LIKE RUNNING WATER? – THE INTERPLAY BETWEEN ANTITRUST AND ONLINE MUSIC LICENSING

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Abstract: *The past approach of EU competition law to collecting societies in the offline environment allowed the creation of a closed network of national territory-based monopolies. However, the Internet and digital technology absolutely changed the paradigm for music dissemination and use. The loss of territoriality – one of the most significant features of copyright and one of the tectonic faults in the interaction with competition law – has apparently abolished the rationale for collecting societies not to engage in cross-border competition. This article considers the interplay between antitrust and online collective copyright management, discussing the role of EU competition law in anticipation of the Commission's CISAC decision review by the General Court.*

> "*The absolute transformation of everything that we ever thought about music will take place within 10 years, and nothing is going to be able to stop it. I see absolutely no point in pretending that it's not going to happen. I'm fully confident that copyright, for instance, will no longer exist in 10 years, and authorship and intellectual property is in for such a bashing. Music itself is going to become like running water or electricity.*

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So it's like, just take advantage of these last few years because none of this is ever going to happen again. You'd better be prepared for doing a lot of touring because that's really the only unique situation that's going to be left. It's terribly exciting. But on the other hand it doesn't matter if you think it's exciting or not; it's what's going to happen."

DAVID BOWIE (musician, producer and actor), June 2002.[1]

"*In short, the emergence of Internet radically modifies the way copyright is exploited.*"

EUROPEAN COMMISSION, 2008 *CISAC* decision[2]

1. ONLINE MUSIC AND COLLECTIVE COPYRIGHT MANAGEMENT

The Internet has grown from being a novel technical application into a central feature of the developed world economy. Music, in turn, has been recognized a key role by the European Commission in the evolution of online services, since it can so easily be distributed online and there is such high demand for it. It is accepted that music has been a major factor in the take-up of broadband services throughout the EU.[3] As such, online music rights have gradually become more significant to the media, IT, communications, e-commerce and entertainment sectors, who require simple and sound solutions to the problem of pan-European rights clearance, notably in order to keep pace with the fast growing US online businesses.[4]

Collecting societies ("CSs") are the traditional interface between right-holders and commercial music users. CSs display a number of idiosyncrasies regarding the impact of the Internet and digitalisation on their activities. Firstly, CSs interact closely with the cultural policies of EU Member States, creating a propensity for the legal debate to become intermixed with politics. Secondly,

1 Pareles, 2002.

2 Case COMP/C2/38.698, *CISAC,* decision of 16.07.2008 ("CISAC"), §120 (appealed T-392/08, T-398/08, T-401/08, T-410/08, T-411/08, T-413/08, T-414/08, T-415/08, T-416/08, T-417/08, T-418/08, T-419/08, T-420/08, T-421/08, T-422/08, T-425/08, T-428/08, T-432/08, T-433/08, T-434/08, T-442/08, T-451/08 and T-456/08 [rejected for being filed out of time]).

3 *Commission staff working document, Impact Assessment reforming cross-border management of copyright and related rights for legitimate online music services* (11 October 2005), p. 5.

4 In the US, copyright is regulated at federal level and the constitutional rule of pre-emption (Section 301 of the US Copyright Act) does not allow copyright or equivalent rights to exist at the level of individual States.

because of the limited "free-pass" granted by the Court of Justice for the offline world, CSs have never before had to deal with the Single Market. Thirdly, Internet and the digital technology have brought about fast and astonishing changes in the way music is demanded, disseminated and consumed. Changing consumer and commercial habits challenge existing rights' clearance schemes. This revolution requires a competition law re-assessment in light of a new borderless, online digital world and, of course and as always, the Single (online) Market.

The current music licensing process for online and transnational purposes is burdensome. Although the Commission's efforts to identify and act on competition concerns regarding CSs' management and licensing of musical works for use on the Internet can be traced back to the 90s,[5] some claim they have not been sufficient to bring competition to a market with little incentive to alter long-entrenched behaviour and haunted by myths from the offline world.

Copyright also raises issues regarding EU market integration. The achievement of a digital single market is the first of seven flagship initiatives in the Commission's Europe 2020 strategy.[6] Nonetheless, although a certain degree of harmonization has been achieved, copyright is still national and territorial. Territoriality has proven to be one of the tectonic faults in the interaction between competition law and copyright.

The timeliness and relevance of this topic is evidenced by the discussion on the impending General Court ruling on the *CISAC* decision and by recent Commission initiatives such as the Communication "*A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*".[7]

We propose to briefly overview and critically analyse the past and future application of EU competition law to online musing licensing,[8] how the Commission and CSs have dealt with the transition to the online world and, finally, to establish just how mad David Bowie was in 2002.

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5 E.g., the *Green Paper on Copyright and Related Rights in the Information Society* (COM/95/382).

6 http://ec.europa.eu/eu2020/index_en.htm. See also IP/10/225.

7 COM(2011) 287, 24.05.2011 ("*2011 Single Market for IPR Communication*").

8 Many competition concerns regarding the problematic behaviour of CSs vis-à-vis their members and users/licensees have been analysed under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), which will not be dealt with directly. Unless otherwise expressly stated, all provisions quoted are from the TFEU.

2. THE RIGHTS MANAGED AND THE ROLE OF COLLECTING SOCIETIES

2.1. Rights

There are a number of rights involved in the dissemination and use of music over the Internet. Also, since these rights are specific to each country, they can vary slightly. In Continental Europe, copyright is usually referred to as "author's rights". The essential function of copyright is to provide a source of remuneration for the author[9] and, in case of neighbouring rights,[10] to protect investment in the production of protected works and to stimulate creativity for the general public good.[11] Author´s copyright includes the right of reproduction[12] and the right of communication to the public/making available. In many Member States this latter right is part of a broader performance/public performance right, which also includes the right to authorise online deliveries of the work.[13] Performers and producers have analogous rights of reproduction and communication.

It follows that the clearance of musical works for online use is complex, since it may involve a multitude of rights (e.g., communication to the public, reproduction and making available) belonging to a multitude of right-holders (e.g., authors, composers, publishers, record producers and performers) in a multitude of countries, each with their own CSs.

