³⁰² http://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/oj/2005/c_200/c_20020050817fr00110012.pdf.

³⁰³ Communication from The Commission to The Council, The European Parliament and The European Economic and Social Committee, COM(2004) 261 final, April 16, 2004, at http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0261en01.pdf.

³⁰⁴ COM(2004) 261 final, at 5.

abstaining from legislative action was no longer a viable option³⁰⁵. Such was not the opinion of performing rights societies which, through GESAC, considered the enactment of a Directive on the collective management of copyright inappropriate³⁰⁶; the societies were of the opinion that the music industry was undergoing rapid and constant changes, and that it was up to the market, not to the legislator, to meet the demand for pan-European licenses. According to the societies, the Santiago and Barcelona Agreements represented a market-based solution that satisfied all stakeholders.

In spite of these objections, the Directorate for Internal Market commissioned a study on the benefit of cross-border collective management of copyright that was published on July 7, 2005³⁰⁷. According to the Commission, the gap between 2004 revenues generated by the online exploitation of music works in the United States and Europe was primarily due to the structure of collective societies, which limited the scope of licensing by territory³⁰⁸. As we have seen in *Simulcast* and in *Santiago*, improved regulation of copyright management was motivated by the desire to enhance competition among collective societies. Since the monopolistic position of these societies was not justified in the digital environment due to the cross-border trading of musical works, they had to comply with Art. 81-83 EC Treaty and compete with each other. For the Directorate, recent moves aimed at providing users with multi-territorial licensing were insufficient because they did not enable rights holders to comply with the performing rights society of their choice. The study proposed three options: (1) do nothing and let the market operate freely; (2) eliminate territorial restrictions and discriminatory provisions in the reciprocal agreements concluded between the societies; (3) give rights holders the option to choose the society of their choice to grant online rights for the entire EU³⁰⁹. The first option was not seriously taken into consideration by the

³⁰⁵ *Id.*, at 19.

³⁰⁶ GESAC, COMMUNICATION OF APRIL 16, 2004 ON THE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE INTERNAL MARKET, June 2004, at http://europa.eu.int/comm/internal_market/copyright/docs/management/consultation-rights-management/gesac_en.pdf.

³⁰⁷ COMMISSION OF THE EUROPEAN COMMUNITIES, STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT, July 2005, at http://europa.eu.int/comm/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf.

³⁰⁸ *Id.*, at 5.

³⁰⁹ *Id.*, at 34 *et seq.*

Commission. The second one would have introduced a single entry point and choice for users, who could have required a license from any collective society as in the Simulcast Agreement; however, this would not have increased competition at the level of the rights holders, which was the ultimate goal of the Commission. The basic difference between the latter options was indeed that option 3 introduced competition in the relationship between right holders and collective societies, while option 2 introduced competition at the users' level³¹⁰. Obviously, the study favored the third option, the only one to actually allow competition at the level of the rights holders by giving them the right to join any society³¹¹.

The Commission, obviously keen on going forward with the adoption of a directive, irritated many by purposefully setting a twenty day deadline in the middle of August to receive comments. Though this period is particularly inappropriate for public participation because most Europeans are on vacation, 80 organizations submitted comments. Contrary to what had been assumed by the Directorate in its study, CISAC pointed out that Article 11 (II) of its Model Contract, according to which affiliates had to be nationals of the country in which their performing rights society operated, had been removed in March 2004³¹². In other words, the primary restriction which had justified an initiative towards cross-border management, i.e., the so-called impossibility for rights holders to join the society of their choice, simply did not exist. Moreover, the figures demonstrating that revenues generated in the United States would be eight times higher than in Europe were misleading because they did not take into account several trends. Revenues generated by ring tones are much higher in Europe than in the United States, and iTunes – which generates 80% of online music sales³¹³ – had not yet been launched in Europe. As expected, collective societies rejected both options 2 and 3. Even though option 2 was built upon the reciprocal agreements that had been

³¹⁰ *Id.*, at 40.

³¹¹ *Id.*, at 54.

³¹² CISAC, PRELIMINARY SUBMISSIONS ON EUROPEAN COMMISSION STAFF WORKING DOCUMENT “STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT” 4, July 2005, at http://forum.europa.eu.int/irc/Download/kmeVAKJ_miGUbpJEH26CRWRYCx3NtriCkiQAKJdVT-JQOHHeHf6zk2q2y0-rNHplbVUB8GNUJuLwovTibUYIq_4DRRUS7cuq/G6-/CISAC_en.pdf. This provision is also at the origin of the investigation launched by the Competition Directorate of the Commission against CISAC Model Contract (see <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-EUSO>).

³¹³ See *infra* Part III B: Does Technology Really Matter - ...And the Internet came.

fundamental to collective societies for over 150 years, it enabled users to “forum shop”, a situation the societies felt was untenable. Besides, it would lead users to seek out the least demanding society, thus encouraging a “race to the bottom” where collective societies became less effective because they were cutting costs to be cheaper and thus more attractive to users, to the detriment of authors³¹⁴. Option 3 was even more worrying because the study concluded that “With respect to cross-border distribution of offline royalties, we believe that Option 3 will also be the most sustainable long-term model”³¹⁵; in other words, in the long term, the model would also be extended to the offline exploitation of copyrighted works. The study thus aimed at revolutionizing the whole model upon which collective societies had been built. GESAC tried to draw the Commission’s attention to several unanticipated consequences of option 3: first, large publishers were likely to adhere to foreign collective societies having substantial financial resources like GEMA or SACEM, while individuals would remain members of their small or medium size national societies; this situation would lead to considerable difficulties regarding documentation and distribution of royalties, and thus significantly increase the costs of management. Second, contrary to the Commission’s prediction, option 3 threatened small collective societies and, consequently, cultural diversity³¹⁶.

Unfortunately for performing rights societies, the battle was lost almost before it began. The Commission unsurprisingly considered option 3 the most promising to enhance competition and satisfy the needs of stakeholders. However, in a nod to the strong opposition, the Commission turned the foreseen directive into a Recommendation on September 30, 2005³¹⁷. The Recommendation’s main provisions for our purpose are the third and fifth ones:

³¹⁴ See GESAC, WORKING DOCUMENT OF 7 JULY 2005 FROM THE DIRECTORATE-GENERAL FOR THE INTERNAL MARKET ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT – GESAC’S PRELIMINARY COMMENTS, July 2005, at <http://www.gesac.org/eng/positions/download/GCOLLECT094ipen05.doc>.

³¹⁵ COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 307, at 54.

³¹⁶ GESAC, *supra* note 314, at 19 *et seq.*

³¹⁷ Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, at http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf.

“3. Right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder.

[...]

5. With respect to the licensing of online rights the relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should at least be governed by the following: (a) right-holders should be able to determine the online rights to be entrusted for collective management; (b) right-holders should be able to determine the territorial scope of the mandate of the collective rights manager; (c) right-holders should, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder; (d) where a right-holder has transferred the management of an online right to another collective rights managers, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded amongst them.”

How did performing rights societies react to the adoption of this recommendation?

2. Performing Rights Societies’ Concerns

a) General Remarks

At first glance, the Recommendation may not seem to change much to the current situation. After all, unlike what the Commission thought, Art. 11 II of the CISAC Model Contract no longer existed. Moreover, *GEMA* had already made it clear in 1971 that rights holders could join any performing rights society within the Community and were allowed to allocate their rights to different societies in different territories³¹⁸. In 1993, *U2* had confirmed that authors had the right to withdraw their affiliation and individually manage their copyrights³¹⁹. Yet performing rights societies were worried because the central licensing agreements encouraged by the Recommendation made much more sense in the online world than offline, and because it enabled the “central” society to deliver cross-border licenses without the need to refer to reciprocal agreements, thus threatening the territorial structure upon which performing rights societies have been built.

³¹⁸ See *supra* Part II B Did You Say Collective Societies – Nature and Ownership.

³¹⁹ See *supra* Part II B Did You Say Collective Societies – Nature and Ownership.

During the interviews, European performing rights societies wondered whether cross-border licensing is a model that is responsive to actual needs of users. GEMA and SACEM explain that “most users are interested in the deliverance of local licenses rather than cross-border ones”. For example, in July 2005, GEMA stated that only two out of 41 ring tone companies and zero online music store had requested a cross-border license; for instance, while GEMA offered Apple a license covering Austria, Czech Republic, Germany and Switzerland, the company, assuming that GEMA would apply its high rate to these countries as well, refused and sought the cheaper licenses from each country³²⁰. While large users like iTunes may be able to suffer the necessary transaction costs to negotiate with each collective society, most small players will not. Interestingly, SUIA points out that “cross-border licenses might paradoxically favor small users who are financially unable to seek licenses from different performing rights societies”. Another hindrance to the development of cross-border licenses might be the language of users’ websites; for instance, JASRAC explains that, in general, its users provide services to the Japanese public in Japanese, so that there is no real practical need for cross-border licenses.

