Creative Content in a European Digital Single Market: Challenges for the Future

Response from the Intellectual Property Foresight Forum to the Reflection Document of DG INFSO and DG MARKT of 22 October 2009

Introduction

The Intellectual Property Foresight Forum is a grouping of independent intellectual property academics in the United Kingdom. We actively promote intellectual property and media law research and it is our aim to assess and respond to new and emerging challenges for IP and media law. We are therefore grateful to have the opportunity to comment on the Reflection Document 'Creative Content in a European Digital Single Market: Challenges for the Future' prepared by DG INFSO and DG MARKT[1].

We very much welcome the European Commission's intention to instigate a broad debate on possible practical solutions aimed at fostering the legal exploitation of creative content in an online environment. Simplifying the online licensing of music, in particular, has been a concern for the European Commission for a long time. Satisfactory solutions, however, still remain to be found. Thus, the Commission's wish for a 'more dynamic and flexible framework' remains a pressing need. An open-minded and well-nuanced debate is a vital prerequisite to achieve this goal. The Reflection Document provides an encouraging starting point as it does not shy away from addressing even most controversial proposals. Moreover, it represents the joint effort of both DG INFSO and DG MARKT. This appears promising as in the past initiatives on the online dissemination of creative works emanated from different parts of the Commission and were not always easy to reconcile and sometimes simply contradictory. Such frictions could be avoided through a concerted policy approach. In that case, however, it seems necessary also to involve DG COMP in the reflection process. The CISAC antitrust decision is only the latest in a number of cases which emphasised the importance of competition law for the management of copyright. A debate on the future challenges for creative content online would therefore benefit if competition law considerations were given the appropriate place right from the start.

All stakeholders generally accept the abstract objective to 'simplify the cross-border management of rights for online uses'[2]. Indeed, legal alternatives to file sharing can only be found if future licensing models for online uses of creative works are simple and efficient. Stakeholders are, however, split on the question how such a simplification can be reached. In the following we comment on what we perceive as the most important issues raised in the Reflection Document. A clear emphasis is on commercial users' access to creative content. More specifically, much of our submission focuses on the online licensing of music as an area marked by a high degree of complexity and therefore presenting the biggest challenges in the current attempt to foster the online dissemination of creative works.

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[1] European Commission, *Creative Content in a European Digital Single Market: Challenges for the Future – A Reflection Document of DG INFSO and DG MARKT* (Brussels 22 October 2009) <http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf>.

[2] European Commission, *Reflection Document* (n 1) 15.

Recalibrating limitations and exceptions

The Intellectual Property Foresight Forum perceives the present regime of copyright exceptions, as laid out in Directive 2001/29/EC, as an unsuitable response to the pressing questions of reconciling copyright law with the digital environment. We share the assessment that the current rules have resulted in a "mosaic of exceptions (…) that vary from Member State to Member State, which might seriously impede the establishment of cross-border online services"[3]. In our view a more robust system of exceptions should adopt a two-tiered approach comprising, on the one hand, a list of precisely worded mandatory exceptions and, on the other, flexibility for Member States to provide for further exceptions.[4] In addition, exceptions affecting fundamental rights or public interest concerns should be construed as binding in the sense that national laws must not permit them to be overridden by contractual agreements or technical protection measures.[5]

We therefore support the Commission's proposal for a 'more nuanced approach' in which 'policy could take a more focused approach, examining each type of exception individually and stating clearly what policy aim is furthered by harmonising an exception and making it mandatory in all Member States'. Clearly, such an approach will be time-consuming but seems indispensable in order to recast the boundaries of the exclusive rights diligently and to avoid upwards harmonisation.

