Making online commerce a reality in the EU

Music online: The role of collective licensing

Input by the MCPS-PRS Alliance

Neelie Kroes, European Commissioner for Competition Policy, published her closing remarks at the Online Commerce Roundtable on 17 September 2008 and invited third parties to comment on the paper “Opportunities in Online Goods and Services: Issues Paper”. Notably, she concludes that ‘if a solution to the problems we face today is not found, then the music industry can hardly complain if the regulators or enforcers step in’. The MCPS-PRS Alliance has played a leading role amongst the twenty-four EEA collecting societies in pioneering pan-European licences and transactional licensing capabilities. The MCPS-PRS Alliance is keen to contribute to developing the Commission’s analysis and understanding of the challenges and problems of today, through communicating our own direct experience of the changes taking place, and to participate in the ongoing dialogue on solutions. Our input in this paper offers thinking on the specific issues in relation to copyright, and the B2B market of collective and direct licensing of online music services. Unlocking this licensing will facilitate the broader rollout of new music services for the consumer.

The MCPS-PRS Alliance

The MCPS-PRS Alliance is committed to ensuring that rightsholders and music users can benefit from effective licensing solutions which are convenient, transparent and affordable. This informs our approach to the collective licensing of rights and to adapting to the new models for licensing mechanical rights. With a significant music repertoire exploited across the EEA and a large market of domestic and cross-border online and mobile services (with licensing revenues in the UK of over €20M in 2007), the MCPS-PRS Alliance is directly concerned in this debate for its own rightsholders and in developing the market for music users and related stakeholders.

The MCPS-PRS Alliance was not only the first society, or music industry licensing body, to demonstrate positive, structural supply-side reforms with the creation of the Joint Online Licence (JOL) in 2002, offering licensing models appropriate for the new markets, but ensured that rightsholders and music users benefited from them - its digital market matured faster than its neighbours and its gross digital collection per capita in 2006 was twice that of its European neighbours. The ability to develop new licensing schemes and supporting administration - which make it easier to use music legally online - and similarly the significant investment that has gone into developing its transactional licensing capability, positions the MCPS-PRS Alliance at the forefront of being able to deliver European licensing solutions for international rightsholders and music users.

1. Collecting societies have a vital role to play, but they have to adapt

Collecting societies have a vital role to play in the online licensing market, and like all incumbents facing change in new markets, they need to adapt to perform that role efficiently, effectively and transparently.

The more relevant question to ask, now, is this: what role will collecting societies have in the future? Will they be membership societies where shared language and culture are compelling to the individual rightsholder; licensing bodies for repertoire whose responsibility is to act quickly to innovate on licensing models for new services; or operational administration centres for the high volume data processing operations on the multi-million streams of music usage online, that flows money accurately from licensee to the rightsholders? Some societies may play a role in each of these markets, and some may specialise in only one or two. Balancing the arguments for cultural diversity and commercial efficiency and effectiveness, while encouraging change in the current infrastructure, is essential.

2. Recognising that the licensing models have changed, and why

Domestic and EU policy on collective licensing has historically been framed around the obligation to issue objective, non-discriminatory licensing agreements to music users. Following the Recommendation on collective management of online music rights in 2005, the four major publishers have each appointed agents or special purpose vehicles to manage directly their Anglo-American mechanical online rights. With the new models primarily based on specific consent to license, the publisher can benefit from flexibility in licensing the mechanical rights owned by them direct to music users, a flexibility which was not available to them as part of the collective e.g. they can enter into deals based on equity or advances, or deals that are above or below the standard pricing of the collecting society.

The impacts for collecting societies and other rightsholders, and collective management more generally, of the major publisher models are still being understood as they enter the market, but clearly the impacts are structural, political, legal, economic and technological. Bridging the gap between direct and collective licensing, and understanding the drivers for each, will be essential to delivering effective solutions for both rightsholders and music users.