In spite of these observations, cross-border licenses can be expected to gain traction over years as proved by the central licensing agreement that was announced during the annual session of MIDEM in Cannes on January 23, 2006 by GEMA and PRS/MCPS, according to which EMI Music Publishing had decided to work with them to build a one-stop shop to clear the rights of EMI’s Anglo-American songs across Europe for online and mobile usage³²¹. The possibility for European performing rights societies to conclude central licensing agreements with right holders and, as a result, to deliver cross-border licenses to users raises concerns of both small, medium and large performing rights societies:

³²⁰ Information provided by GEMA.

³²¹ http://www.gema.de/engl/communication/press_releases/pm20060123.shtml.

b) *Small performing rights societies concerns*

Whether large or small, the performing rights societies interviewed agree that, by encouraging central licensing agreements, the Recommendation endangers the role of reciprocal agreements and, consequently, threatens the existence of numerous small and medium performing rights societies. As stated by SABAM, “major publishers now have a clear interest in reducing transaction costs by assigning all their rights to large performing rights societies such as GEMA, PRS or SACEM and closing the local offices of their sub-publishers”. The disappearance of local sub-publishers, better informed about local needs, may ultimately impoverish cultural diversity, a result that conflicts with the recent signature by performing rights societies of the UNESCO Convention, whose main purpose is to recognize and celebrate the importance of cultural diversity³²². The utilitarian approach taken by the European Commission would thus be unable to properly consider the multiple functions performed by the societies, in particular their cultural and social roles.

SUISA, another small performing right society, obviously shares SABAM’s concerns, with one major difference: unlike SABAM, SUISA does not believe that individual authors would be influenced by the majors to join large performing rights societies. The Swiss performing right society believes that proximity matters for individuals, a feeling also shared by SACEM. The rights of authors to assign their rights to any society since *GEMA* was never really used; according to SUISA, “in practice, it is important for individuals to be in direct contact with their local society, with whom they share a common language and have developed trust”. For the Swiss performing rights society, the recommendation may lead to the development of a dual system: one for the majors, whose rights would be assigned to large performing rights societies, and one for individuals, who would remain affiliated to their local society. As a result, small performing rights societies would be unable to offer the majors’ repertoires and would be limited to the management of only their members’ works, a far less

³²² This fear was reinforced by a delegation of six prominent songwriters and music composers who, in February 2006, addressed the European Commission to defend their rights and shared their fears that the Recommendation may indeed undermine cultural diversity and their longstanding and effective relationship with performing rights societies (see <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2006-02-McCreedy>).

attractive and lucrative situation for users. Deprived of their primary source of revenue, small and medium size societies may no longer be viable.

GEMA, which has also opposed option 3, concedes that this risk may exist. However, at this stage, “any such assertions would be merely speculative”. For GEMA, “cultural diversity has already disappeared to a great extent without any centralization; such is the case in particular with radio stations, which do not offer a wide repertoire, instead performing the same hits days and nights”.

In its impact assessment report published on October 10, 2005, the Commission sweeps these fears aside and states that, to the contrary, the retained option will allow all societies to compete for members irrespective of their nationality or domicile. Therefore, a performing rights society which does not have a strong repertoire may attract rights holders from other jurisdictions based on its efficiency³²³. One cannot deny this possibility, as the central licensing agreement concluded on April 30, 2004 between SABAM and Universal for eighteen months proves³²⁴. However, the parallel drawn by the Commission between costs and efficiency is strongly criticized by all performing rights societies interviewed, which unanimously agree that their efficiency cannot be mirrored by their costs. It depends on what services societies perform for those costs, and their effectiveness in performing those services. Far from being a sign of efficiency, administration costs significantly lower than the one charged by sister societies are likely to reflect less valuable management to the detriment of the rights holders³²⁵. GEMA in particular insists on pointing out that “monitoring copyrighted works, auditing users, compiling necessary documentation, drafting detailed reports and setting up DRM are expensive, much more so than the European Commission seems to

³²³ COMMISSION OF THE EUROPEAN COMMUNITIES, IMPACT ASSESSMENT REFORMING CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS FOR LEGITIMATE ONLINE MUSIC SERVICES 30, October 2005, at http://europa.eu.int/comm/internal_market/copyright/docs/management/sec_2005_1254_en.pdf.

³²⁴ <http://www.sabam.be/website/data/universalangl.doc>. According to SABAM, the agreement was considered to be an experimental one. It will however not be renewed, for reasons that have not been disclosed.

³²⁵ FICSOR, *supra* note 31, at 47 § 100 and 57 § 127. Eliminating a satisfactory quality of documentation and reporting leads to a higher risk that the royalties will be distributed to the wrong right holders, thus leading to deficient collective management.

believe”. One cannot logically require collective societies to produce a complete census and simultaneously reduce their administration costs, as the European Commission does.

Small and medium size performing rights societies know that they will not be able to afford the costly infrastructure described above if they are forced to compete without the majors’ repertoires. If central licensing agreements develop as can be expected, small and medium performing rights societies are likely to have no choice but to reduce their costs to survive. Questioned as to possible solutions to reduce their costs of management, GEMA and SABAM consider that small societies will have to combine their resources and create joint ventures to consolidate technical investments and back office administration. Joint ventures have already been created among collective societies, both at the national and international level: for example, PRS/MCPS, SACEM/SDRM and BUMA/STEMRA share certain elements of management regarding the common exploitation of performing and mechanical rights³²⁶. On the international scene, several cooperative agreements have been signed: between SABAM and BUMA/STEMRA regarding the joint management of mechanical rights and IT support, data synchronization and process harmonization³²⁷, in the Caribbean region³²⁸ and the International Music Joint Venture (IMJV) put in place by PRS/MCPS, BUMA/STEMRA, ASCAP and SOCAN to use a single shared database³²⁹.

c) Large (potentially central) performing rights societies’ concerns

While the situation is particularly worrying for small performing rights societies, larger ones also expressed some concerns during the interviews. GEMA believes that “delivering cross-border licenses is one thing, but monitoring the exploitation of works performed in other countries is entirely different”. The European Competition is wrong in its belief that DRM are a solution to every problem. Several management steps still must be

³²⁶ FICSOR, *supra* note 31, at 49 § 106.

³²⁷ <http://cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=CN-2004-04-SABAM-BUMA>.

³²⁸ FICSOR, *supra* note 31, at 121 § 328.

³²⁹ Remark by Tony Pool (Boosey & Hawkes Music Publishers Ltd.), in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 232 (2002).

performed offline: how can one society granting a cross-border license confirm that documentation provided by users accurately reflects the exploitation that took place? Auditing will obviously be required. Who will be entrusted to audit the accounting of users located in other countries and speaking different languages? For GEMA, the “central” society “must have access to users’ location to check the configuration of their IT support and DRM to determine whether reports accurately reflect the consumption of musical works. Circumvention by users who would put in place their own infrastructure is very easy and, in most cases, access to users’ software is impossible”. GEMA concedes that it already faces difficulties getting reports from German ring tone companies³³⁰, and wonders how to effectively safeguard its members’ interests at the international level. If users refuse to pay their royalties, how could enforcement be achieved? Would the granting society have standing in other countries to sue the users? These are serious practical hindrances against an effective cross-border management³³¹. Strangely enough, at a time when competition between performing rights societies has significantly increased, the need for cooperation and information sharing has never been so urgent.

Finally, SUISA draws our attention to the fact that the delivery of central licensing agreements will raise concern regarding the scope of the rights covered by these agreements: “In practice, one author may already have assigned its rights to a society before contracting with a publisher. In this case, the agreement between the author and publisher can obviously not cover the rights which have already been assigned to a performing rights society. In the traditional license model, the issue to know whether the rights upon a certain work are managed by the performing rights society of the author or the one of the publisher does not matter, since each performing rights society monitors a worldwide repertoire on its own territory based upon reciprocal agreements. The situation gets different in the case of central licensing agreements, where the “central” performing rights society will have to find whether

³³⁰ GEMA mentions the fact that it had requested ring tone companies to insert a chip in their software to precisely monitor the exploitation of works. The companies however did not want that level of transparency and refused, arguing that this chip would lead to interoperability problems with their software.