The present state of online music licensing

It strikes us that the Reflection Document mentions the relatively recently established pan-European licensing platforms in passing only.[6] The 2005 Recommendation which led the major music publishers to withdraw the mechanical online rights for their Anglo-American repertoire from the traditional system of collective management and to offer them individually on a pan-European basis, for its part, is not addressed at all.[7] Yet, this move has fundamentally changed the landscape of online music licensing.[8] Before, an internet music provider had to approach every collecting society in every Member State to which it intended to deliver music. These licences would cover the worldwide repertoire of music but be only mono-territorial in nature. After the emergence of music publishers' pan-European licensing platforms, however, no European collecting society is in

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[3] L Guibault, G Westkamp et al, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (Institute for Information Law Amsterdam 2007) <http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm>, part 1, 166.

[4] For a more detailed analysis see Intellectual Property Foresight Forum, *Response to the European Commission Green Paper on Copyright in the Knowledge Economy* (Edinburgh November 2008) <http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/consultation_copyright/intellectual_foresight/_EN_1.0_&a=d> 9-10.

[5] M-C Janssen, 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation' in E Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, Cheltenham and Northampton 2009) 340-344.

[6] European Commission, *Reflection Document* (n 1) 6.

[7] Commission Recommendation of 18 October 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC), [2005] OJ L 276/54.

[8] A recent and comprehensive overview of the developments in this regard is provided by Hellenic Foundation for European and Foreign Policy, *Collecting societies and cultural diversity in the music sector* (study for the European Parliament, DG Internal Policies, Policy Department B, Brussels June 2009) 26-33.

a position any more to license the full worldwide repertoire of music.[9] Today, an internet music service provider is able to obtain multi-territorial but mono-repertoire licences from the four major music publishers. In order to be able to continue to offer the worldwide music repertoire the provider would, in addition, still need to obtain licences from the domestic collecting societies. An assessment of the merits of this new reality of online music licensing should be the starting point of all considerations of future licensing models.

But has the advent of these mono-repertoire pan-European licensing platforms simplified online music licensing or helped to create 'a more rapid development of cross-border internet services'[10]? The answer would probably have to highlight the mixed results of the recent market developments. On the one hand, they further complicated online licensing practices insofar as commercial users willing to offer the worldwide repertoire now have to obtain even more licences than before. A further consequence is an increased uncertainty as to which entity controls which rights. For these reasons many commercial users disapprove of the licensing platforms. Recently, this view was illustrated in the submission of Deutsche Telekom to the Final Report of the Online Commerce Roundtable: 'the current withdrawal initiatives do not facilitate the acquisition/clearance of rights in the online market at all'.[11] On the other hand, pan-European licensing platforms seem to have helped the development of at least some cross-border music services. Nokia, for example, does not believe that its Comes With Music service 'would have ever been possible to be launched in Europe under the old system'.[12] The divergence in views of commercial users can be explained with regard to the relevant underlying business model. Deutsche Telekom operates 'traditional' download platforms – a recognised form of online exploitation of music for which licenses can readily be obtained through collecting societies. Nokia's Comes With Music service, however, represents an innovative business model which did not fit the established rate structure. It could be argued that the pan-European licensing platforms operated by the major music publishers offer more flexibility to find licensing solutions even for such new business models as their decision making process is of a more direct nature than that of a collecting society. The latter has to take into account the interest of not only one but a multitude of rights holders. From its experience, Nokia therefore argues in favour of an 'effective market-based licensing regime [that] requires licensees to be able to negotiate appropriate remuneration for the rights with the principal rights holders who have the ability to determine the commercial terms. A so-called "one-stop shop" would not allow this …'[13].

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[9] S Müller, 'Rechtewahrnehmung durch Verwertungsgesellschaften bei der Nutzung von Musikwerken im Internet' [2009] Zeitschrift für Urheber- und Medienrecht 121-131, 130.

[10] European Commission, *Reflection Document* (n 1) 15.

[11] Deutsche Telekom, *Reply to the Commission's consultation regarding the online distribution of music* (30 June 2009) <http://ec.europa.eu/competition/consultations/2009_online_commerce/deutsche_telecom_ag.pdf>.
The submission goes on to say: 'If Deutsche Telekom would have to choose between a licensing model that provides a global repertoire license on a territorial basis (1) or a license model that provides multi-territory licenses for restricted repertoire and rights (2) Deutsche Telekom would advocate the first … Although Deutsche Telekom is generally interested in multi-territory licenses, there is no advantage for Deutsche Telekom if such multi-territory licenses must be acquired from a multitude of right-owners with regard to certain works and/or music repertoires".

