The Online Commerce Roundtable — Advocating improved access to online music for EU consumers

Carlo Alberto Toffolon (1)

1. Introduction

In recent years, DG Competition has dealt with collective rights management issues and online music licensing practices under antitrust enforcement and advocacy initiatives. Among the former, the CISAC case (2) can be mentioned. DG Competition has also recently looked into pricing issues for online music services in the iTunes case (3). Among the advocacy initiatives, the Online Commerce Roundtable (hereafter: ‘the Roundtable’) is the most prominent example. The present article gives an overview of the discussions and outcome of the Roundtable.

The starting point for this advocacy initiative is to be found in the observation, which emerged from the iTunes case, that there is no internal market for digital music downloads and that consumers from the new EU Member States still have a limited choice of what digital music they can legally buy over the internet, even though the demand for such content is growing (4). European consumers seeking to legally buy content protected by Intellectual Property (IP) rights such as music, films, videos and pictures as electronic data files over the internet are often only allowed to access online stores directed to their country of residence. In spite of the open and borderless nature of the internet, territorial restrictions prevent the emergence of a genuine internal market for online services, limit business opportunities and harm consumers.

The current licensing practices applicable to IP-protected online content are not up to speed with technological progress brought about by the internet. It is very difficult for start-up companies to enter the European online music business because they need to negotiate with a large number of different entities to clear the music repertoire they plan to make available.

1(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

2(2) Case COMP/38.698 — CISAC Agreement.


4(4) The IFPI Digital Music Report 2010 indicates that, among the EU-12 Member States, legitimate digital music services currently exist in Bulgaria (8), Cyprus (1), the Czech Republic (9), Estonia (1), Hungary (10), Latvia (1), Lithuania (1), Malta (1), Poland (11), Romania (3), Slovakia (1) and Slovenia (2). The number of legitimate digital music services is much higher in the EU-15 Member States.

Against this background, in 2008 Commissioner Neelie Kroes started a dialogue with top industry and consumer representatives about how to eliminate existing barriers, how to increase the business opportunities open to creative industries on the internet and how to ensure that European consumers have access to the widest possible range of goods and services online. The outcome of the Roundtable is outlined below.

2. The legal context

2.1. Licensing of IP rights

IP rights are territorial in nature, which means that they can be granted territory by territory. Therefore, an online (or mobile) music provider who wants to make a commercially significant and attractive offer has to enter into as many different licence agreements as the number of countries in which it wishes to operate.

In most cases, the provider of an online/mobile music distribution service needs to acquire a licence for the relevant mechanical and performance rights pertaining to the author(s) of the music as well as a licence for the relevant recording rights, which mainly protect the individual interpretation of a song by a performing artist (5). While the publishing rights of a song are with the authors and their publishers, the recording rights are with the recording companies and the artists (e.g. singers, performers), who normally transfer them to their record companies. The lack of either of these rights prevents legal use of the song.

Generally, authors transfer copyright of their works to music publishers and receive from the latter payments of advances and a share of the royalties generated by the commercial exploitation of their works. Music publishers exploit the rights given by authors to grant licences to right-users. These right-
users encompass all sectors where music is required (CDs, films, advertising, radio, TV, internet and mobile applications). The users pay royalties for the use of these musical works.

The licensing of mechanical and performance rights is generally carried out by collecting societies on behalf of publishers and/or authors. The collecting societies generally sign agreements with all publishing companies, which allow the collecting society to grant a blanket licence (including repertoires from all publishing companies) so that all end users can enjoy full access to musical works.

2.2. Recent market developments

Since the 2005 Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, some major music publishers have started to ‘withdraw’ their Anglo-American mechanical rights from the global repertoire administered by collecting societies and to select agents to license their rights on a pan-European basis directly to online and internet music providers (e.g. iTunes, Amazon, Nokia, YouTube). For example, EMI Publishing partnered with CELAS (a joint venture between the German collecting society GEMA and the British PRS); Universal Music with the French collecting society SACEM; Sony/ATV with GEMA, and Warner/Chappell Music has appointed several collecting societies to license its rights.

The consequence is that a commercial user wishing to offer the global repertoire has to continue concluding licensing agreements with each national collecting society for the remaining repertoire, and must in addition secure agreements with the rights managers mandated to license the withdrawn Anglo-American rights of the major music publishers.