³³¹ See also GESAC, GESAC ANSWERS TO THE QUESTIONNAIRE OF MRS MERCEDES ECHERER ON “COLLECTING SOCIETIES” 11, March 2003, at <http://www.gesac.org/eng/positions/download/GCOLLECT039EN03QUESTECHERER.doc> (cited ANSWERS).

all the works of a given author are covered by the central licensing agreement or not, since it will only be entitled to deliver cross-border licenses for the works covered by the agreement”. According to SUIA, this delimitation didn’t need to be made previously and will involve significant transaction costs, thus creating a serious practical hindrance.

d) *Towards a New Environment*

All in all, performing rights societies agree that the adoption of the EU Recommendation changes the atmosphere and has an impact upon their prior solidarity. Competition increases at several levels: performing rights societies do not only have to compete against each other, with the large and small societies seeking different goals, but also have to confront the major publishers. While DRM may serve the interests of collective societies and help solve the problems described above as well as enhance cooperation³³², they can also be implemented by the rights holders themselves. Should DRM be regarded as a step towards individual management, and consequently the demise of collective management?

3. **Digital Rights Management (DRM): a Friendly Enemy?**

According to Professor Hugenholtz, “Copyright levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually. With the advent of DRM, this assumption must be re-examined. In the digital environment, technical protection measures and digital rights managements systems make it increasingly possible to control how individuals use copyrighted works”³³³. Therefore, the possibilities conferred to rights holders to directly control the exploitation of their works through DRM should enable them to fully exercise their exclusive rights. Thanks to DRM, the implementation of exceptions (such as private use) and levies on blankets or devices that go with them could be phased out. Rights holders would thus be in a position to get better

³³² Daniel Gervais, *The Evolving Role(s) of Copyright Collectives*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 27, 41 (Christoph Beat Graber et al. ed., 2005).

³³³ Hugenholtz *et al.*, *supra* note 176, at 1 and 10 *et seq.*

compensation than they used to get through the levies distributed by collective societies. Individual management could thus replace collective management.

Questioned about Hugenholtz' position and the possible implementation of DRM as a substitute to collective management, performing rights societies share the same viewpoint; whether European, American or Japanese, they strongly reject Hugenholtz' assertions, for several reasons. First, individual management is extremely costly and even prohibitive for a vast majority of authors. Second, to monitor the exploitation of the works requires an expertise that rights holders do not have. Third, European performing rights societies in particular believe they play an important social role. They represent a lobbying force to negotiate against powerful users with far more leverage than the authors alone³³⁴. Without performing rights societies, authors would be at the mercy of users and producers.

If individuals do not have the financial resources and expertise to manage the exploitation of their works, one may wonder why the major publishers could not withdraw their repertoire from these societies, self-monitor the exploitation of their repertoire and thereby increase their profit margins. Among the societies interviewed, only SUISA concedes that this possibility raises serious long term concerns. ASCAP however wonders "Why a publisher would feel like engaging the costs of direct licensing when there is an amazingly effective system [i.e. collective management] at disposal? Far from increasing their profit margin, publishers might lose money"³³⁵.

Performing rights societies have suggested two factors that may indeed prevent publishers from engaging in individual management, at least on a short-term basis:

³³⁴ Opinion shared by Thierry Desurmont (SACEM), in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 203 (2002); Gervais, *supra* note 332, at 31.

³³⁵ This view is shared by several prominent scholars in this field: FICSOR, *supra* note 31, at 97-98 § 260 *et seq.*, considers that, far from decreasing, the role of joint management will probably increase; Adolf Dietz, *Rationales of Copyright and Collective Administration in the Information Society (comment)*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 57 *et seq.* (Christoph Beat Graber et al. ed., 2005). See also Alfred Meyer (chief executive of SUISA), *DRMS Do Not Replace Collecting Societies (comment)*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 61 *et seq.* (Christoph Beat Graber et al. ed., 2005).

First, users do not want to acquire several licenses from different entities; they want to exploit a worldwide repertoire with only a single license. Performing rights societies are still the only entities to provide such a service. While it is true that the majors may agree among themselves to offer a similar service in the future, such agreements would suffer two shortcomings: they would most likely be considered a concerted practice that would fall under the scrutiny of competition authorities due to the dominant position of the majors³³⁶, and would probably lead to an increase in the amount of royalties sought, thus encouraging opposition from users. Regardless, this first argument seems pretty weak. The United States example clearly demonstrates that the need to acquire a reasonable number of licenses is not a serious hindrance for users; the situation of iTunes, which preferred to acquire several licenses rather than to accept the single one proposed by GEMA for Austria, Germany and Switzerland is another example. Truth remains that users have a similar interest as rights holders to the existence of performing rights societies.

A second argument is more decisive. All performing rights societies agree that there is no uniform standard for DRM so far, and that companies are unlikely to reach an agreement. At this stage, the establishment of a global and interoperable technical infrastructure on DRM systems based on a consensus among the stakeholders is far from being achieved³³⁷. A study published in July 2004 by the High Level Group on Digital Rights Management, a study group created by the European Commission, states that “the timescale to see meaningful progress towards mass-market deployment of interoperable solutions would likely be in the

³³⁶ This assumption is confirmed by the class action lawsuit brought in March 2006 by *Bulcao et al. v. Sony BMG Music Entertainment et al.* in the Northern District Court of California against the major records labels, alleging federal and state antitrust violations based upon an alleged conspiracy to fix inflated prices in the online music space that would restrain the availability of online music (see <http://www.svmedialaw.com/cat-content.html>, <http://www.zdnet.fr/actualites/internet/0,39020774,39316239,00.htm>, of March 3, 2006).

³³⁷ The opinion of the performing rights societies is shared by the European Commission: see *supra* note 313, at 10-11, as well as by some scholars: John Palfrey, *Holding Out for an Interoperable DRM Standard*, in DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 1 *et seq.* (Christoph Beat Graber et al. ed., 2005); Reinhold Kreile/Jürgen Becker, *Rechtsdurchsetzung und Rechteverwaltung durch Verwertungsgesellschaften in der Informationsgesellschaft*, 4, in GEMA Jahrbuch 2000/2001, available at http://www.gema.de/kommunikation/jahrbuch/jahr_00_01/themadesjahres.shtml.

range of two to five years”³³⁸. In addition to what precedes, GESAC adds that “DRM are not by themselves a satisfactory solution to the needs of protection of authors in term of control of the exploitation of their works, court proceedings, fight against piracy, negotiation of fair terms of remuneration with users etc...”³³⁹. According to GESAC, for the time being no user suggests that DRM could effectively replace authors’ societies in rights management³⁴⁰. Universal even shares this opinion, believing that “collective licensing may well have a future and certainly is a viable business model for licensing in the context of on-line delivery mechanisms. In fact it may be the only viable method of licensing. It remains to be seen whether the existing copyright societies can reform themselves sufficiently to be able to deliver collective licensing in this context, or whether the members should seek alternative collective solutions”³⁴¹. For these reasons, performing rights societies firmly believe the solutions offered by scholars, according to which levy schemes could be abandoned thanks to DRM and possibilities of individual management³⁴², are totally unrealistic.

Performing rights societies are nevertheless deeply aware that their business model, based upon 19th century needs, has to be adapted to the needs of the digital environment. Performing rights societies view DRM not as a competitor but as “a helpful tool that facilitates the identification and accurate tracking of the use of works”³⁴³. They are already used to a great extent in the United States: in August 2005, BMI acquired a digital audio recognition technology called BlueArrow, which enables BMI to accurately measure the

³³⁸ HIGH LEVEL GROUP ON DIGITAL RIGHTS MANAGEMENT, FINAL REPORT 11, March-July 2004, at http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/040709_hlg_drm_2nd_meeting_final_report.pdf.

³³⁹ GESAC, WORKSHOP OF 28 FEBRUARY 2002 ON DIGITAL RIGHTS MANAGEMENT SYSTEMS 2, April 2002, at <http://www.gesac.org/eng/positions/drmdownload/drm2002.doc> (cited WORKSHOP).

³⁴⁰ GESAC, CONFERENCE ON COPYRIGHT FOR CREATIVITY IN THE ENLARGED EUROPEAN UNION: PROFILE, PERCEPTION, AWARENESS 4, August 2004, at http://www.gesac.org/ENG/NEWS/others/download/OTHERSEN_20040620_Conference%20on%20copyright%20in%20Dublin.doc.