[12] S Valkonen (Global Director Music Business Affairs, Nokia) at the World Copyright Summit (10 June 2009); video available at <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=1004&method=afficherArticleInPortlet>.

[13] Nokia, *New consultation on the Report concerning the online distribution of music – Submissino of Nokia* (June 2009) <http://ec.europa.eu/competition/consultations/2009_online_commerce/nokia.pdf>.

However, even if one were to accept that pan-European licensing platforms have the potential to help innovative business models to develop, one must not forget the shortcomings of the platforms. Notably, there is a clear danger for cultural diversity as regards consumer choice in online music. Several arguments can be made in this respect. The first relates to what could be called cultural policy. In contrast to most continental European collecting societies, the publishers' licensing platforms do not make deductions from the royalties collected to fund cultural and social activities. Under the old system the royalties generated through the licensing of the mechanical online rights would have been subjected to deductions of that kind. Moreover, the licensing platforms lack the element of solidarity which is inherent to collecting societies. Through the specific way in which royalties are distributed and costs shared, lesser-known artists benefit largely while becoming net contributors when their popularity rises[14]. This, again, can be seen as an investment to guarantee a culturally diverse musical output in the future. Secondly, the establishment of publishers' licensing platforms has led to a fragmentation of repertoire. To offer the worldwide repertoire has become more costly and burdensome for a commercial user. Some might therefore simply content themselves with the Anglo-American repertoire of the main music publishers. Such a development would have a direct negative impact on cultural diversity as consumers would not be able to obtain less popular niche music. A third cause of concern is the potential loss of the collective bargaining power of creators of music not part of the repertoire licensed by the publishers' platforms. Nokia's Comes With Music service might illustrate this. The necessary licensing of the service was only possible because Nokia was able 'to negotiate with the principals for the rates and other terms and then roll that out co-operatively with all the various societies and get them on board for their member repertoire'[15]. In a situation where a commercial user intends to launch a new service throughout Europe and has already secured the rights for the Anglo-American repertoire, the collecting societies administering the remaining European repertoire will be under immense pressure. The commercial user has a great bargaining power due to the popularity of the Anglo-American music repertoire of the four main music publishers and collecting societies might be inclined to accept lower prices for the online distribution than they normally would in order for their own repertoire to be available at all. Of course, one could well argue that monetising music through this service, even if done for a low price, is, in the end, more beneficial to creators than making no profit at all. This, however, should not hide the fact that the negotiating position of European creators is weakened and that collecting societies might then no longer be able to fulfil their function as facilitators of collective bargaining.

The preceding remarks have tried to address some of the consequences of the 2005 Recommendation and the music publishers' move to individual licensing. Whether these consequences are desirable should be a question for the present debate. In any case, proposals for future re-organisation of the online licensing schemes for creative content must always start from an acknowledgement of the new online licensing reality.

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[14] S Nérisson, 'Social Function of Collective Management Societies (CMS): Provisory Conclusions', in Max Planck Institute for Intellectual Property, Competition and Tax Law (ed), *MPI Book Project Collective administration of Copyright and Neighbouring Rights* <http://www.ip.mpg.de/shared/data/pdf/3_nerisson_-_social_functions.pdf> 5.

[15] S Valkonen, World Copyright Summit 2009 (n 12).