3. The meetings of the Online Commerce Roundtable

3.1. Overview

Commissioner Neelie Kroes hosted the first meeting of the Roundtable at the European Commission’s Brussels headquarters on 17 September 2008. It was attended by Sir Mick Jagger, EMI Music Publishing, Fiat, eBay, Apple/iTunes, Alcatel-Lucent, LVMH, Which? (a UK consumers organisation) and SACEM (a French collecting society for authors and composers) and concerned both goods and music services online. Before and after the meeting, participants submitted to the Commission their views on the future of online retailing in Europe. Stakeholders who were not present at the meeting had the opportunity to send written contributions, which were published on the Roundtable’s website.

It was later decided that subsequent meetings would focus on the online distribution of music only and would be limited to participants concerned with this issue. As regards the online distribution of goods, a variety of views were outlined and the Commission announced that it would use these inputs in the context of its ongoing review of the rules on vertical restraints. A second full-day meeting of the Roundtable took place on 16 December 2008 at the premises of DG Competition in Brussels. The proceedings resulted in the Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing, which was published on 26 May 2009 and submitted for public consultation.

The third meeting (8 September 2009) was enlarged to other key players in the online and mobile music industry, i.e. Amazon, Nokia, PRS for Music (a UK collecting society), STIM (a Swedish collecting society), Universal Music Publishing and the representatives of European consumers (BEUC — the European Consumers’ Organisation). The fourth meeting — being the last one under the mandate and aegis of European Commissioner for Competition Neelie Kroes — took place on 19 October 2009.

3.2. The discussions

The offering of EEA-wide multi-repertoire licences through a single point of contact emerged as one of the main themes for discussion; another main theme was the full availability to users of rights ownership information that should help to simplify the current complexities of the negotiation process and enhance cross-border licensing.
Generally, it was agreed that the internet provides all actors involved in the music value chain with tremendous opportunities to foster their creativity and business activities, for the benefit of the end-consumers. Thanks to this new technology, the digital consumption of music can take a wide variety of forms and be delivered through many different channels, platforms and devices.

All participants recognised the need for EEA-wide licensing, in the online environment, of both performance and mechanical rights for a wider repertoire and in competition between several rights managers. Both EMI (though CELAS) and SACEM are offering EEA-wide licences and are willing to continue doing so. The success of a rights manager should not depend on its size, but on its efficiency and the quality of services it is able to offer.

Certain users, such as Apple, would prefer to obtain a ‘blanket licence’ from one-stop shops: the rights being fragmented, these users would need to request and obtain a separate licence for each repertoire. In this respect, a system of rights ownership information should help make life simpler for users and the relevant information would have to be shared among right holders/collecting societies, but several questions should be resolved first, e.g. how to avoid ‘monopolisation’ of the information by a single entity and ensure open access to the database.

One licensing model which seems to satisfy the needs of commercial users is to have several rights managers offering a licence that covers such a large repertoire that it comes close to the global repertoire and thereby de facto offers a one-stop shop. Nevertheless, a limited number of rights managers which offer a large, albeit not global repertoire, could still be a workable solution if a common database can provide transparency on who offers what at which price. If effectively implemented, in particular by publishers and collecting societies, this would benefit all stakeholders.

SACEM stated that it is willing, in principle, to entrust other collecting societies with pan-European licensing of its repertoire and to act as non-exclusive rights manager for publishers and other collecting societies. On the music publishers’ side, EMI is ready to authorise more than one rights manager to offer its repertoire for the whole EEA, for example by appointing different entities (e.g. local agents) for efficient licensing purposes. Apple would consider making its content available to all European consumers if it was readily able to license rights on a multi-territorial basis from publishers and collecting societies.

3.3. Joint Statement on ‘General principles for the online distribution of music’

Building upon the above premise, the members of the Roundtable signed up to a Joint Statement (14) in which:

- They committed to pursue new EU licensing platforms comprising the repertoires of several collecting societies. These platforms should consolidate the widest possible repertoire in their catalogues and should be based on voluntary cooperation among right owners.

- They agreed that collective rights managers should adhere to certain objective, transparent and non-discriminatory criteria to allow other entities to deliver multi-territorial licences.

- They set up a working group to create a common framework for the identification and exchange of rights ownership information. This will make it easier for commercial users to identify the relevant right owners and secure the necessary rights.

(a) New online licensing platform(s)

The Roundtable participants realised that extensive fragmentation of rights and the lack of effective rights clearance mechanisms create challenges to efficient and transparent music licensing. They recognised that such mechanisms facilitate the emergence of new business models and the deployment of multi-territorial online (and mobile) music services. On this basis, they agreed, without prejudice to any other alternatives, to explore in the near term the following ways forward, which could coexist:

- The development of efficient licensing platforms including several collective rights managers offering multi-territorial licences for their repertoires. Such platforms would manage and, where possible, license the ‘online rights’ (performing and mechanical rights) of all right holders willing to entrust them.