³⁴¹ Remark by Crispin Evans (Universal Music Publishing), in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 209 (2002).

³⁴² See in particular: Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1et seq. (2004); Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, to be published in 28 HASTINGS COMM. & ENT. L.J. __ (2005), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801124; Hugenholtz *et al.*, *supra* note 175.

³⁴³ Results of interviews (quote from GEMA) confirmed by GESAC, ANSWERS, *supra* note 331, at 6.

performance of music on radio, television and the Internet³⁴⁴; and ASCAP uses Mediaguide, a digital verification device to track the use of various music by US radio stations³⁴⁵. ASCAP claims that, thanks to these technological tools, the sample gets closer to a complete census. However, the use of DRM is not limited to tracking the exploitation of music works on radio stations or television channels. In November 2005, BUMA/STEMRA announced that they had reached an agreement with the Dance Music Interest Association to digitally monitor the exploitation of works during live events³⁴⁶. International initiatives also exist. One of the most ambitious projects to respond to the challenges of digital technology is the CISAC's Common Information System (CIS), whose goal is to create a database that would be accessible to any performing right society. This database would enable societies to track music works using only a single identification number in any area of the world³⁴⁷.

In conclusion, stakeholders agree that DRM are unlikely to replace performing rights societies. Far from being viewed as a competitor, the societies believe that DRM will help them to adapt their structure to this new environment. Technological tools will enable them to operate with more efficiency by enhancing cooperation and transparency through the creation of common standards and IT support in particular.

³⁴⁴ <http://www.bmi.com/news/200508/20050830a.asp>.

³⁴⁵ <http://www.mediaguide.com>. This entity is 50% owned by ASCAP. According to ASCAP, the database contains millions of sound recordings which have been digitally fingerprinted. The device tunes in to all radio stations and analyzes the signal that is being broadcast. It digitally fingerprints the signal, identifies it and compares it with the one in the database, without any input from radio broadcasters.

³⁴⁶ <http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-bumadance>.

³⁴⁷ See as to the CIS project: FICSOR, *supra* note 31, at 101 *et seq.* § 273 *et seq.*; UCHTENHAGEN, *supra* note 25, at 52 *et seq.* § 252 *et seq.* For other examples of technological tools used by performing rights societies at the national or international level, see GESAC, HEARING ON COLLECTIVE MANAGEMENT OF RIGHTS 9, April 2001, at <http://www.gesac.org/eng/positions/download/GCOLLECTHEARINGNOV2001069en01.doc>.

4. Current Practice of Performing Rights Societies³⁴⁸

a) *Introduction*

BMI and ASCAP started to license online exploitation of musical works in 1995. Today, all performing rights societies interviewed deliver online licenses. Until December 31, 2004, European performing rights societies and BMI were applying the Santiago Agreement and thus delivering pan-European licenses to users who had their economical residence in their territory. Considering the Statement of Objections delivered in April 2004 by the European Competition Commission, the societies decided not to renew the Agreement after its initial term set on December 31, 2004.

Since January 1, 2005, European performing rights societies have returned to the traditional single license model, which is also used by the United States and Japan. With a single territorial license model, performing rights societies deliver blanket licenses covering a worldwide repertoire, but limited to the territories of their competence³⁴⁹. Theoretically, performing rights societies could also deliver worldwide licenses for their own local members' works; however, a dual system that would establish cross-border licenses for the local repertoire and licenses limited to their territory for the repertoires of their sister societies would be too cumbersome to monitor, without mentioning the difficulties to identify one's own repertoire.

b) *The granting of territorial licenses in the absence of central licensing agreements*

In the absence of central licensing agreements, performing rights societies thus grant licenses limited to their own territory. As a consequence, it is important to understand the criteria referred to by these societies to define their competence. Interviews demonstrate a

³⁴⁸ By "performing rights societies", I mean the performing rights societies interviewed, and do not claim that the practice described is followed by any other performing rights society.

³⁴⁹ For instance, ASCAP can deliver licenses for the United States, its territories and possessions, and the Commonwealth of Puerto Rico, SUISA for Switzerland and Liechtenstein, and SACEM for France, Luxembourg and Monaco.

lack of uniformity so that the criterion will differ from one society to another: the first, used by JASRAC and SABAM, considers the residence of users as decisive. In other words, a user located in Japan or Belgium will have to ask for a license from JASRAC or SABAM, even though the services would not be provided to the Japanese or Belgium public. The location of the server is not considered relevant, because of the “forum-shopping” it would encourage in users. A second point of attachment relates to the origin of the transmission; this criterion is used by ASCAP which, according to article 6 lit. c of its experimental license agreement for Internet sites³⁵⁰, is competent to grant a license to any user whose signal originates from the United States or its possessions. In other words, ASCAP is “not competent to deliver a license to a US company whose signal is transmitted from its facilities in the United Kingdom”. Under the third criterion, the point of destination (end-user principle) is decisive. This viewpoint has been adopted by SACEM, which considers its competence justified each time a user provides its services to the French public. SABAM also attaches importance to the market as an alternative to the residence of users, since it considers the existence of a domain name registered under the “.be” ccTLD as relevant to define its competence. Finally, BMI and SUISA consider both the points of origin and of destination to be relevant criteria, since both constitute points of attachment to their territories.

Example:

A French company originates its transmission from Belgium to provide its services to the US and Swiss markets. The French company will neither have to ask for a license from SACEM, since the services are not offered to the French public, nor to ASCAP, since the transmission does not originate from the US. While the transmission originates from Belgium, SABAM does not consider the point of origin to be a relevant criterion, so that the French company does not need the deliverance of a license from SABAM either. Considering the fact that it offers its services to the US and Swiss markets, the French company will have to acquire a license from BMI and SUISA, because both these societies consider the point of destination to be a relevant criterion to define their competence.

While practice shows that users assume the point of destination to be the relevant criterion and thus acquire a license in each country where they intend to provide their services, the application review process is far from harmonious. The relevant criteria can vary

³⁵⁰ <http://www.ascap.com/weblicense/>.

with each society and with each country. Such a solution may lead to disputes: for instance, a Belgium company that would originate its transmission from the United States for the French market should not only acquire a license from SACEM (point of destination), but from SABAM (economic residence) and ASCAP (point of origin) as well. There is no doubt that a common standard would be highly desirable to achieve legal certainty. According to SABAM, discussions would be taking place among performing rights societies on these points since the adoption of the EU Recommendation.

c) The applicable rate schedule(s) in case of a central licensing agreement

When rights holders sign a central licensing agreement with a performing rights society to assign all their rights on a worldwide basis, the society will have the ability to offer cross-border licenses to users. Since the works will be exploited in different countries, presumably with different cost structures, one may wonder whose rate schedule will apply. Does the granting society apply its rate schedule, no matter where the exploitation takes place, or will it apply the rate schedule used by the relevant society in each country where the works are exploited? Performing rights societies dealing with offline central licensing agreements have always applied the second alternative, in compliance with the principle of the country of destination. In the first online central licensing agreement ever concluded between Universal and SABAM, the latter however unilaterally decided to apply its own rate schedule for all performances, without the prior consent of its sister societies³⁵¹. Performing rights societies strongly reacted to what was considered a violation of the principle of the country of destination. While SABAM points out that the licensing agreement never gave rise to any concern from competition authorities and was perfectly valid³⁵², it did defer to the strong reaction of its sister societies and now recognizes that “negotiations among collective

³⁵¹ <http://www.sabam.be/website/data/universalangl.doc>.

³⁵² One should view this assertion with a critical eye. Art. 41 of the Swiss Copyright Act requires anyone who administers copyrights to have an authorization granted by the Swiss Institute of Intellectual Property, which confirms that the concerned entity fulfils certain requirements. By managing the online exploitation of Universal's repertoire in Switzerland, SABAM obviously violated this provision since it did not have any authorization from SUISA. Generally speaking, the application of one's rate schedule without the prior consent of sister societies infringes the principle of territoriality, according to which one should refer to the applicable regulations of the concerned country for any act occurring in this country.

societies are always needed to conclude cross-border licenses”. Several proposed cross-border licenses have already been negotiated and finalized: iTunes got a license from SACEM covering not only France, Luxembourg and Monaco, but also Belgium; telecommunication companies such as Nokia and Ericson also received cross-border licenses from the performing rights society of their respective countries for mobile phone use of the world music repertoire.