Cultural aspects and the authors' interests in collective representation

We are pleased to note that the European Commission specifically recognises the existence of 'cultural aspects and considerations relating to the collective representation of authors' interests' in the licensing of authors' and composers' rights in musical works.[16] Indeed, there are aspects of the work of collecting societies which are not only in the interest of their members but could also be seen as in the interest of the public. Some of these have already been mentioned in the discussion of the consequences of the withdrawal of rights by the major music publishers. The future debate must map out in more detail the different cultural and social functions of collecting societies and their contributions to a culturally diverse online music offering in Europe.[17] It would then be important to focus on the significance of collecting societies' work in this respect and to assess whether this merits precedence over considerations of licensing efficiency or even competition law concerns. In this context, Josef Drexl's model of 'creative competition' as an alternative concept to allocative efficiency deserves a closer look.[18] Naturally, the outcome of the still pending appeal cases against the CISAC decision before the Court of First Instance will strongly influence any further discussion on the relationship between collective licensing and competition law.

A related topic is that of cultural diversity. In fact, the term is used numerous times throughout the Reflection Document. An attempt, however, to define the expression has not been made. This is regrettable as the idiom has become a buzzword and its use inflationary. One obvious meaning of 'cultural diversity' in the context of music online would relate to the online availability for consumers. Thus, a culturally diverse offer would be one which presents consumers with a broad choice of music. Another, more extensive interpretation of 'cultural diversity' is used by collecting societies. They argue that cultural diversity will diminish should their influence in the online licensing of music decline and, hence, refer to their cultural and social functions.[19] Understood this way, cultural diversity also encompasses the cultural policy activities undertaken to promote new creators and to guarantee a broad choice in music in the future. Finally and maybe somewhat surprisingly, even the new pan-European licensing platforms – although not spending any money on cultural policy – claim to enhance 'cultural diversity'. Applying this significantly narrower concept, they claim that their work fosters cultural diversity because creators are properly rewarded for their music which, in turn, is made widely accessible[20]. Given this broad range of different interpretations, speaking of 'cultural diversity' without further clarification clouds the discussion instead of clarifying it. The European Commission would therefore do well to specify what exactly it means when it refers to 'cultural diversity'.

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[16] European Commission, *Reflection Document* (n 1) 16.

[17] An overview of the cultural connotations of the work of collecting societies is provided by Hellenic Foundation for European and Foreign Policy, *Collecting societies and cultural diversity in the music sector* (n 8) 15-16.

[18] Josef Drexl, 'Competition in the field of collective management: preferring 'creative competition' to allocative efficiency in European copyright law' in P Torremans (ed), *Copyright Law – A Handbook of Contemporary Research* (Edwar Elgar, Cheltenham/Northampton 2007) 255-282.

[19] See above 4.

[20] Hellenic Foundation for European and Foreign Policy, *Collecting societies and cultural diversity in the music sector* (n 8) 27.

Streamlined pan-European and/or multi-territory licensing processes

As the overview of the present situation has shown, no fully satisfactory solution to simplifying the online licensing structures have been found until now. The Intellectual Property Foresight Forum therefore welcomes the European Commission's general intention to create the legal framework for streamlined multi-territorial licensing schemes.

The consolidation of the two online rights into one unitary licence has great potential for simplification and should therefore be encouraged. Indeed, commercial users find it increasingly difficult to understand that two rights must be cleared for a single use of a musical work. They fear 'horizontal fragmentation' with the potential to block the monetisation of music on the Internet once either the holder of the mechanical online right or the holder of the performing online right opposes the exploitation.[21] Very much in the same vein, a recent German decision taken by the lower district court of Munich I held that the splitting of copyright into a mechanical online right and a making available online right was inconsistent with German law.[22] The court focussed on a norm in German copyright law according to which the splitting of copyright into different usage rights is not without limits. In particular, a usage right needs to enable at least some form of exploitation. In the context of online distribution of music, so the argument runs, the digital reproduction right alone does not enable any use and a digital transmission of a musical work relying on the reproduction right alone is technically impossible. The court concludes that EMI, the first music publisher to set up a pan-European licensing platform in a joint venture with PRS and GEMA, had not validly withdrawn the mechanical online rights from the system of collective copyright management. Although the decision can be criticised on several counts[23] and has been appealed, it highlights the growing feeling that a splitting of rights is unnecessarily burdensome.