As a rule, different CSs manage different categories of rights. In nearly all Member States each category of rights is managed by a single CS. As such, existing EU case law and Commission decisions on CSs do not always refer to the same rights. However, the conclusions drawn are usually also valid to

9 Case 62/79, *SA Compagnie Générale pour la diffusion de la télévision, Coditel and others v. Ciné Vog Films and others* ECR [1980] ECR 881, §14.

10 "Neighbouring rights" is the term used in several EU Member States to refer to autonomous rights which protect sound recordings, performances, broadcasts and other works or productions derived from the original intellectual creation.

11 Joined Cases 55 and 57/80, *GEMA,* [1981] ECR 147 §13; Case C-200/96, *Metronome,* [1998] ECR I-1953 §24; Case COMP/C-3/37.792, *Microsoft,* decision of 24.03.2004, §711.

12 Which covers reproductions of performances embodying protected musical works by mechanical, electro-acoustic or electronic means (including those made in the process of online distribution of a musical work), also known as mechanical rights – see Vinje & Niiranen, 2007: 2 and *Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services* (18.05.2005, 2005/737/EC) ("2005 Recommendation"), recital 5.

13 In *CISAC* (§41) the Commission defined it rather simplistically, but terminological hurdles may arise across Member States – see Ricolfi, 2007: 288.

the management of different rights, as the monopolist behaviour of CSs tends to be similar whatever the rights managed.

2.2. Role: "special" undertakings?

CSs are the interface between right-holders and users. By bypassing the inconvenience of individual management, CSs grant their members the comfort of a collective bargaining position vis-à-vis a plethora of stronger users (e.g., TV and radio broadcasters, cinema studios and online music providers) and the automated collection and distribution of royalties resulting from the use of their works. They also present such users with a centralised one-stop shop offer of national and international repertoires.[14]

The portfolio of rights signed over by authors for management is only part of a given CS's repertoire. Such repertoire is much broader and it also includes the repertoires of other CSs, through reciprocal representation contracts ensuring the international protection of rights. This creates a restricted network in which each CS is the unavoidable monopolistic intermediary within its national borders.[15]

It follows that collective management is not the same as copyright and that the existence of copyright is different from its exercise. As Mendes Pereira[16] suggests, one of the myths preventing a fully-fledged application of competition law to CSs is taking the part for the whole (the "synecdoche myth"), creating the illusion that collective management concerns the very existence of copyright and that any limitation of collective management is the same as limiting copyright itself. Although the *existence* of IP rights under national law is not challenged, the *exercise* of copyright may be affected by the prohibitions imposed by the Treaty[17] and may be limited to the extent necessary to give effect to Article 101.[18] This myth has been rejected by the

14 Mendes Pereira, 2002: 162.

15 Porcin, 2009: 57.

16 Mendes Pereira, 2006: 25.

17 Case 15/74, *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc,*. 31 October 1974, [1974] ECR 1147, §7.

18 Joined cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, 13 July 1966, [1966] *ECR* 299. See also *Musik-Vertrieb membran*, §12, where the Court says that, in respect of Article 36 of the Treaty, "*there is no reason to make a distinction between copyright and other industrial and commercial property rights*" – see Mendes Pereira, 2006: 25.

Court, by the Commission,[19] and even by right-holders[20] but it still seems to live on.

Another long-entrenched idea is that collective management is a cultural activity and therefore, to that extent, CSs are "special" undertakings to whom competition rules should apply differently – or not at all.[21] This idea is not only incorrect, it is without any legal foundation. Firstly, it naïvely confuses culture with economics. As Van Morrison[22] has put it, "*music is spiritual; the music business is not*". CSs are engaged in an economic activity[23] that is very important for the exploitation of music – nonetheless, they do not create it. Secondly, an overview of the TFEU leads to the conclusion that agriculture[24] and defence[25] are the only two economic activities to which the Member States have granted limited permanent exemptions from the application of the competition rules.[26] This was a political decision. Agriculture and defence therefore have normative hierarchy over competition rules (provided that a number of conditions are complied with). As Mendes Pereira notes, unlike the cases of agriculture and defence, Article 167 (ex Article 151 of the Treaty establishing the European Community "ECT") does not grant such normative hierarchy to the rules applicable to culture (or more precisely, to cultural activities entailing commercial transactions). As such, cultural issues may be relevant to policy considerations, possibly under Article 101(3);[27] however, this will not save a restrictive agreement which should otherwise be prohibited. Conversely, an agreement which does not restrict competition cannot be prohibited because of negative cultural consequences – such problems must be

19 Case COMP/C2/38.014, *IFPI 'Simulcasting'*, decision of 08.10.2002 ("Simulcasting"), §66.

20 As results from the facts underlying case COMP/C2/37.219, *Banghalter et Homem Christo v SACEM*, decision of 12.08.2002, where the musicians from techno group Daft Punk expressed to SACEM its desire to manage some of their rights directly.

21 The "*aristocratic myth*" referred to in Mendes Pereira, 2006: 24.

22 Famous Northern Irish singer-songwriter and musician.

23 In short, the characteristic feature of an economic activity for Article 101 purposes is the offering of goods or services on the market, where that activity could, at least in principle, be carried on by a private undertaking in order to make profit, regardless the legal status of the entity and with no need for a profit-motive or economic purpose. See Whish, 2008: 82-88 and Jones and Sufrin, 2008: 128-129.

24 Article 42, ex-Article 36 ECT.

25 Article 346(1) (b), ex-Article 296(1) ECT.

26 Mendes Pereira, 2006: 25.

27 As was the case in *Simulcasting* – see Mendes Pereira, 2006: 25.

dealt with under different rules.[28] It should be stressed that this results from a political option by the Member States. From a political standpoint, a different choice would be equally legitimate. However, as it stands the Treaty offers no legal basis for sidelining competition rules in favour of cultural aspects. This point is particularly relevant for the analysis of the *CISAC* decision.