- The potential for the creation of licensing platforms which would manage substantial bodies of repertoire and deliver pan-European/multi-repertoire licences to commercial users. Such platforms should be non-exclusive and non-mandatory.

Right holders should be free to license directly, or through the rights managers of their choice, which would compete for their rights, their own repertoire

to commercial users, subject to applicable European competition law rules. Commercial users and content providers should make all commercially reasonable efforts to ensure they have the right to offer pan-European music services to all European consumers.

Such commitment to develop efficient pan-EU licensing platforms comprising the repertoires of several collecting societies and publishers should meet the demand of commercial users who have expressed a preference for securing all the necessary online rights for a given repertoire from a single source.

(b) Objective, transparent and non-discriminatory criteria for the selection of entities entrusted to license online rights on a multi-territorial basis

It was agreed that such criteria should at least include the ability to secure an appropriate level of royalties for right holders; to manage and process efficiently all elements of a licence in accordance with the mandate granted; to accurately identify the rights; to meet certain technical standards; to ensure that royalty distribution is properly handled; and to carefully monitor and enforce uses in each territory of the licence. Objectively justified concerns about the reliability, trustworthiness and/or track record of the entity concerned and the market conditions may also be taken into account.

As a result, it can be expected that more collecting societies will be authorised to licence important repertoires on a pan-EU basis. For instance, following the Roundtable EMI has announced that it expected to mandate other collective rights managers than CELAS to license its repertoire.

(c) Common framework for rights ownership information

The members of the Roundtable also agreed that a common framework for consolidating and maintaining accurate rights ownership information is needed as soon as possible in order to facilitate the identification, management and administration of the relevant rights pertaining to a music track at global level, as well as to promote legal certainty and eliminate the risk of double payments. The participants are committed to working on common formats and standards and supporting the creation of modern systems of rights ownership information, for the benefit of all stakeholders. They will continue to discuss possible improvements regarding the interconnection and interoperability of the existing databases.

Some members of the Roundtable (EMI, PRS for Music, SACEM, STIM and Universal Music Publishing) formed a ‘Working Group on a Common Framework for Rights Ownership Information’, which is open to other market participants, including commercial users, other collecting societies and independent publishers. This Working Group also delivered a Joint Statement (15) indicating that it would consider, inter alia, appropriate measures to ensure open, transparent and non-discriminatory access to rights identification data; the continued accuracy of the data and avoidance of possible duplication of information; and the need to safeguard confidentiality of commercially sensitive information.

A commitment to work on a common database system that would make it possible to consolidate and maintain accurate rights ownership information on all music tracks would, in turn, greatly facilitate the identification of online rights and the management and administration of licences. It would also considerably reduce uncertainties as to the ownership of rights and the ensuing risk of double payments — a concern which is high on the agenda of digital service providers.

4. Follow-up

Following the Online Commerce Roundtable:

• Apple announced that it was encouraged by progress towards more efficient online music licensing and that it was optimistic in making the iTunes store available to consumers in more European countries in 2010.

• EMI announced that it expected to take an important step forward in digital licensing in Europe via forthcoming non-exclusive deals with the Spanish (SGAE) and French (SACEM) collecting societies.

• Amazon stated that it was committed to continue working to provide customers the broadest possible selection of online music offerings (16).

• In line with the agreed principles of the Roundtable, SACEM will now actively cooperate with as many European authors’ societies as possible with a view to building a common, non-exclusive portal able to offer the largest possible repertoire to online services on a pan-European basis.

5. Conclusion

The Online Commerce Roundtable agreed that the simplification of online licensing practices will benefit authors, right holders and commercial users alike and will allow more European consumers to

(16) On 3 December 2009, Amazon announced the launch of their new MP3 stores in Austria and Switzerland.
have legitimate access to more music online. This initiative delivered concrete results within a short timeframe; it allowed industry stakeholders to engage in open discussions leading to jointly agreed actions; it also helped to foster the internal market for online services, increase business opportunities and benefit consumers.

This initiative took place in parallel with DG Competition’s monitoring of the implementation of the CISAC prohibition decision, and was followed by policy initiatives by other Commission departments (17). It should be seen in the wider context of Commission President José Manuel Barroso’s Political guidelines for the 2010-2015 Commission (18), which *inter alia* propose to tackle the main obstacles to a genuine digital single market. In this wider context, DG Competition will continue to play a key role, particularly by examining from an EU competition law perspective not only the current online licensing practices, but also other collective rights management and copyright-related matters (including issues related to copyright levies and private copying).