At the same time, the decision illustrates that the music publishers' pan-European licensing platforms do nothing to alleviate the problem of split usage rights. On the contrary, the problem has been caused by the withdrawal activities. This is because of the Anglo-American copyright particularity that mechanical rights traditionally are not transferred by the author to a collecting society but to the music publisher. Under the traditional system of music licensing the publisher then licensed the mechanical rights to sub-publishers in abroad territories who, in turn, mandated the local collecting society to administer the right. That meant that in most of the EU, where the performing and the mechanical rights are collectively managed by the same entity, this entity was able to grant a unitary licence. In the UK, where performing rights are managed by the PRS and mechanical rights by the MCPS, both societies started very early to co-operate to offer joint online licences allowing the commercial user to clear the online rights in a single transaction. The main shortcoming of the licences under the old system was, however, that they were territorially limited to the country where the respective society was active.[24]

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[21] Nokia, *Submission* (n 13). Interestingly, commercial users support the creation of a unitary online licence whether they approve of the new pan-European licensing structures or not; see Deutsche Telekom, *Reply* (n 11).

[22] LG München I (7 O 4139/08 – 25 June 2009).

[23] O Jani, 'Alles eins? – Das Verhältnis des Rechts der öffentlichen Zugänglichmachung zum Vervielfältigungsrecht' [2009] Zeitschrift für Urheber- und Medienrecht 722-730.

[24] The reason for this lies in the territorial limitation contained in the reciprocal representation agreements between collecting societies as well as in the fact that the sub-publisher in a given territory only had the right to administer the mechanical right in that territory.

In principle, there are two possible ways to achieve a unitary online license. First, the making available right could be re-worded so that either the reproduction aspects of a digital transmission are also authorised if the online performing right has been cleared or vice versa. Such a solution does not seem to be at odds with the international obligations of the European Union as the WCT and the WPPT consciously adopted an 'umbrella solution' leaving it free to the parties to the Treaty how to characterise legally the exclusive right of interactive online transmission as long as an exclusive right covering all aspects of the digital transmission of a musical work is provided for.[25] A second possibility would be to continue to legally recognise the two rights as being necessary to allow a digital transmission but to promote joint licensing. In theory, it would be more effective to provide for the mandatory collective management of the mechanical online right. This, however, appears to be inconsistent with international obligations.[26] The legislator therefore cannot do more than encouraging joint licensing and the present debate should take a closer look at how this can be done best.

The second specific proposal for a streamlined multi-territory licensing model mentioned in the Reflection Document concerns the more ambitious form of a one-stop shop re-aggregating the manifold layers of different rights and rights holders in a musical work. Such a solution would indeed represent the most drastic simplification for commercial users. Yet, legislative options are limited. Again, international copyright obligations prohibit forcing rights holders to licence their rights jointly. Furthermore, the issue of how to distribute the jointly collected revenue could well prove to be an insurmountable obstacle. Competition law concerns, too, could turn out to be a further hindrance. Additional research would be needed to analyse these aspects in more detail and to establish whether there is a promising way for the European Union to facilitate such an all-encompassing one-stop shop. JAL Sterling's proposal of a Global Internet Licensing Agency could – although adopting a global perspective – be a promising starting point for further considerations.[27]

Finally, another step to streamline pan-European licensing would consist of several collecting societies pooling their repertoire and offering pan-European licences. This is also a model that the participants of the online commerce roundtable agreed to further explore.[28] Although, as the Reflection Document notes in footnote 47, such a model would not overcome the fragmentation of rights, it could, depending on the actual degree of participation of collecting societies, reduce the negotiation processes for commercial users significantly. Should the current phenomenon of music publishers' pan-European licensing platforms persist, one could even imagine the pooling of all non-Anglo-American repertoires by European collecting societies. To co-ordinate the joint licensing, a central agency could be created. In this respect, the Brazilian Central Officer for Collection and Distribution (ECAD) might be an example to follow. It serves as a central licensing point for all copyright licensing bringing together eleven independent collecting

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[25] M Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?' in D Gervais (ed), *Collective Management of Copyright and Related Rights* (Kluwer Law International, Alphen aan den Rijn 2006) 50-56.