A third myth relates to the supposedly altruistic or eleemosynary nature of CSs, which may be seen as providers of services of general economic interest exempted from the constraints of economic efficiency.[29] This is also incorrect. In fact, even though the Court as clearly stated that CSs are subject to Article 101[30] and are not covered by Article 106 (ex Article 86 ECT),[31] some CSs still insist in this idea.[32]

CSs are only considered providers of services of general economic interest insofar as they have been entrusted with the operation of such services by a Member State; and this is not the case where CSs manage private rights, have not been assigned any particular task by the State and are merely supervised by it.[33] Even if national laws entrust a CS with the performance of a public function, EU competition rules still apply insofar as they do not obstruct the performance of the tasks assigned – and, in principle, it can be argued that the prohibition of a concerted practice having the effect of preventing a CS from choosing the most efficient CS or CSs to represent its members abroad does not obstruct the performance of such tasks.[34] It can also be argued that reciprocal representation is always the result of an autonomous decision by each CS, even when its monopoly position and functions result from their national laws.[35]

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28 Faull & Nikpay, 2007: 185; for an alternative perspective, see Townley, 2009. The role of non-economic concerns within Article 101 is discussed below.

29 Mendes Pereira, 2006: 26.

30 Case 127/73, *BRT v SABAM* [1974] ECR 313 ("*BRT II*"), *Musik-Vertrieb membran*, Case 7/82, *GVL v Commission* [1983] ECR 483 ("*GVL*"), joined cases 110/88, 241/88 and 242/88, *Lucazeau v SACEM* [1989] ECR 2811 ("*Lucazeau*"), joined cases C92/92 and C326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH*, [1993] ECR I-5145.

31 *GVL* §32 and *BRT II* §23.

32 *CISAC* §256.

33 Turner, 2010: 233.

34 *CISAC* §259, Turner, 2010: 233.

35 *CISAC* §101.

To summarise, it should be concluded, for competition assessment purposes, that CSs are not "special" undertakings.

3. COLLECTING SOCIETIES IN THE TRANSITION TO THE ONLINE ENVIRONMENT

3.1. The offline environment

The application of EU competition law to CSs dates back to the 1970s and initially took place in the framework of an analogue, offline environment. When licensing was granted for use on physical premises, reciprocal representation agreements between CSs were found not to fall under Article 101(1) to the extent that i) there was no evidence of concerted action; ii) there was no evidence of exclusivity; and iii) the underlying economic justifications, i.e. the non-feasibility and economies of scale of replicating monitoring structures in foreign territories where they were already implemented by local CSs still existed.[36]

In this context, most CSs entered into reciprocal representation agreements containing territorial restrictions (a local CS grants licences regarding foreign CSs' repertoires only within its boundaries) and also membership restrictions (a right-holder can only assign its exploitation rights to its home CS). CSs were prevented from granting EU-wide licences for any part of their repertoires, either their own or represented. This solution was highly dependent on the analogue model that required both physical and geographical monitoring.

As a rule, only one CS manages a particular type of right on behalf of a particular kind of category of right-holder in a particular territory. The number of CSs increased in the second half of the twentieth century along with technology and the recognition of new rights[37] – but this increase occurred only in the number of CSs managing different rights and not in the number of CSs managing the same rights in each Member-State.[38] This market segmentation continued to grow within national borders. The structure created by the CSs led them to occupy monopoly positions by territorially dividing the market between themselves, thus eliminating any possibility of competition.

36 *Tournier* §24 and *Lucazeau* §13-14.

37 The above mentioned neighbouring rights.

38 It is noted, however, that in the USA different CSs (in particular ASCAP and BMI) manage the same rights and compete in the same territory for members and users – Vinje & Niiranen, 2007: 403.

Another consequence of the territorial limitations of traditional licensing is that the reciprocal representation agreements between CSs do not provide for the possibility of a CS granting a multi-territory license to a user including, not only its own repertoire, but also the repertoire of the CSs it represents (a multi-repertoire license). Such representation agreements permit a CS to grant a license to a user only for its own national territory if it includes the repertoire of a represented sister-CS. This means that the agreements between CSs allow for the grant of both mono- or multi-repertoire licenses but, in the case of multi-repertoire licenses, these must always be mono-territorial.[39]

Given that the applicable licensing model for online use (which potentially involves transmission to several territories) is determined by the country-of-destination principle,[40] the mono-territorial mandates resulting from strict territorial delineation of reciprocal representation have obstructed potential competitors in the administration of rights and curtailed the emergence of others means of such administration, including new ways of administering copyright by existing players.

3.2. The online environment

After the loss of tangibility and the end of territoriality, the rationale for CSs not to engage in cross-border competition and the justification for continued and unaltered existence of the network of reciprocal representation seems to no longer exist. The advent of the Internet absolutely changed the paradigm for copyright use, throwing the above mentioned legal construction into turmoil and reopening the discussion over the principles enshrined in *Tournier* and *Lucazeau*.[41]

Technical and economic barriers preventing CSs from entering the markets of other CSs have noticeably grown weaker. In our view, the main change brought about by the Internet and digital technology was the end of territoriality (caused by the loss of tangibility) and the impact of this on monitoring. In fact, with the possibility to monitor copyright use remotely using suitable software, monitoring becomes independent from human and physical factors. Former territorial restrictions based on the non-feasibility of replicating monitoring structures in foreign territories are no longer tenable.

39 *Simulcasting* §16.

40 Discussed below.

41 *CISAC* §54.

Wary for their long-established whip hand in the relevant markets, the CSs tried to adapt the instruments on which their dominant positions were founded, i.e. reciprocal representation agreements and membership restrictions, to the new borderless reality. This approach (to which Mendes Pereira refers to as "the perpetuity myth"[42]) was based on denying the substantial differences between the online and the offline worlds, attempting to perpetuate the *status quo* of the offline world. However, as authors[43] note, this denial ignores certain patent realities.