The country of destination is a key consideration for performing rights societies, whose primary goal is to protect their own members. Accordingly, they assert that their rate schedule will have to apply to every exploitation that takes place in their country. Technically, the geographical scope of a cross-border license may cover the entire European Union, but the granting society will thus have no choice but to apply 25 different rate schedules to take into account the geographical exploitation of the works.

To avoid the application of several rate schedules by the granting society, European performing rights societies would favor the adoption of a pan-European rate schedule. Such a solution is at least several years in the future according to GEMA and SACEM, which still consider the online distribution of music works to be at its infancy. Due to the differential penetration of online music distribution in various countries, these societies believe a centralized rate structure is premature. The French society adds that collective societies take several factors into consideration each time they adopt a rate schedule³⁵³, including social and economical conditions and previous existing rate schedules. Though each country is different, SUIA hopes that harmonization among countries with similar socio-economical conditions is nevertheless possible. The European Competition Commission would most likely favor the adoption of a common rate schedule as proved by *Simulcast*, where the rate schedule was an aggregate of the rates applicable in the different countries, provided however that the rate clearly makes a distinction between the royalty and the commission so as to enhance competition³⁵⁴.

³⁵³ See *supra* Part II B : Did You Say Collective Societies ? – Granting Licenses.

³⁵⁴ UCHTENHAGEN, *supra* note 25, at 59 § 292 correctly points out that a shared rate schedule without any distinction between the royalty and the commission would most probably be considered a concerted practice by competition authorities.

In practice, the current diversity among applicable rate schedules is not a significant hindrance. Since *Lucazeau*, the imposition of significantly higher tariffs than those applicable in other European Member States constitutes an abuse of dominant position, unless the differences are justified by objective and relevant factors³⁵⁵. As a result, the applicable rates as to the online exploitation of copyrighted works are very similar in the European Union:

³⁵⁵ *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811. See *supra* note 93.

	Music On Demand (downloading)	Music On Demand (streaming)	Ring Tones ³⁵⁶
ASCAP ³⁵⁷	Sampling method	Sampling method	Sampling method
BMI ³⁵⁸	Sampling method	Sampling method	Sampling method
JASRAC ³⁵⁹	1. If fee: 7.7% of the fee per work per request, with a minimum of 7.70 Yen per title downloaded. 2. No fee: 6.60 Yen per title downloaded if the website generates advertising revenues, 5.50 Yen otherwise. 3. If the monthly royalty is below 5'000 Yen, a flat fee of 5'000 Yen.	1. If fee: 4.5% of the fee per work used, with a minimum of 4.5 Yen per work streamed. 2. No fee: 50'000 Yen per year.	1. If fee is charged: 7.2% of the fee per work per request, with a minimum of 5 Yen per title downloaded; 2. No fee: 5 Yen per title downloaded. 3. If the monthly royalty is below 5'000 Yen, a flat fee of 5'000 Yen.
GEMA ³⁶⁰	- 12.5% of prices paid by consumers, with a minimum of 0.15€ per download until December 31, 2006; - 15% of prices paid, with a minimum of 0.175€ from January 1, 2007.	12.5% of prices paid by consumers, with a minimum of 0.1125€ per title downloaded until December 31, 2006; 15% of prices paid by consumers, with a minimum of 0.125€ from January 1, 2007.	15% of prices paid by consumers, with a minimum of 0.125€
SABAM ³⁶¹	8% of prices paid by consumers, taxes excluded, with a minimum of 0.08€ per title downloaded.	Same rate	12% of prices paid by consumers, with a minimum of 0.10€ per download.
SACEM ³⁶²	12% of prices paid by consumers, temporarily reduced to 8%, with a minimum of 0.07€ per download, and 0.70€ per album up to 15 titles.		12% with a minimum of: (a) 0.25€ if charged 3€ (b) 0.18€ between 2-3€ (c) 0.15€ under 2€
SUISA ³⁶³	8% of prices paid by consumers, with a minimum of 0.10 Swiss franc per title downloaded.	Same rate	

³⁵⁶ The graph only takes into consideration the rates applicable to the downloading of ring tones from the Internet. France in particular has different rates applicable if the ring tone is downloaded from a voice server.

The applicable rates among European performing rights societies are thus nearly identical³⁶⁴, with the notable exception of Germany. Questioned as to the *rationale* for this difference, GEMA answers that “current rates are far too low and no longer reflect the value of the rights holders’ contributions”. According to the German society, “labels get up to 70% of the revenues generated, causing unreasonable financial loss for artists; a rate of approximately 20% would be the ideal”. SUISA agrees that current rates do not reflect market realities in music distribution where music prices are getting cheaper each year thanks to technological innovations. Article 60 of the Swiss Copyright however mandates that the royalty should not exceed 10% except under exceptional circumstances. An amendment may therefore be necessary to raise rates to appropriate levels. SACEM ambitiously intends to increase its rate to 12% over the next years, a policy that GEMA and SABAM deem unrealistic given the historical difficulties in raising rates once they are set.

The rates of European performing rights societies nevertheless show slight differences. For instance, SUISA and GEMA are the only European societies that consider the length of the music downloaded³⁶⁵. Unlike SACEM, which requires an additional royalty of 100€ per month if pre-listening is possible, SABAM does not require any additional royalty for pre-listening. On the other hand, GEMA has a special rate schedule for pre-listening, i.e., the streaming of works up to 45 seconds for sampling purposes³⁶⁶. All these differences are

³⁵⁷ <http://www.ascap.com/weblicense/>. For ring tones, see <http://www.ascap.com/weblicense/release3.0.pdf>.

³⁵⁸ <http://www.bmi.com/licensing/webcaster/>.

³⁵⁹ <http://www.jasrac.or.jp/ejhp/provisions/pdf/tariffs02.pdf>.

³⁶⁰ <http://www.gema.de/engl/customers/>.

³⁶¹ SABAM did not publish its rate schedule so far.

³⁶² <http://www.sacem.fr/portailSacem/jsp/ep/channelView.do?channelId=-536880157&channelPage=ACTION;BVCONTENT;0;/ep/programView.do&pageTypeId=8585>.

³⁶³ This rate schedule was agreed upon on 2004 and was renewed for 2006. It however remains provisional and is not published so far, as it has not been submitted to the approval of the Arbitral Commission.

³⁶⁴ According to SABAM, the rate of 8% would be the result of a recommendation from BIEM. For SUISA, the BIEM had recommended a rate of 12%. The rate of 8% would be the result of the first contract related to music on demand, which would have road the map as performing rights societies cannot discriminate users who develop their activities based upon a similar business model.

³⁶⁵ The rates described only apply if the work downloaded does not exceed four minutes for SUISA and five for GEMA. SUISA requires a supplement of 0.022 Swiss franc for each additional minute, and GEMA one fifth of the minimum royalty for each additional minute.

³⁶⁶ SACEM limits pre-listening to 30 seconds. Art. II 2 of GEMA Royalty Rate Schedule VR-W 2 defines the royalty as follows: “(1) Websites with up to 500,000 pre-listening samples per month: (1.1) For the use of up to 20 works from GEMA’s repertoire with a playing time not exceeding 45 seconds in each case, the royalty

considered as minor by SACEM, according to whom “the management of cross-border licenses should not lead to a significant cost increase”.

Differences in the rest of the world are more significant than in Europe. To compare the situation among these performing rights societies, the table only refers to blanket usage license agreements delivered for commercial purposes. Rates are however structured differently from one continent to another. In Japan, JASRAC has a particularly detailed rate schedule regarding interactive transmissions and distinguishes whether the license agreement is a blanket one or not, whether the service is commercial in nature or not and the type of works downloaded (sound recordings or lyrics or other). The Japanese rate schedules were negotiated between the Japanese collective society and a trade organization representing online music service operators, Network Music Rights Conference (NMRC). According to JASRAC, the existence of NMRC as a representative entity leads the prosperity of the Japanese market for online distribution of music. In the United States, ASCAP and BMI both refer to sampling methods that not only take into account the number of works consumed, but also other factors such as the revenues generated through advertising³⁶⁷.

