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Comments on the developments that have taken place since the adoption of the Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services

On 18 October 2005, the European Commission (EC) adopted a Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (hereinafter the Recommendation).¹ The EC's aim was to make it easier for both users and rights holders, who increasingly need pan-European rather than territorial licences, to operate in the digital market place. The EC's intention was to replace the need for users to secure an individual licence for every territory in which they operated with a regional licence while at the same time simplifying the pan-European administration of their works for rights holders.

The Recommendation mainly covers two matters: licensing of online rights and governance of Collective Rights Managers (CRMs). On governance, the debate has been less intense. Indeed, the European umbrella organisations of authors' societies and music publishers, were quick in agreeing on a Common Declaration dealing with governance issues in line with the Recommendation, which is currently being implemented by GESAC members.

The debate on licensing of online rights, on the other hand, has been much more heated. The fact of the matter is that this Recommendation was adopted without an adequate and in-depth consultation process and the option chosen – referred to as Option 3 in the Working Document and Impact Assessment of the EC – was widely criticised for proposing a system without one-stop shops that could grant pan European licences of the world repertoire. Moreover, concerns were raised as to the effect of such Recommendation on small repertoires, cultural diversity and the role of small and medium sized societies.

Another issue that has been vividly discussed is whether the Recommendation, an instrument that is not of a binding nature, can have an impact in the market, something that cannot be denied at the light of the recent developments that have taken place:

⇒ EMI Music Publishing has withdrawn its Anglo-American repertoire from all European authors' societies and entrusted it to the newly created MCPS-PRS/GEMA joint venture, CELAS;

¹ 2005/737/EC.

- ⇒ Warner Chappell has withdrawn the rights to administer the European digital rights for its Anglo-American catalogue from the European societies and is currently offering those rights for licensing to digital users to individual European societies on a non-exclusive basis;
- ⇒ French authors' society SACEM, Spanish authors' society SGAE, and quite possibly Italian authors' society SIAE, are jointly creating a one-stop pan-European licensing operation for online and mobile digital musical rights of the national repertoires of the three societies;
- ⇒ In 2006, SGAE and MCPS-PRS also announced the creation of the eLOS joint venture with the aim of offering digital users a joint pan-European licensing platform for Latin repertoire. That agreement has not been finalised.

While stakeholders are divided as to the benefits and drawbacks of the Recommendation, it is clear that these deals, without prejudice of the positive effects that they may have for the organisations involved therein, increase the difficulty for commercial users to clear rights, thus making the process more complex. As a matter of fact, the European Parliament (EP) has been highly critical with the soft-law and the Option 3 approaches taken by the Commission. In the Report on the Recommendation adopted by the Legal Affairs Committee, the EP calls for the Commission to conduct a thorough consultation process and to present a Directive on cross-border collective management that takes on board a number of the concerns raised by small and medium sized societies and commercial users. It stresses the need to keep one-stop shops granting pan European licences of the world repertoire, albeit applying the tariff applicable in the country where the consumption of the copyrighted work takes place; to introduce competition, albeit with certain controls, amongst collective rights managers; and to foster a new generation of collective licensing models based on the reciprocal representation agreements scheme. Also the report reminds of the important role that small and medium sized societies play in the protection and promotion of cultural diversity and on the need, when introducing competition between authors' societies, to find an adequate balance to avoid adverse effects on small rights holders, small and medium sized societies and cultural diversity, a balance that can be found through cooperation between authors' societies.

Indeed, before the Legal Affairs Committee adopted its report on the Recommendation, authors' societies members of GESAC were working on a possible new model of cooperation for the cross-border collective management of rights. The ad hoc groups that were working on this model within GESAC started from the premise that this model should be one of cooperation between societies based on qualitative criteria for the granting of multi-territorial licenses in the online field based on the tariff-of-destination principle, in order to offer as much repertoire as possible to users.

These ad hoc groups had to interrupt their work in order to avoid any interference with the development of the CISAC case. However, after the clear message sent by the EP and as soon as the CISAC case comes to an end, it is clear that authors' societies need to resume their work on this model.

Report by Silke von Lewinski

Executive Committee of ALAI – March 2007

"Regarding online music licencing, in addition to what Mr. Darias wrote in his separate report on behalf of GESAC, I would like to indicate that some basic information on the new joint venture by MCPS-PRS/GEMA (CELAS) is available under www.celas.eu, and that the latest Report by the EP's Legal Affairs Committee on the Commission's Recommendation has been adopted on March 5, 2007 (Report on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), doc A6-0053/2007) (and, without changes, on March 13 by the Plenary). The Parliament therein adopts a critical view of the Commission, in particular as regards the undemocratic procedure excluding the EP and the Council, and the effects of the Recommendation which favors the mainstream repertoire of a few major companies, and a few major collecting societies, rather than promoting small and medium size collecting societies and repertoires. The reports strongly highlight the need to focus on cultural diversity and promote social and cultural funds of collecting societies. It calls for harmonization of basic rules for collecting societies by a directive by indicating some basic features of such an instrument.

It also condemns the (passed) plans of the European Commission to adopt a recommendation on private copying remuneration. In this respect, one has to state that the respective plan of the Commission was "buried" in December 2006, after protests from Member States and NGO's."