Firstly, it ignores the change of the economic context. The adoption of unjustified geographic restrictions in order to sustain monopolies clashes directly with the EU's fundamental freedoms (free movement of goods and persons, freedom of services and capital). It cannot, of course, be denied that the licensing and monitoring of copyright, even for online use, will always require human participation and a certain degree of differentiated input at national level. There is however no reason to believe that this aspect is more significant in relation to copyright licensing than in relation to a number of other cross-border economic activities. Also, as noted by the Commission, in the online environment "*there is no legal or practical requirement that only the collecting society located where the exploitation takes place can grant a copyright licence.*"[44]

Secondly, this attitude ignores technological progress. To a certain extent, this is also due to a lack of incentives, which are, in turn, a consequence of a lack of competition. Technologically evolved CSs (particularly in the area of monitoring) could play a major role as a rehabilitated interface between authors and users. However, there seems to be no incentive for them to do so as long as both their inputs and outputs are guaranteed by their monopoly position.

Thirdly, it denies the changes in the industry demand. Information, entertainment, art and communication are now available to consumers on ever-evolving online and increasingly wireless and converging supports. New, wider and more flexible licenses and licensing methods are now crucial. The territorialised system is unable to meet the needs of those who wish to obtain cross-border licences. By requiring online providers to obtain rights clearance from each national CS in all countries where the work is accessible (due to the

42 Mendes Pereira, 2006: 26.

43 Vinje & Niiranen, 2007: 404, Mendes Pereira, 2006: 26-27.

44 *CISAC* ¶160.

country of destination principle[45]), the system not only hinders competition but also prevents different forms of distribution and use of music from developing, to the clear disadvantage of right-holders. Online music exploitation could also bypass the traditional physical methods of distribution, foster the advent of new music products and broaden audiences. To summarise, it could result in a dynamic response to the technological progress as it materializes and update it to meet demand.

Fourthly, the failure to adapt to new technological opportunities also results in a constantly growing – but unmet – final consumer demand. Music consumers, like the consumers of any other product, obviously desire broader, legally safe choice at a lower cost. However, innovative services and potential new products are being curtailed. It is also apparent that the current CSs licensing framework may be one of the causes of the absence of legal alternatives, at a retail level, to counterbalance increasing piracy and illegal downloading.[46]

Finally, this attitude denies authors a fair share of this technological progress. If real competition existed, authors would favour the most efficient, innovative and revenue-wise CSs instead of being fated to be managed by their national CSs. Technology may give authors better control of the use of their rights either by CSs or, possibly, via improved individual management tools (e.g., for licensing and distribution).[47]

These issues are currently the subject of much political debate, as shown by the multiple interventions – not always aligned, as it will be discussed – of several European Commissioners. They have also been referenced in economic literature.[48]

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45 According to this binding principle, the act of communication to the public of a copyright protected work takes place not only in the country of origin (emission-State) but also in all the States where the signals can be received (reception-States). It is opposed to the country-of-origin principle according to which the act of communication to the public of a copyright protected work takes place in the emission-State only. In the framework of a reciprocal agreement, this means that rights clearance is effected in one country but remuneration is due in all countries where the simulcast signal can be received (*Simulcasting* ¶21).

46 As established by the 2009 *Online Commerce Report* (below).

47 Ricolfi, 2007: 293.

48 Stressing how the monopoly power and efficiency benefits provided by CSs to right-holders are fast fading away, see Jenny, 2007. Identifying the flourishing of digital rights management (DRM) systems as a monitoring alternative and the consequent rights' management by music publishers, see Erber, 2009.

4. *CISAC* AND ONLINE MUSIC LICENSING UNDER ARTICLE 101

Copyright licensing of online services has so far not been addressed by any EU Court judgment. It is nonetheless currently before the General Court, as CISAC (the International Confederation of Collecting Societies of Authors and Composers) and 22 CSs have filed in late 2008 appeals against the *CISAC* decision.

However, this issue has been a concern of the Commission for some time. The Commission's efforts range from the 1995 *Green Paper* to the recent 2011 *Single Market for IPR Communication*.[49] There have been three landmark Commission decisions on the control of reciprocal agreements: the pioneering *Simulcasting*,[50] *Santiago Agreement*[51|52] and *CISAC*.

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49 Other important initiatives, which will not be discussed in detail, include: i) European Parliament's *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (15.01.2004-2002/2274(INI)); ii) *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market* (16.04.2004 – COM/2004-261) ("*2004 Commission Communication"*); iii) *Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright* (7.07.2005); iv) *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 Recommendation"); v) *Commission Staff Working Document – Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services* (11.10.2005 – SEC(2005)1254) ("Commission Impact Assessment"); vi) *Monitoring of the 2005 Music Online Recommendation* (07.02.2008, available at http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf); vii) *Online Commerce Roundtable – Report on Opportunities and barriers to online retailing* (May 2009, available at http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf) ("Online Commerce Report"); viii) *Public Hearing on the Governance of Collective Rights Management in the EU* (23.04.2010, available at http://ec.europa.eu/internal_market/copyright/management/management_en.htm); ix) *Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market* (13.07.2011 COM(2011).

50 *Simulcasting* was the first decision by the Commission regarding the collective management of copyright for online commercial exploitation of music. The purpose of the agreement was to facilitate international copyright licensing of musical works' rights to radio and TV broadcasters wishing to engage in simulcasting (transmission of the signal simultaneously both via the traditional means [air, cable, satellite] and the Internet), by creating a new multi-territory and multi-repertoire license. The Commission focused its competition concerns on two issues: i) territorial restrictions and ii) the amalgamation of the copyright royalty and administration fees in the tariffs charged to the users. As a result of the discussions held between the Commission and the parties, the original model agreement was amended twice. The foremost advance in *Simulcasting* is the acknowledgement of the end of territoriality. It also sums up and clearly explains the important principles laid down in previous Commission decisions and Court judgments regarding the relationship between copyright and competition law, adapting these existing principles to the online environment. For a thorough analysis of this decision, see Mendes Pereira, 2003, and Mestmäcker, 2007: 15.

51 Notification of cooperation agreements case COMP/C2/38.126, *BUMA, GEMA, PRS, SACEM* (OJ C 145 of 17 May 2001) ("Santiago Agreement"), p. 2; IP/04/586 of 3 May 2004; *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 200 of 17 August 2005), p. 11.