3. Collecting societies as platforms, and what that could tell us

Whenever transaction costs are high, search costs significant and coordination problems present - there will be a market for a platform. Examples of platforms are everywhere, with MasterCard and the London Stock Exchange being two apt examples - one connects merchants to consumers, the other unites willing buyer and willing seller. Whilst DG Internal Market conducted an impact analysis on this issue, it did not anticipate fully the ‘disruption costs’ that would occur during transition. Nor did it consider the true value of the emerging theory and application of two-sided markets in this context. The MCPS-PRS Alliance published
4. Balancing competition and co-operation

The Commissioner is right to point towards the frustration being felt by many, due to the lack of progress in delivering new licensing systems to new markets. But a more delicate question to ask, and answer, is whether the introduction of competition, as opposed to co-operation, could hinder either efficiency developments or re-aggregation of the fragmented repertoire. Put another way, the focus should not be about how the existing platforms compete, but how new platforms need to be encouraged based on shared investments in business models and back-office operations to deliver innovative and cost effective licensing solutions. These projects could realise economies of scale and efficiencies between societies, not to set one against the other. The ‘ICE’ joint venture between the Alliance and its Swedish counterpart, STIM, is an example of two societies working together to develop a single entity - which provides a new wholesale market for matching and processing data. Policy which drives competition between societies for rightsholders and music users might disrupt the trust required for shared developments across the network of platforms.

5. Service levels, as core measures of efficiency

Societies have a mutual dependency for licensing and administration in their respective territories, and for services provided across a range of rights. Finding solutions for online licensing is part of a broader debate. Rightsholders want transparency, efficiency and effectiveness from their own society, and the dependencies on other societies and agents mean that the same service levels and qualities should also be sought in the reciprocal agreements. The bi-lateral review of those agreements triggered by the CISAC Decision should lead to an assessment of the terms and conditions of rights administration to ensure that the rightsholders’ interests are backed up by high minimum service standards from partner societies.

Relevant services include:

- the provision of accurate work registration of all repertoire on a pan-European basis,
- the ability to handle all agreements information underpinning rights ownership,
- systems capable of volume processing for multi-million streams of music analysis from sales reports,
- transactional systems capable of handling specific repertoire licensing,
- full transparency on cost and investment structures and
- the track record of delivering good licence terms and conditions to new markets.

6. Specific impacts of a direct licensing model in music licensing

The analysis of solutions needs also to consider the challenges specific to copyright in developing new models for cross-border licensing. The Commission acknowledges that copyright is territorial in scope and wants to push to borderless licensing. There may be different requirements for separate revenue models, for streaming vs download and for different content uses. New legal and practical issues need to be understood and resolved as direct licensing of specific repertoires leads to the erosion of the blanket licence:

a) split copyright: a large proportion of musical works (around 40%) are co-written and therefore co-owned by multiple writers and publishers. A music user with a blanket licensing is not aware of this. But with specific repertoire licensing, multiple societies and/or major publishers can be involved in licensing elements of the same work, claiming a share of remuneration.

b) Contracts for copyright: the route and destination of royalties earned from licensing depend on the contracts between writers and publishers, and between publishers and sub-publishers. Collecting societies enable the transparent direct distribution to writers of money collected for their rights, and to enable the sub-publishing network to operate.

7. Challenges specific to the internal market

Delivering the policy goal of cross-border licensing for online services needs to be addressed in the round alongside other internal rules which may impede the effectiveness or viability of multi-territory licensing models.

a) National regulation (of tariffs or of establishment of societies e.g. registration or supervisory requirements). Regulation by national member states, whether under copyright law or specific rules on collective management, are confined to exploitation of rights or undertakings within that member state. The development of cross-border licensing models leads to new questions about the jurisdiction and application of national rules, and these will need to be clarified.

b) Withholding tax. Currently double-taxation treaties offset the tax withheld on royalties transferred between societies across borders on a bi-lateral basis, from one member state to another. Multi-territory licensing, across borders, involving a triangulation between the location of the licensing body, location of the music service and the ultimate residence of the rightsholder look certain to increase the exposure to tax withheld in member states. Individual writers and small independent publishers are much more exposed to this financial risk than multi-national companies which can benefit from exemption through intra-company transfers under the royalty directive.

c) National repertoire (as distinct from Anglo-American repertoire) remains within the society network. This means that any online licensee who wishes to operate in multiple territories is still required to negotiate national licences with national societies in addition to pan-European repertoire-specific licences.

d) The US model of copyright and copyright licensing is often mooted as a comparison for Europe. We agree that impact analysis of potential solutions should certainly look at appropriate comparators but they should also be fully aware of the differences and limitations of any comparison in terms of the protection of creators and the economics and structure of the market.

Conclusion

MCPS-PRS Alliance has been a champion for market development over intervention by the regulator. We believe there is positive and crucial role for collective licensing in online music licensing, but it will have to adapt to the changing rights representation structures and music user needs. And it will have to be global, not simply European, in outlook.

The MCPS-PRS Alliance
29-33 Berners Street
London W1T 3AB
www.mcps-prs-alliance.co.uk
sue.booth@mcps-prs-alliance.co.uk