[26] Ficsor, 'Collective Management' (n 25) 57-59.

[27] JAL Sterling, *The GILA System for Global Internet Licensing* (1 November 2008) <www.qmipri.org/documents/Sterling_JALSGILASystem.pdf>.

[28] Participants of the Online Commerce Roundtable, *General principles for the online distribution of music* (Brussels 19 October 2009) <http://ec.europa.eu/competition/sectors/media/joint_statement_1.pdf>.

societies.[29] The obvious counterargument against such joint licensing efforts would be competition law concerns. Further work is needed to elaborate whether a pooling solution could be implemented which is consistent with competition law. A comparative analysis of parallel problems in Brazil could be enlightening. In the end, any such initiative would depend on the willingness of collecting societies to work together. For the moment, such efforts do not yet appear to be made as in the aftermath of the CISAC decision societies are still afraid to work too closely with each other.

Central rights ownership repository

The current fragmentation of rights has not only increased the negotiating processes for commercial users, but also created uncertainty as to which entity owns which rights. A central ownership and licence information repository would therefore be desirable. The establishment of a Working Group on a Common Framework for Rights Ownership Information through EMI Music Publishing, PRS for Music, SACEM, STIM and Universal Music Publishing is a step in the right direction and should therefore be supported further.[30]

Extending the scope of the Satellite and Cable Directive to the online delivery of audiovisual content

The Intellectual Property Foresight Forum is doubtful whether extending the scope of the Satellite and Cable Directive to the online delivery of audiovisual content would bring about the desired effect. The Reflection Document assumes that under an amplified Directive 'once an online service is licensed in one EU territory … this licence would cover all Community territories'.[31] Previous experience from the Satellite and Cable Directive, however, tells that commercial operators still, for the most part, choose to obtain single state clearance. It must be expected that the same practice would be resorted to under an extended Satellite and Cable Directive. So while widening the scope of the Satellite and Cable Directive might, in theory, promote the accessibility of audiovisual content in the entire single market, such legislative reform would need to be accompanied by additional measures to encourage market participants to actually make use of these flexibilities in practice. Which forms such an encouragement could take, is an issue for the present debate.

A European copyright law

In theory, a Community-wide title would overcome the consequences of the territoriality principle and the inherent market fragmentation along national borders. Yet, this is not to say that the market would be less fragmented if there was a single copyright title. As the Reflection Document rightly states elsewhere, 'the present legal framework does not in itself prevent rightholders from commercialising their works on a multi-territory basis'.[32] It is therefore far from certain that rights holders would exploit their

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[29] See <http://www.ecad.org.br/ViewController/publico/conteudo.aspx?codigo=16>.

[30] See EMI Music Publishing, PRS for Music, SACEM, STIM, Universal Music Publishing, *Joint Statement – Working Group on a Common Framework for Rights Ownership Information* (Brussels 19 October 2009) <http://ec.europa.eu/competition/sectors/media/joint_statement_2.pdf>.

[31] European Commission, *Reflection Document* (n 1) 17.

[32] European Commission, *Reflection Document* (n 1) 12.

works under a unified European Copyright Law in a fundamentally different manner. In the end, their aim will still be to derive maximum revenues. Thus, the contractual licensing of copyright on a country-by-country basis would still be likely. Past experience from the Satellite and Cable Directive confirms that creating the legal possibilities for a Community-wide licensing of copyright does not necessarily mean that these possibilities will also be taken up by the stakeholders. Moreover, we do not believe that unifying European copyright laws would be the best way to restore the balance between rights and exceptions. Even proponents of a unification of European copyright law argue in favour of an 'unhurried drafting process' and assume the unification of European copyright to 'become a project of the very long term'.[33] Re-calibrating copyright law, however, has become a pressing matter and should be dealt with as swiftly as possible. For the same reason we do not believe that a unification of European copyright law, which would certainly have merits, would be the best way to foster the online dissemination of creative content. Practical solutions need to be found now and not at some distant and even uncertain point in the future.