CISAC can be regarded as reflecting the revised and updated Commission enforcement approach. CISAC had set up a model contract, which was a non-mandatory model for reciprocal representation agreements between CISAC's members, especially for the licensing of public performance rights (including online use) of musical works. In 2006, the Commission sent a Statement of Objections to CISAC and its EEA-based CSs, setting out its concerns that certain clauses of the model contract contained anti-competitive elements.

In its July 2008 decision, the Commission found that the clauses on membership restrictions (preventing an author from choosing or moving to another CS) and territorial restrictions were in breach of Article 101(1). The territorial restrictions included an exclusivity clause (by which a CS authorised another CS to administer its repertoire in a given territory on an exclusive basis) and also a concerted practice among all CSs resulting in a strict segmentation of the market on a national basis.[53]

The CSs did not put forward arguments specifically addressing the application of Article 101(3) to the membership and exclusivity clauses. Accordingly, the decision only considered whether Article 101(3) could apply to the concerted practice and found that the said co-ordinated approach amounting to a systematic domestic territorial restriction was not objectively necessary in order to ensure that CSs grant each other reciprocal mandates.[54]

As in previous decisions, the Commission took note of the end of territoriality wrought by the Internet, but updated the reasons why a local presence is not required in order to monitor the use of licences for online

52 The *Santiago Agreement* was notified to the Commission in April 2001. The purpose of this model agreement was to allow each of the participating CSs to grant "one-stop shop" copyright licenses, which include the music repertoires of all societies (multi-repertoire) and which were valid in all their territories (multi-territory), to online commercial users, thus supplanting the traditional licensing framework that requires commercial users to obtain a license from every single relevant national CS. However, each CS was given absolute exclusivity in its own territory regarding the grant of the multi-territorial/multi-repertoire licenses. The existence of a "most favoured nation" clause would also have allowed a guarantee that all CSs would be subject to the same territorial limitation, thus leading to an effective lock up of national territories. This was found by the Commission to infringe the EU competition rules. The *Santiago Agreement* expired at the end of 2004 without being renewed, resulting in a return to traditional country-by-country licensing. The main reason for this was that CSs were reluctant to abolish the customer allocation/territorial exclusivity clause (*Commission Impact Assessment*, p.9). The relevance of *Santiago* (along with showing that, with the end of territoriality brought about by the Internet, there is no legal or practical requirement that only the CS in the territory of the use can grant a licence) is that it reinforces the idea that the granting of multi-territorial licences is viable and that local presence in the countries of use is not deemed to be necessary.

53 *CISAC* §74.

54 *CISAC* §229-255.

rights.[55] The Commission concluded that CSs are technically capable of issuing multi-territorial licences and that the only reason precluding them from doing so is uniform and systematic territorial delineation. *CISAC* clearly identifies the forms of competition affected and decouples the existence and territoriality of copyright from its exercise and territorial restrictions.[56] The Commission also analysed aspects regarding cultural diversity in Europe and the impact on the survival of small CSs and local repertoires.[57]

The decision neither prohibits the reciprocal representation system as such, nor the possibility of CSs introducing certain territorial delineations and commercial conditions in their representation contracts. What *CISAC* does is to prohibit co-ordination that amounts to a systematic territorial delineation according to national borders[58] and outlines the harmful effects of the combined implementation of both kinds of restrictions (membership and territorial), notably at the level of right-holders. It also identifies how territorial delineation cements the existing structure of the market and excludes other forms of multi-repertoire licensing, thus leaving no scope for new competitors that are capable of administering the copyright in question, or for new ways of administering copyright by existing players.[59]

To summarise, *CISAC* provides a detailed picture of how the practices at issue asphyxiate competition in the markets concerned. *CISAC* also states this is particularly serious because only CSs are realistically able to enter each others' national markets.[60] However, despite its thorough analysis of the facts and strong-worded description of the effects on competition, the Commission did not impose any fines, on the grounds that these would have penalised the right-holders represented by the CSs.[61] The Commission only required the CSs i) to put an immediate end to the infringements constituted by the membership and exclusivity clauses in the representation agreements, ii) to cease the concerted practice and iii) to refrain from repeating any act or

55 *CISAC* §189-194.

56 *CISAC* §111-122.

57 *CISAC* §94-99.

58 *CISAC* §200-221.

59 *CISAC* §206-212.

60 *CISAC* §254.

61 MEMO/08/511 of 16 July 2008.

conduct having the same, or similar, object or effect as those of the restrictive clauses and the concerted practice.

The relevance of *CISAC* is evident. Although it lacks the groundbreaking innovation of *Simulcasting, CISAC* reflects the Commission's *acquis* over 15 years of decisions, initiatives and internal studies on online music licensing, updating it in light of the most recent commercial and technological developments. *CISAC* is the ultimate compilation of arguments and competition concerns. Moreover, *CISAC* will now provide the General Court with an opportunity to render a judgment on this subject for the first time since the online revolution.

Nevertheless, as discussed below, *CISAC* also raises serious doubts as to the role and relevance of EU competition law and the Commission's enforcement for the resolution of the concerns identified.

5. ANTITRUST AND ONLINE MUSIC LICENSING AFTER *CISAC*

5.1. Soft-handed approach by the Commission in *CISAC*

Insofar as it attracts pressure from non-competition areas, the current topic raises sensitive questions on the scope of Article 101(1) and Article 101(3). We will argue that a pure competition assessment should only take place in the bifurcated framework of Article 101, in which the reference to "*prevention, restriction or distortion of competition within the common market*" involves two kinds of concerns: i) consumer welfare and competitive economic efficiencies and ii) market integration.[62] Such assessment consists of an identification of the agreement's anti-competitive object or effects.

Once this has been done, it can be determined whether these are outweighed by any pro-competitive effects. This balancing operation shall be conducted exclusively within the framework established by Article 101(3),[63] as doing so under Article 101(1) cannot easily be harmonised with the current schema of Article 101.[64] Nevertheless, Article 101(3) is mainly about efficiency gains.[65] In principle, non-economic considerations are irrelevant.[66]

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62 *Commission's Notice Guidelines on the Application of Article 81(3) of the Treaty* (2004), OJ C101/97 §13.