Since performing rights societies have to comply with the principle of fair and equitable treatment, identical rate schedules have to apply to all users conducting similar

amounts to €150.00 for an exploitation period of one year; (1.2) For the use of more than 20 and up to 100 works from GEMA’s repertoire with a playing time not exceeding 45 seconds in each case, the additional royalty per work amounts to €2.50 for an exploitation period of one year; (1.3) For the use of more than 100 works from GEMA’s repertoire, the royalty for each additional number of 100 works from GEMA’s repertoire with a playing time not exceeding 45 seconds in each case amounts to €0.80 per calendar month of insertion. (2) Websites with more than 500,000 accesses using music per month: The royalty rate is calculated in compliance with Section II, No. 1.1 to 1.3. However, where the number of pre-listening exceeds 500,000 per month, the royalty is increased by 10 % per month for each additional number of 100,000 accesses using music”. ASCAP also enacted a specific rate schedule regarding pre-listening, which is limited to 60 seconds per work.

³⁶⁷ ASCAP has three alternative rate schedules: rate schedule A contains the broadest of the three types of fee calculations and is suited for music-intensive sites. Rate schedule B applies to more narrowly defined revenue and session and is suited for sites that generate considerable non-music revenue or sessions; rates are slightly higher than rate schedule A and requires submission of more sophisticated data. Finally, rate schedule C applies to even more narrowly defined revenue and session and is suite for sites that have limited (ASCAP) music use; this rate requires an ability to track and submit detailed music use data (<http://www.ascap.com/weblicense/feecalculatoin.html>). As to ASCAP’s rate schedules when they were introduced, *see* Bennett Lincoff, Remark in WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 85 (1998).

activities on the same market. The societies thus strongly affirm that users cannot re-negotiate the royalty rate, unless they can demonstrate that their business model differs from existing ones in a way that justifies differential rates. According to SACEM, “users often try to make such a demonstration, for instance by stating that their online store differs from iTunes because they cannot rely upon revenues generated by the sales of iPods”. Unfortunately for them, this argument has been rejected by SACEM since “iPods and iTunes are legally distinct from each other”. The definition of the relevant market nevertheless remains a key issue to avoid any problem with competition authorities. Separate rate schedules are thus adopted every now and then when a new business model appears. While the table only mentions the most lucrative ones, performing rights societies have adopted the following rate schedules to reflect the different types of online exploitations of musical works: background music on websites (GEMA, SABAM and SACEM), webcasting (all performing rights societies), video on demand (GEMA), podcasting (BMI) and online karaoke for commercial uses (JASRAC). While the royalty rate of the license agreements are hardly negotiable, SABAM believes that “one could possibly negotiate a discount on the administrative costs, for instance if users demonstrate that their revenues exceed a certain amount, or if users provide perfect sales reports, which is far from being the case today and leads to an increase of costs of management”.

d) The distribution of the royalties in case of a central licensing agreement

Once performing rights societies have applied a rate schedule and collected the royalties in compliance with the principle of the country of destination, they will have to distribute the money among the different rights holders. There are two general alternatives for this process: either to apply the distribution rules of each country of destination and distribute the royalties to the different rights holders, or to allocate the money due to its sister societies in the concerned countries, which would then take care of the distribution in compliance with their respective distribution rules. The first alternative is considered too expensive by all performing rights societies and would ultimately lead to a significant increase of the costs of management and, consequently, to lower royalty rates to the prejudice of the rights holders.

For this reason, the second alternative is the only one applied, both for offline and online central licensing agreements. Traditional distribution rules remain applicable since no performing right society has adopted specific rules for the online exploitation of musical works.

The society to which rights holders have assigned all their rights through a central licensing agreement will thus allocate the amount due for each country of destination based on its own valuation. Therefore, performing rights societies will depend upon the “central” society for their share of royalties. In spite of a growing competitive environment, cooperation and transparency thus become particularly important. GEMA made it clear that its cross-border licenses would have several requirements: “first, users must secure the rights to obtain a multi-territorial license (for example the adaptation rights for ring tone companies); second, the agreement itself will be subject to strict conditions regarding respect of moral rights, reporting and management infrastructure”. Cooperation among performing rights societies will be important with the development in online music stores, which makes it difficult for societies to audit the accuracy and relevance of sales reports. While one can easily appraise the valuation made by a sister society regarding the number of audience members in a movie theater, SUISA concedes that “a lack of technical expertise makes it difficult to accurately monitor the number of downloads reported”. This lack of sophistication³⁶⁸ may result in different claims from performing rights societies against their sister societies and protests from users. To resolve disputes related to royalties, GEMA has established an arbitration system³⁶⁹ whereby it opens an escrow account with the concerned user. The amount in dispute is placed in the escrow account, and the rest directly paid to GEMA. In this way, “the user only pays the amount that it considers fair, and the rest is put in the escrow account”. After the settlement, the effects of the decision are retroactive and the money on the escrow account is distributed in compliance with the decision. According to

³⁶⁸ The situation would differ in the United States, where ASCAP considers its level of management to be years ahead of Europe regarding the online exploitation of musical works.

³⁶⁹ This system is used for collective management in general by GEMA, but may play a significant role in this new online market.

GEMA, “this could be a problem for users like Napster, which contests a substantial amount of royalties due, and would thus have to pay a large amount in to the escrow account”.

While the design of alternative dispute resolution mechanisms (ADR) will be needed to solve cross-border disputes related to the central management of musical works³⁷⁰, ADR will not get rid of the necessity to enhance transparency and cooperation among societies. Standards, database and form requirements will have to be standardized; at a time of centralization, it makes no sense for users to have to complete form reports structured differently for each country. Cooperation through the creation and exploitation of common database such as the CIS project is thus crucial to register and keep track of performances, as well as to avoid duplication on the documentation side to improve efficiency and users’ convenience³⁷¹.

B. Unauthorized Distribution Channels: Enforcement and P2P

The unauthorized distribution of musical works takes place in two ways: through unauthorized streaming or downloading websites or through p2p file exchange systems. How do performing rights societies approach these channels? How can they improve their monitoring systems?

1. Enforcement mechanisms

All performing rights societies interviewed actively prevent the proliferation of illegal websites by monitoring the web. GEMA’ surveillance system relies not only on its own staff, but also on third parties and lawyers to police the web. SABAM also proactively contacts ring tone companies to grant licenses for Belgium. At this stage, revenues generated by online

³⁷⁰ Article 15 of the EU Recommendation provides that “Member States are invited to provide for effective dispute resolution mechanisms, in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights”.

³⁷¹ See Björn Juell-Sundbye, Remark *in* WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 88-89 (1998).

music stores however remain limited³⁷² and do not allow a systematic intervention of performing rights societies which focus their efforts on important websites.

Once a website allowing unauthorized performances of musical works is discovered, performing rights societies will contact the owner and invite him to request a license. In most cases, owners agree. In the few cases where the owners refuse, the societies will request the intervention of Internet service providers (ISPs). The ISPs have to react diligently in compliance with articles 12-14 of the E-Commerce Directive if they don't want to be held liable for infringement occurring on these websites³⁷³. The cooperation of ISPs has even been made official in France through the signature in July 2004 of a Charter against piracy³⁷⁴. This Charter can be invoked not only to secure the intervention of ISPs against websites' owners, but also against ISPs themselves. It has already been used by SACEM "to oblige access providers like Tiscali and Wanadoo to enjoin their advertising campaigns promoting their broadband capacities to enable fast downloading of musical works". On the whole, cooperation with ISPs is considered effective by European performing rights societies and proves to be an efficient way to legalize the situations. Once an ISP threatens a website owner with a shut down of his service, the latter will almost always ask for a license. While this cooperation seems to be effective in Japan, ASCAP and BMI remain disappointed with the US situation and believe that the safe harbor provisions in section 512 of the DMCA are to blame. Though these provisions were supported by these societies at the time of their enactment, ASCAP and BMI now believe that "they were not the best way to handle the problem".

While effective, cooperation between ISPs and European performing rights societies is more difficult in two situations. First, when the website is hosted abroad, pressure exercised

³⁷² In 2005, ASCAP's revenues generated through the sales of digital music amounted to USD 8.1 million. While this sum represented an increase of digital sales of 50% as compared with 2004, it only represented slightly more than 1% of ASCAP's total revenues, which amounted to USD 749 million (http://www.ascap.com/press/2006/031306_financial.html).

³⁷³ Directive 2003/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, available at http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf.