A softer approach, i.e. a single European title which would not take precedence over national copyright titles, is not desirable. It would further complicate matters for commercial users as yet another layer of rights to be cleared would be created.[34] It would therefore even be counterproductive to the aim of simplifying the existing licensing structures.

Alternative forms of remuneration

Alternative forms of remuneration are often discussed as a means to legalise peer-to-peer file sharing for consumers. The debate had been instigated by a number of proposals drawn up by American law professors from 2002 onwards and today a wide array of different models has been tabled. These proposals bear names as diverse as 'alternative compensation system', 'non-commercial use levy', 'compulsory blanket license' or 'voluntary blanket license'[35]. What is more, the differences in terminology are not only cosmetic but – rather on the contrary – indicate differences in the respective conceptualisation of the alternative form of remuneration. Nevertheless, all concepts share certain characteristics. A working definition of 'alternative form of remuneration' could therefore be 'a system in which internet users pay a flat fee in return for which they may legally download digital content'.

As long as ISPs and rights holder agree on such systems voluntarily, there seems no need for legislative intervention. But the most controversial proposals advocate introducing a levy to be paid by all internet users as part of their online subscription. Technically, such a solution could be implemented by introducing a private use exception to the making available right. A recent legal study conducted by the Institute for European Media Law found that such an amendment would be consistent with German constitutional

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[33] M van Eechoud, B Hugenholtz et al, *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International, Alphen aan den Rijn 2009) 324, 325.

[34] M van Eechoud, B Hugenholtz et al, *Harmonizing European Copyright Law* (n 33) 318.

[35] For a summary of the different models see Salil Mehra, The iPod Tax: Why the Digital Copyright System of American Law Professors' Dreams Failed in Japan, Temple University Legal Studies Research Paper No. 2007-27 <http://ssrn.com/abstract=1010246>, and Tal Z. Zarsky, 'Assessing Alternative Compensation Models for Online Content Consumption' (2006) 84 Denver University Law Review 645-719, both with an abundance of further references.

law as well as with the three-step test enshrined in the international copyright conventions. Yet, the study also compared the current state of discussion in four different European Member States and concluded that currently such a model is not capable of winning a majority.[36]

But even if one were to agree that an amendment would be legally possible, the Intellectual Property Foresight Forum, in the present situation, would not support the introduction of a private use exception to the making available right and a corresponding right to equitable remuneration for rights holders. First, as the Reflection Document points out, rights holders act very cautiously at the moment with regard to the online distribution of their works. Yet nevertheless, legal offers are on the increase and recent years have seen the advent of innovative business models. A number of 'digital jukeboxes' have established themselves, such as we7, Deezer or Spotify. These business models are either based on advertisements or subscriptions. Another current trend is the bundling of music access to existing services such as broadband subscriptions (Orange in France, TDC in Denmark) or mobile phone line subscriptions (Nokia's Comes With Music). A private use exception to the making available right would impede the viability of all of these business models. Secondly, from a practical perspective, determining an equitable level of remuneration would seem arbitrarily at a time where the value of the market for legal services can at best be guessed. A third reason for our scepticism is the fact that the introduction of such an exception would not appear desirable from an internal market point of view either. Assessing the private copy levy scheme allowed under European law, one must conclude that its introduction has created tremendous disparities between Member States. Not only are there Member States, such as the UK, which have not introduced a private levy scheme, but even among the Member States with a private levy scheme the level of remuneration fluctuates heavily. Remuneration for a private use exception of the making available right would inevitably lead to comparable results. Yet, at a time of growing consensus for a streamlining of the exceptions for copyright throughout Europe, creating further inconsistencies should be avoided.

[36] Institut für Europäisches Medienrecht (ed), *Die Zulässigkeit einer Kulturflatrate nach nationalem und europäischem Recht* (Saarbrücken 2009) <http://www.gruene-bundestag.de/cms/netzpolitik/dokbin/278/278059.kurzgutachten_zur_kulturflatrate.pdf>.