63 *Article 81(3) Guidelines* §11.

64 Odudu, 2006: 128-174, Whish, 2008: 152-157, Jones & Sufrin, 2008: 268-277.

65 *Article 81(3) Guidelines* §48 and 59-72.

66 In our analysis, we will endorse the majority view (the "orthodox position", per Townley, 2009: 11) that economic efficiency should be the primary goal of competition analysis. This is, however, a controversial

This framework was clearly applied by the Commission in both *Simulcasting* and *Santiago*. The existence of multi-territorial, multi-repertoire one-stop shops can only be achieved by allowing a certain degree of collusion between the existing CSs. Accordingly, some restrictions to competition identified under Article 101(1) can be tolerated *ex vi* Article 101(3), to the extent that their efficiencies outweigh their anti-competitive effects. Those that fail this test are not tolerated.

In *CISAC*, the Commission seems to have engaged in a more holistic, but more confused, approach to Article 101(1). In fact, as noted by Townley, non-economic goals were considered in this decision.[67] We believe that a strict competition assessment by the Commission would have led it to adopt a different and more assertive decision.

Firstly, after raising compelling arguments regarding the infringement and its effects, the Commission did not impose any fines. The Commission is not, of course, bound to impose fines as a deterrent measure. However, what is disturbing is not the lack of fines, but the underlying reasoning. This is not discussed in the decision, only in the accompanying FAQs document.[68] Two reasons are given:

i) the CSs argued that imposing fines on them would result in penalising the authors and composers represented; and
ii) the fact that several CSs have started, since the proceedings were initiated, to remove restrictive clauses from some of their reciprocal agreements, thus showing a certain degree of willingness to address the Commission's concerns.

The first reason is puzzling. The Commission seems to accept the confusion between the CSs and their members, thus resuscitating this outdated myth. CSs are autonomous undertakings, bound to a duty of transparency under which copyright royalties are accounted separately from their own administration fees in the tariffs charged to users, as seen in *Simulcasting*. If the Commission

issue. The approach adopted by the Commission in its *Article 81(3) Guidelines* has been criticised for being out of synch with its own decision-making practice and as not fully consistent with EU Courts case-law, which seem to have considered non-economic goals under Article 101 in the past. For an updated view on this subject, see Townley, 2009, where an alternative position is adopted, suggesting that public policy considerations are relevant under Article 101.

67 Townley, 2009: 5, fn. 32.

68 MEMO/08/511, cit.

wants CSs to compete on the basis of administration fees and efficiency, it could not have accepted such an argument. The Commission's acceptance of this argument is tantamount to accepting that any competitive efforts would also be to the detriment of right-holders. This is a serious step back from *Simulcasting*. Without any further explanation, the idea conveyed is that right-holders are being held to ransom and that the Commission is dangerously playing along with this situation. It is unclear why the Commission accepted this argument. Fining a cartel is also to the detriment of shareholders of the infringing companies – and this has never held the Commission back. This different and more favourable treatment of CSs vis-à-vis other undertakings is an undesirable and unjustified discrimination.

The second reason is also confusing and amounts to an unsafe precedent. The Commission has adopted guidelines involving a two-step methodology of setting fines for Article 101 infringements. First it fixes a basic level and then it may adjust this amount up or down.[69] "*A certain degree of willingness to address the Commission's concerns*" by a limited number of CSs by removing restrictive clauses from "*some*" of their reciprocal agreements does not even amount to a mitigating circumstance under the guidelines,[70] let alone the non-imposition of fines *ab initio*. Moreover, it is also evident that many CSs did not remove the clauses in question. According to the grounds presented in their appeals,[71] many CSs do not even acknowledge that they should do so. Even if some CSs have removed the offending clauses, this removal is not the same as bringing the infringement to an end. Furthermore, Article 101 may apply to agreements which are no longer in force if they continue to produce effects, as the decision itself recalls.[72]

Secondly, it should be stressed that the Commission did not apply Article 101(3). Nevertheless, the soft-handed measures adopted lead us to believe that some kind of balancing influenced by non-efficiency cultural concerns was undertaken under Article 101(1).[73] It is doubtful that such non-competition concerns should be given any weight at all. However, if they are to be considered,

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69 *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02).

70 Op. cit. §29.

71 Discussed below.

72 *CISAC* §263.

73 Townley, 2009: 159, fn. 132.

only their economic aspects should have been balanced under Article 101(3). The Commission seems to have engaged in the "rule of reason" approach which it has repeatedly rejected in the past.[74] In fact, notwithstanding previous Court of Justice judgments on "effect" (starting with *STM*[75]) which, to a certain extent, kept the door open for a flexible interpretation, the General Court and the Commission clearly refuted the existence of a "rule of reason" under Article 101(1) in *Métropole*.[76]

Thirdly, the remedies imposed are of somewhat uncertain implementation. Given that the Commission requires bilateral review of territorial delineation, each CS' compliance with these remedies is put beyond its own independent capacity and made dependent on 23 other CSs. CSs are unable to unilaterally change their reciprocal agreements. To further complicate matters, all CSs will still be inter-dependent in the offline environment.

It is also interesting to consider the grounds pleaded in the 23 appeals filed and in the oral hearings that took place between September and November 2011. Although sharing some ideas (notably regarding alleged procedural faults), CSs have pleaded widely diverging grounds, some of them surprisingly outdated. Indeed, it is argued that: CSs' offline and online activities must not be treated differently; territorial delineation constitutes the corollary of the exclusivity rights held by authors and composers, and an essential and necessary element of the international collective protection of those rights; territorial delineation is an expression of the generally recognized principle of territoriality in copyright law; intellectual and artistic works protected by intellectual property are not the same as other goods and services; the decision is in reality aimed at the mutual annihilation of the CSs, by distorting healthy competition, laying down unequal market terms and creating inevitable clashes between CSs, leading them to suicide; the alleged concerted practice on territorial delineation is not illegal because it concerns a form of competition that is not worthy of protection; CSs are entrusted with the operation of services of general economic interest and EU competition law obstructs the performance of their tasks; Article 167 (ex Article 151 ECT) is violated.