³⁷⁴ http://www.minefi.gouv.fr/presse/communiqués/charte_musique_en_ligne.pdf.

by performing rights societies cannot be as strong as within their territory. In this case, one can expect performing rights societies to cooperate to handle these cases within their respective territory. Second, ISPs are reluctant to intervene when the unauthorized distribution of music occurs through chats, discussions forums or p2p, since they do not consider themselves liable for traffic generated by consumers. This scenario led to a lawsuit brought by SABAM against Tiscali, an access service provider, in the *Tribunal de première instance de Bruxelles* on June 24, 2004³⁷⁵. SABAM would like a ruling that would require ISPs to filter musical works and prevent their transmissions through these websites. On November 26, 2004, the Court invited experts to determine whether the technical solutions proposed were feasible. While the *Tribunal de première instance de Bruxelles* seems to be responsive to the arguments raised by SABAM, the case is still pending. Similarly, in July 2005, GEMA requested that 42 access providers take steps to block access to certain illegal websites that enable copyright infringement³⁷⁶; negotiations are ongoing.

2. p2p file exchange systems

The development of authorized platforms like iTunes and lawsuits against consumers has led to a decrease of p2p systems usage³⁷⁷, but the exchange of musical files will continue through new means of distributions such as instant messengers or reader devices³⁷⁸. Performing rights societies are deeply concerned by this situation but none of them is yet able to suggest a miracle way to solve the problem.

Whether American, European or Japanese, performing rights societies all consider the actions brought by the RIAA against individuals to be detrimental to public relations. While consumers are without doubt liable for uploading and thus enabling an unauthorized

³⁷⁵ *SABAM v. Tiscali Tribunal de Première Instance de Bruxelles*, decision of November 26, 2004, available at http://www.droit-technologie.org/jurisprudences/premiere_instance_bruxelles_260104.pdf.

³⁷⁶ <http://www.gema.de/kommunikation/pressemitteilungen/pm20050706.shtml>.

³⁷⁷ Mary Madden/Lee Rainie, *The state of music downloading and file-sharing online* (April 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf; see also Mary Madden/Lee Rainie, *The impact of recording industry suits against music file swappers* (January 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf.

³⁷⁸ See Mary Madden/Lee Rainie, *Music and video downloading moves beyond P2P* (March 2005, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Filesharing_March05.pdf.

distribution of works³⁷⁹, ASCAP considers it more effective to sue providers which actually derive benefit from the situation. By analogy, ASCAP states that “one will neither sue a band that performs music in a pub without required authorization nor consumers, but the owner who ultimately profits from this situation”³⁸⁰. The same should apply on the Internet. ASCAP and GEMA nevertheless understand that “the RIAA currently has no alternative to protect its members’ interests”. From its perspective, SABAM considers these actions to be mostly ineffective, which explains its choice to sue an access provider like Tiscali rather than consumers. The goal is however not to shut down the websites - the more people consume works, the better it is – but to get fair remuneration for the authors. BMI believes that, if one admits that most downloaders are students, “the best way to handle the problem may be to launch educational campaigns in schools”.

Performing rights societies feel that only the introduction of a compulsory license can improve the situation. Most societies agree that there is a danger of turning exclusive rights into remuneration rights, and thereby transforming the right to exclude in a mere right to get paid. Some feel that this may lead consumers to believe that they can exchange musical files “for free”, but it is the lesser of two evils; they find it hard to imagine any other way to receive fair remuneration for their members.

Such a levy already exists in one form or another in some countries. While Japan has refused to introduce a rate schedule applicable to reader devices such as MP3 players or iPods, Germany and Switzerland already have one. For SUIA, such levy schemes for reader devices are all the more important in the digital age because new business models allow the consumption of music for a cheaper price, provided that consumers purchase expensive readers to play the works. They are by far the primary source of revenues, and rights holders have no reason to be deprived of revenues made possible thanks to their creations.

³⁷⁹ This is not the opinion of the Supreme Court of Canada, however, see *supra* note 270.

³⁸⁰ One may however argue that, unlike the situation in a bar, consumers have an active behaviour on the Net since they initiate the distribution of the works.

While compulsory licenses upon blanket media and reader devices are already disputed in most countries, things get even worse when one proposes a compulsory license for ISPs. GEMA believes that “telecommunication operators should pay royalties for the transmission of musical works they facilitate”; according to the German society, “it is time for Governments and European authorities to understand that these operators make a lot of money through the distribution of illegal content, to the detriment of the rights holders, and that they should pay for it”. The French Legislature first seemed to agree; in December 2005, the National Assembly proposed a bill that would have compelled ISPs to pay a flat royalty rate through their subscription fees, and create a global license upon exchange files systems in return. Unlike GEMA, SACEM opposed such a scheme, asserting that a global license would not have reflected the actual consumption of each work – which is made possible to a certain extent by other compulsory licenses such as the one upon the sales of blank media for instance - and would ultimately have been detrimental to the rights holders. On March 9, 2006, the French Parliament finally rejected the proposal for a global license and decided to encourage the development of DRM by keeping the proprietary model as the default regime³⁸¹.

While the introduction of new levy schemes such as those imagined by GEMA, the French National Assembly or various scholars³⁸² might be the only way for authors to receive fair remuneration for the exploitation of their works through file exchange systems at this stage³⁸³, compliance with the three steps test enacted in Art. 9.2 of the Berne Convention and 10.1 of the TRIPS Agreement is highly doubtful. As stated by Peukert³⁸⁴, these treaties mandate exclusive rights and anti-circumvention provisions as the statutory default regime in national copyright laws. In other words, one could only give rights holders the choice to voluntarily opt for compensation instead of control. To that extent, the solution finally

³⁸¹ <http://www.zdnet.fr/actualites/internet/0,39020774,39329640,00.htm>.

³⁸² See Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 *et seq.* (2003); FISHER, *supra* note 16, at 199 *et seq.*; Lionel S. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers*, 18 BERKELEY TECH. L.J. 667 *et seq.* (2003).

³⁸³ This seems to be the opinion at least of Peter Jaszi (Washington College of Law/Digital Future Coalition, in INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 215-216 (2002).

³⁸⁴ Peukert, *supra* note 342. Same opinion: Gervais, *supra* note 332, at 48.

retained by the French Parliament to let the rights holders freely choose their mode of remuneration fully complies with a voluntary system³⁸⁵.

In any case, without broaching the subject of new levy systems, existing schemes already face strong opposition from the software industry as well as manufacturers of recording devices and blank media. These industries' representatives allege that private copying schemes could now be phased out in favor of DRM. Several countries seem to be responsive to these assertions. The European Commission recently began an investigation into the need to adapt the private copy remuneration schemes which exist in 22 out of the 25 Member States; these schemes would also be under review in other countries such as Australia, Canada, Japan and Mexico³⁸⁶. However, as previously discussed, DRM are still in their infancy and unable to efficiently protect rights holders; collective societies, CISAC, BIEM and GESAC in particular, constantly affirm that the abolition of these schemes would be detrimental to the rights holders and to creation of works in general³⁸⁷.

Based upon what precedes, one cannot expect a global consensus to emerge to solve the problems created by exchange file systems at the international level in the next months. This being said, p2p seem to raise more concern for the entertainment industry than for authors themselves. Thus, according to a Pew Report published in December 2004, artists are divided about file sharing; while a majority believes that unauthorized file sharing of copyrighted works should be illegal, most authors use the internet to gain inspiration and do

³⁸⁵ Art. 1 of the bill as of March 27, 2006 reads as follows: "The author is free to choose the mode of remuneration and distribution of his works or to make them available to the public for free", freely translated from the original text: "*l'auteur est libre de choisir le mode de remuneration et de diffusion de ses oeuvres ou de les metre gratuitement à la disposition du public*" (see <http://www.zdnet.fr/actualites/internet/0,39020774,39332478,00.htm>, of March 21, 2006). According to some French reporters, the rejection of a global license would nevertheless have nothing to do with the three steps test; it would rather be the reflect of political considerations by the French Prime Minister Dominique de Villepin to give a clear signal to French students he was then confronting on major labour policy issues that he was unwilling to show any weakness (see <http://www.zdnet.fr/actualites/internet/0,39020774,39329640,00.htm>, of March 10, 2006).

³⁸⁶ http://www.gesac.org/ENG/NEWS/COMMUNIQUESPRESSE/download/COMMUNIQUESEN_20060122_Private%20copying.doc.

³⁸⁷ *Id.*; GESAC, WORKSHOP, *supra* note 339, at 5.

not consider file exchange systems to be a big threat to creative industries³⁸⁸. Whatever the solution, collective management is likely to go on playing a significant role. As stated by Ficsor, “collective management or some other system of joint exercise of rights, however, is also needed in the majority of cases where mere rights to remuneration are recognized, namely, in those cases where mass uses are involved or where it is otherwise particularly difficult to monitor uses”³⁸⁹. Exchange files systems are a typical example of mass use where one finds it hard to imagine that the mere implementation of – possibly – effective DRM in the future would be able to solve every problem and allow complete individual management.