74 *Article 81(3) Guidelines* §11.

75 Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH* [1966] ECR 234. This trend was afterwards followed by the ECJ in several other landmark decisions. For an extensive list see Jones & Sufrin, 2008: 211.

76 Case T-528/93, *Métropole Télévision SA v. Commission* [1996] ECR II-649.

It is therefore clear that CSs are essentially rehashing the traditional offline world arguments. Virtually no new online argumentation is developed. The change of paradigm brought by the Internet is apparently ignored in order to perpetuate the existing monopolistic territorial framework.

5.2. Competition law enforcement *vs* legislative intervention

Regardless of the merits or flaws of the *CISAC* decision, a deeper analysis may reveal that EU competition law is itself of limited use for the issue at hand. As noted by Jenny, it should be queried whether competition law enforcement has, somewhat inappropriately, been used to try to solve the CSs' governance problems and whether other tools are not more appropriate for this task.[77]

The limits to the Commission's action under Article 101 have been noted. The most effective and far-reaching competition law tool is Article 101(3), but it cannot provide a global solution. Competition law enforcement is primarily a deterrent device, suitable to prevent and punish anti-competitive behaviour. It creates disincentives. However, sometimes disincentives may not be enough for effective solutions to emerge. These also require incentives and a different kind of intervention.

Even a more "internal market driven approach" (such as that enshrined in the *2005 Recommendation*[78]) and the new pan-European licensing platforms mentioned in the *2008 Monitoring Report*[79] can, in turn, give rise to new competition concerns. Such platforms offer multi-territory but mono-repertoire licenses (often limited to a given record company). Even where they offer multi-repertoire licenses (limited to the small number of CSs belonging to each one), this offer will still be dependent on the will of the CSs – much as it previously depended on the reciprocal agreements framework. It can also be debated whether a number of CSs really have the incentives and know-how

77 Jenny, 2007: 366.

78 In October 2005 the Commission adopted a Recommendation (prepared by DG Internal Market and Services and not DG Competition) endorsing a policy option (the so-called Option 3) giving right-holders the option to authorise a CS of their choice to manage their works across the entire EU. This solution would be based on the existing framework of reciprocal agreements and would favour competition among CSs. However, the Commission departed from the position it has previously adopted in the *2004 Commission Communication*, when it expressly stated that reliance on soft law did not seem appropriate and that it intended to propose the adoption of a legislative instrument. On this topic, see Mendes Pereira, 2010: 820.

79 This report concluded that the *2005 Recommendation* had been endorsed by a number of CSs, music publishers and user groups, although it recognized the natural divergences between these economic operators. These developments were embodied by a number of new EU-wide licensing platforms jointly developed by EU CSs, such as *Alliance Digital*, *ARMONIA*, *CELAS*, *PEDL*, *SACEM-UMPG* and others.

(notably regarding enforcement) to license their repertoires on EU-wide basis. Therefore, an EU "omni-repertoire" would still require licensing online rights with a maze of entities with non-substitutable repertoires.[80]

Both before and after *CISAC*, commentators discussed a number of possible alternative scenarios for the future of online music licensing. For some, an oligopolistic CSs market is the probable outcome.[81] Others stress the role of digital rights management (DRM) technology,[82] whether operated by CSs or not, the bypassing of CSs by certain right-holders or the spin-off and empowerment of monitoring and enforcement activities.[83] Other solutions such as so-called "ISP licensing"[84] have also been put forward.

We believe that the future lies in combining EU multi-territory and EU "omni-repertoire" licences. The need for multi-territorial licenses is addressed in *CISAC*, but solving territoriality is perhaps only part of the problem. Access to global repertoires is essential and may even be considered an essential facility.[85] However, *CISAC* also revealed that the relevant markets are saturated, and that only CSs are realistically able to enter each other's national markets.[86] Their long held monopolies created barriers to entry that newcomers cannot overcome. Any evolution towards the mentioned scenarios would therefore again depend, at least partially, on the action CSs. Nevertheless, as the past as shown, CSs lack the incentives to move forward rapidly in order to respond to demand, in particular when some of their monopoly positions result from national legislation.

EU competition law, by itself, may not be enough to deal with these problems. As a deterrence device, its enforcement would not be the proper tool to create incentives to foster the build-up of a new licensing system if the existing one were simply abolished for being contrary to EU competition law.

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80 Ricolfi, 2007: 296, Porcin, 2009: 60.

81 Frabboni, 2006: 17, Ricolfi, 2007: 297.

82 Ricolfi, 2007: 297, Mendes Pereira, 2010: 828. Also Erber, 2009.

83 Porcin, 2009: 64.

84 "ISP licensing" is the concept of charging a licensing fee on the monthly bill of every Internet subscriber for file sharing and distributing this money to right-holders. See Masur, 2010.

85 At broadcaster level, for example, partial repertoire would mean that broadcasters could be forced to operate in partial illegality or limit music use, and to spend time and resources scrutinizing media contents in order to analyse each embedded music piece.

86 *CISAC* §252.

In fact, it is also noted in *CISAC* that, 19 years after the *Tournier* and *Lucazeau* rulings, the majority of the EEA CISAC members have not yet modified their reciprocal representation agreements in compliance with these judgments, even though they all recognise the illegality of exclusivity clauses.[87] To this extent, *CISAC*'s soft remedies may perhaps be interpreted as the Commission throwing in the towel, doubting that a stronger competition law approach could indeed be implemented.

This also seems to be the reason why the Commission feels compelled to consider non-competition concerns. Mindful that music and culture are too important at the cultural and political levels, stronger measures against the current framework could be very harmful in the absence of positive incentives that ensure the (re)construction of a new, competition law-compliant, online licensing framework.

In our opinion, what the evolution of the Commission's assessment of online music licensing under Article 101 shows is that only a concerted, structural and global legislative response, creating incentives and involving IP, internal market and competition aspects, would be capable of dealing with the competition issues identified. Several authors have already expressed this view.[88] The recent study by the Spanish Competition Authority on collective management also reaches the conclusion that legislative intervention (notably at copyright level) is of key importance.[89] In fact, as recently endorsed by Hugenholtz in the framework of the recast EU copyright discussion, territoriality is the Achilles heel of the *acquis* regarding copyright and not even the perfect harmonization of national copyright laws can solve it – only a codified European copyright can.[90]

The country of destination principle, currently in force and which some authors[91] also regard as inconsistent with the internal market, is yet another example of an issue that competition law enforcement is not capable of dealing with. An EU-wide approach would also prevent unequal competition

87 *CISAC* §144.

88 Vinje & Niiranen 2007: 412; Mendes Pereira, 2010: 831.

89 *Informe sobre la Gestión Colectiva de Derechos de Propriedad Intelectual* (2009) 84-87, available at http://www.cncompetencia.es/TabId/105/Default.aspx?contentid=260171.

90 Huhgenholtz, 2009: 307.

91 Vinje & Niiranen, 2007: 413.

conditions between CSs arising from differing national requirements and obligations regarding the operation of their services.[92]

The debate on how such legislative measures could be implemented has already commenced following the publication of the *2011 Single Market for IPR Communication*, where the Commission expressed the need to adopt an IPR policy based on "enabling legislation", in order to create a legal framework allowing multi-territorial and pan-European licensing by European "rights brokers", while also suggesting the adoption of an European Copyright Code.[93] However, this Communication is quite vague and it is not clear how this "one-size-fits-all solution" will in practice solve the existing problems or how it will be implemented against the current framework.

It must also be recalled that collective licensing is itself subject to different sets of rules, enforced by different Commissioners and Directorate Generals – Digital Agenda, DG MARKT and DG Competition – each defending different and sometimes conflicting interests. As such, the effective implementation of the Commission's final position will require a difficult balance between these three conflicting views, which to some extent explains why a clear-cut solution has yet to emerge.[94]

As such, the anticipated General Court judgment in *CISAC* could provide an excellent opportunity for such overall solution to be explored. However, it will take tremendous political will for the General Court to adopt a landmark ruling that is able to globally analyse the various political, cultural, internal market and competition issues involved.

In any event, we believe that such an alternative legislative framework should be market driven and designed for the benefit of right-holders and commercial users. To this effect, some commentators advocate the need of a truly independent regulatory authority with jurisdiction over the CSs.[95] Another possible scenario being discussed is a single pan-European CS.

92 Mestmäcker, 2007: 352.

93 *2011 Single Market for IPR Communication*, 10-11.

94 See also Mendes Pereira, 2010: 793.

95 Vinje & Niiranen, 2007: 412

6. CONCLUSION: WHAT ROLE TO COMPETITION LAW?

Copyright itself seems to be out of tune with the demands of online music licensing. The online world has forced copyright to a crossroad, but this is a tuning problem that cannot be solved by competition law.

The Commission is not yet internally ready to deal with the problems posed by online music licensing. The efforts of Digital Agenda, DG COMP and DG MARKT officials seem to be more parallel than convergent. In musical terms, they could be singing different songs about the same subject. This is another tuning problem that only a stronger (political) conductor could solve.

It is also clear that online music licensing is out of tune with competition law. CSs presently face a twin challenge: the reality of the Single Market and the inevitability of the virtual world. While most other economic activities in the EU digested the consequences of the Single Market a long time ago and are now gearing up to face the challenges posed by the online world, CSs, having remained unaffected by the construction of the Single Market, have found themselves in a position where they have to face both challenges simultaneously.[96] EU competition law infringements, as shown above, cannot be justified by the "internal copyright issues" mentioned above. The pivotal role of CSs as the interface between supply and demand and in promoting right-holders' best interests cannot be squared with their current Peter Pan-like attitude, refusing to grow up from the offline world to the online world. Nonetheless, a certain degree of concerted action will always be necessary in order to create multi-territory and multi-repertoire licenses. Article 101 would not even be applicable in the absence of such agreements. The safe harbour and flexibility provided by Article 101(3) are based on economic efficiency, proportionality and necessity. In theory, solutions passing that test would be a reasonable way for CSs to facilitate the emergence of new multi-territory and multi-repertoire products. However, as we have seen, the CSs prefer not to innovate (the *Santiago Agreement* was not renewed, for example) and seem unwilling to risk their monopolies.

This shows that EU competition law, by itself, may not be enough. Competition law is an effective deterrent mechanism. However, it is not sufficient to deal with all problems that would result from its strict enforcement regarding the current CSs online licensing framework. It does not create incentives to foster the build-up of a new licensing system if the existing were

96 Mendes Pereira, 2006: 27.

abolished. Moreover, this would lead to several important non-competition concerns, which must be dealt with outside Article 101.

Nevertheless, the Commission's assessment under Article 101 should not be unfocused by its limitations. Collective administration of copyright should not be treated differently from any other horizontal arrangement between competitors.[97] Antitrust analysis has its particular role to play in the overall solution to the problems identified, one which benefits from remaining impermeable to non-competition concerns. Importing such concerns into Article 101 would vitiate the purity of antitrust analysis and weaken its essential deterrent role.

Such non-competition concerns must, of course, be addressed. They are fundamental. However, the interweaving of competition and non-competition concerns should be explored outside Article 101. In particular, the extent that such non-competition concerns can overrule competition remedies is an issue to be discussed outside of the boundaries of EU competition law. Although competition law is only one of the battlegrounds on which this battle has been fought without producing a clear winner,[98] we believe there can be no other role for competition law, either now or in the future. To this extent, *CISAC* may be a very dangerous manoeuvre, in that it diverges from the pattern initiated by *Simulcasting* and from a clear application of Article 101(1) and Article 101(3).

That being said, it must also be concluded that copyright right-holders and users could benefit from a regulatory intervention in a situation in which free market and the Commission's enforcement measures (especially *CISAC*) have failed to provide effective solutions. Indeed, it seems that no one has thought of asking right-holders directly for their opinion on these matters. Bowie summed it up when he said: "*Music itself is going to become like running water or electricity.*" Both of these markets are regulated markets. Hats off to Bowie?

97 Katz, 2009: 468.

98 Hugenholtz, 2009: 311.

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