V. CONCLUSION

Collective management plays an important role when high transaction cost prevents individual management. The field of musical works is a typical example of mass use where rights holders are financially unable to monitor the exploitation of their works. As stated by Sinacore-Guinn, “The very fact that collective administration of copyright has become standard practice in all developed countries and the vast majority of developing countries which have copyright or related rights is in itself evidence that such a method of organization serves society well”³⁹⁰. Performing rights societies indeed provide useful services to all stakeholders: to authors, by monitoring the exploitation of their works and bargaining on their behalf against powerful users or publishers; to publishers, by providing them efficient services to monitor the exploitation of their repertoire against moderate fees; to users, by enabling them to acquire a single license per territory thanks to reciprocal agreements concluded among collective societies (single territorial license model); finally, to society in general, by keeping track of all musical works created so far and encouraging musical diversity thanks to their welfare plans and social actions.

³⁸⁸ Mary Madden, *Artists, Musicians and the Internet* (December 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf.

³⁸⁹ FICSOR, *supra* note 31, at 130 § 343.

³⁹⁰ SINACORE-GUINN, *supra* note 11, at 199-200.

The digital age is unlikely to change that premise. While some argue that DRM would now enable individual management, performing rights societies consider this assumption to be short-sighted. DRM are expensive to put in place and individuals cannot afford them. Even though the major publishers may have the financial resources to install such monitoring systems, three reasons make individual management unlikely to happen: first, DRM remain ineffective and lack the interoperability that would be necessary to allow efficient individual management; second, publishers lack technical expertise: to have a piano is one thing, to master it is another one; finally, they have no interests to get rid of a system which proved its efficiency over the years and which provide them with services for a price possibly cheaper than the costs they would have to incur if they were to put monitoring systems in place.

Although the Internet does not yet represent a major source of income in the music distribution process, performing rights societies agree that its potential to surpass the traditional methods of music delivery over the next decades makes a focus on this area imperative. The assumption according to which the development of online music stores will likely lead to a substantial increase of the royalties collected on the Internet was confirmed on March 13, 2006, when ASCAP announced that revenues generated by online music stores in 2005 had increased by 50% in comparison with 2004, for a total amount of USD 8.1 million³⁹¹. Societies thus recognize that they have to adapt to the digital environment. This adaptation takes place at several levels:

First, societies have to respond to new business models that emerge and react accordingly to ensure fair remuneration to their members. While societies had no difficulty in enacting new rate schedules for online music stores, webcasting or ring tone companies, exchange file systems remain an issue of serious concern. As shown in part III, when new modes of exploitation develop, users' groups usually first try to argue that the new use should not be protected and, if that argument fails, then argue that these modes should be made subject to nonvoluntary licensing schemes. History however proves that, to implement these

³⁹¹ http://www.ascap.com/press/2006/031306_financial.html. In spite of this increase, digital music remains for the time being a minor channel of distribution when one knows that royalties collected by ASCAP in 2005 amounted in total to USD 749 million.

remuneration rights, individual management must not only be impractical, but even impossible; we saw in part III that the issue of compulsory licenses is directly related to the one of private copying, and that these schemes were in particular enacted to respond to the development of blank media and reader devices to copy and perform musical works in private homes. Unsurprisingly, discussions thus turn around the issue to know whether exchange file systems like p2p should be submitted to compulsory licenses. Unlike the situation with blank media or reader devices, individual management with these systems however does not appear impossible (thanks to the possible implementation of DRM), but merely unpractical. The three steps test encompassed in article 9.2 of the Berne Convention and 10.1 of the TRIPS Agreement, as well as cases described in part II like *GEMA*, *BRT v. SABAM*, *U2* or *Banghalter* make it clear that the proprietary regime and individual management through exclusive rights has to remain the default one, and that compulsory license schemes related to exchange files systems would have to remain voluntary.

Second, to increase their efficiency and confront the “fragmentation” described by Gervais as “the lack of cohesion, standardization, and, to a certain extent, effective organization of both copyright law and collective management *per se*”³⁹², performing rights societies need to set up common IT infrastructure and database such as the CIS project under development. In the online world, territorial borders have no role to play; technical infrastructure and documentation thus need to be standardized at regional levels if not worldwide on the long term. Standardization is also needed as to form reports, which remain different in each country and unnecessarily lead to an increase of transaction costs for users. Cooperation and transparency will be key factors in this new environment for performing rights societies to reduce their costs of management and continue to provide costly efficient services to all stakeholders. “Collective” administration may thus lean towards “cooperative” and “centralized” administration in the future.

Third, in spite of this necessity for cooperation, European performing rights societies will have to evolve in a competitive environment for the first time. The monopoly of these

³⁹² Gervais, *supra* note 332, at 27.

societies is justified regarding the offline exploitation of musical works where performances occur on a territorial basis. The existence of a single performing rights society per country thus makes sense to reduce transaction costs. However, considering the ubiquitous nature of the Internet, these monopolies are no longer justified when performances occur online. To force performing rights societies to compete against each other, the European Commission adopted a Recommendation in September 2005 that enables rights holders to assign all their rights for Europe to a single society (central licensing agreement). This society is then entitled to grant cross-border licenses to any user, thus erasing the need to maintain reciprocal agreements.

By enabling central societies to grant multi-territorial licenses, the European Commission leaves no choice to performing rights societies but to compete against each other. It is the Commission's belief that competition will force these societies to reduce their costs and become more efficient. Ultimately, societies should be able to provide better services to users for a cheaper price as the management cost should get lower. The result of the interviews conducted shows that performing rights societies strongly disagree: first, efficiency has not correlation with costs, on the opposite; technical infrastructure and common database are costly to put in place, even when they are shared. Second, the Commission tries to create an artificial market upon the costs to favor users, while the primary goal of performing rights societies is to serve their members' interests, not the ones of the users. Third, centralization endangers the existence of small societies. The reciprocal agreements upon which performing rights societies have been built enabled them to maintain a local repertoire thanks to the social funds that were, arguably, primarily collected through the use of the majors' repertoires. The possibility given by the Recommendation for central societies to grant cross-border licenses however puts an end to the need to refer to reciprocal agreements. Deprived from the majors' repertoires, the management of small societies would be limited to the one of their local repertoire. Considering the lack of interest of users for repertoires others than the ones of the majors, their viability would be in danger and, consequently, cultural diversity as well.

In the end, one may regret the European Commission's decision to treat music as any commodity and to have forgotten the social and cultural significant roles played by European performing rights societies since their inception. This utilitarian approach, which mirrors the one taken in the United States for decades, contradicts the "*droit d'auteur*" tradition upon which continental copyright legislations are built upon; far from fostering music creation, the approach taken by the Commission may favor the Anglo-Saxon repertoire to the detriment of regional repertoires. Ultimately, local genres may thus suffer from this shift of policy in copyright management.

At this stage, several questions remain open: will the traditional utilitarian *rationale* of copyrights, i.e., to provide an incentive for creation, be defeated by the structure imposed by political institutions to manage these copyrights? Will the fate of cultural diversity ultimately be left to the good will of private initiatives and sponsorships as already is the case for classical music? Will public entities have to implement quota regulations and subsidize the music industry as already done successfully in France to protect the French movie industry³⁹³? Or, on the contrary, will the development of digital music encourage music creation by substantially reducing transaction costs for authors and enable the growth of niche markets? Any answer would be premature. Truth remains that the structure of European performing rights societies is likely to change in the coming years, and that this evolution, driven by a balance to be found around key concepts like "centralization", "cooperation" and "competition", may influence the future of music. Strangely, cultural diversity may thus depend more upon the way musical works will be managed in the coming years than upon the future of copyrights itself. It remains to be hoped that conglomerization of the entertainment industry and its lobbying will not weigh the balance towards an impoverishment of cultural diversity that would ultimately lead to a serious defeat of the very reason of being of copyrights.

³⁹³ According to DAVID A. COOK, *A HISTORY OF NARRATIVE FILM* 477 (4th ed., 2004), France is one of the most productive film industries in the world thanks to the high level of protectionism that is rationalized by a concept known as the "French cultural exception", which holds that cultural products are not merchandise products and are therefore entitled to protection against stronger competitors to maintain the cultural distinction of French society. It remains to be seen whether the utilitarian approach of copyrights in music chosen by the European Commission will lead to protectionism by local governments, a reaction that would likely contradict the goal sought by the Commission.

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