

# Managing Copyrights in the Cultural Industries

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## **Abstract**

The paper considers recent policy changes to the copyright law and its management, particularly digital rights management, and asks how they can be evaluated. Copyright law is perhaps the most important policy tool affecting the cultural industries and it provides the regulatory environment in which all enterprises in the music, film, book publishing, broadcasting and other media industries function. Digitalisation is now affecting all art forms and the management of rights is becoming an issue for arts managers as well. In Europe, the European Commission is seeking to increase competition into rights management but it is argued this may lead to restriction of cultural diversity and other cultural policy aims.

## **Keywords**

Copyright, digital rights management, cultural industries, cultural economics.

## **Introduction**

This paper considers recent policy changes relating to the management of copyrights (authors' rights and neighbouring rights) of artists, performers and other copyright-holders and asks the question whether these changes are justifiable. Copyright law is perhaps the most important policy tool affecting the cultural industries and it provides the regulatory environment in which all enterprises in the music, film, book publishing, broadcasting and other media industries function.<sup>1</sup> As such, it enters the lives of most arts managers, particularly with the spread of digitalisation.

Collective rights management (CRM) of copyrights has been established for over 100 years. It started in the music business with composers collectively (and spontaneously) organising to defend their right to control the public performance of their work, expanded with the development of sound recording to the control over their 'mechanical' rights and has been extended through legislation to performers' public performance and rental rights. In the publishing industry, photocopying was the spur for CRM. In some cases, CRM was a response to compulsory licensing (the over-riding of the author's exclusive right) and its accompanying compensation through equitable remuneration; in others, it was the result of legislative intervention where rights owners were deemed to be unable to exercise their rights individually (eg. performers). Digitalisation presents the prospect of Digital Rights Management (DRM), which in principle would enable individual rights owners to manage their own rights. The question whether CRM continues to merit the support it currently receives through statutory measures is now being considered by the European Commission (EC); moreover, the collecting societies, which are mostly monopolies, now face the application of competition law to break

their power on the market for the service of administering copyrights due to the potential of DRM (see Appendix).

It seems that the possibility of digital rights management of digital content has caused a significant change of policy concerning the administration of rights: previously, it was held that CRM by collecting societies should be supported and encouraged, have now become persuaded that the monopoly power of the collecting societies needs curbing. This reaction seems in part to be connected to claims by the sound recording industry that CRM has prevented them from adopting online distribution (a claim that many analysts dispute). The EC is thus now seeking to undo the previously favoured empowerment CRM offered to authors and performers and by promoting DRM and encouraging competition between national collecting societies.

The impetus for changes to adapt copyright law to digital technologies comes from the World Intellectual Property Organisation (WIPO), whose so-called 'Internet Treaties' have led to changes in the laws of all developed (and many less developed) countries. In Europe, changes in each country are mandated via the European Union and its Commission Directives. Analysis of documents issued by these organisations shows that they emphasise economic goals for copyright and the benefits of increased competition. From the theoretical point of view, it is questioned whether the economic model of competition that appears to underlie these legal changes is appropriate. Broader societal and cultural objectives also must be met, such as the promotion of creativity, as well as the commercial viability of arts organisations and enterprises with their need to keep down the costs of copyrights. Good management of rights is as vital to authors, artists and performers as it is to the organisations and businesses in the creative industries.

This research is part of an ongoing project concerned with the effect of digitalisation on rights management in the arts and cultural industries. It is too early to say what the overall conclusion will be. That depends to a large extent upon emerging business models adopted by the organisations and businesses involved. However, the question of how to evaluate copyright policy can be discussed at this point. My position (which I have spelled out in earlier work (Towse, 2001a), is that copyright policy should be regarded as part of cultural policy and assessed by the criteria of cultural economics. That means we assess measures by their ability to fulfil the aims of cultural policy. I apply this to assessing the effect of a recent change in copyright law as it affects one area of copyright, that is, performers' rights.

The topic is of concern to almost every arts organisation and arts managers have had to quickly come to terms with the new elements of copyright law that arise alongside digitalisation; for example, many museums are being encouraged to digitalise images their collection but find the copyright aspects hard to fathom. Unfortunately, this paper will not help with those problems; what it does is do offer some economic insight into the pros and cons of recent changes to copyright law.

## **Economics and Copyright**

Even up to the mid 1960s, the few economists working on copyright were still considering the question posed in the Great Patent debate of the preceding century: is statutory patent and copyright law – the grant of monopoly to inventors and authors – needed to stimulate innovation and creativity? Most concluded it was not, citing various reasons, first and foremost the aversion to monopoly but also others, among them (in modern terminology) that, as the author or

publisher was the first to market, statutory intervention was not necessary to provide an incentive to create and publish works of art, music and literature. An important economic insight is that copyright is a system for getting the consumer to pay for the incentive to the author through the higher prices that copyright facilitates – Macauley had called it ‘a tax on readers for the purpose of giving a bounty to writers’ already in 1841.<sup>2</sup> That must be borne in mind in selecting policy measures to achieve cultural objectives; however, it is not often discussed. By contrast, the alternative incentive system of subsidy to artists is financed by taxpayers, only some of whom are consumers of the goods and services whose production they pay for. Those who are sceptical of subsidy to the arts may well bear this point in mind (and *mutatis mutandis*, copyright sceptics might do so too!).

It was perceived by economists early on that enacting copyright law was not the only means of encouraging the creation of works of art since authors (artists) could also be rewarded by prizes or other forms of state patronage (nowadays, subsidy).<sup>3</sup> Such patronage would directly benefit the artist, in contrast to the copyright system that did so indirectly via the creative industries and their reliance on success in the marketplace.

Of course, by the mid 1970s, the development of copying technology, starting with photocopiers and VCRs, had altered the market for information goods by making copying cheap and easy, though not yet producing perfect substitutes for the original; subsequently digitalisation overcame the problem of the inferior quality of copies and a new wave of home-based copying equipment opened the floodgates of mass unauthorised copying. Economists in the 1970s and 80s, rather than continuing to question the case for copyright as an incentive to create, began to analyse the trade-off between the net benefits to society of the scope and duration of copyright law by analysing the increased cost of access by consumers and/or other users, including other creators.<sup>4</sup> Now (in the 21<sup>st</sup> century) economists are concerned with the viability of the creative industries in the face of extensive ‘piracy’ and the whole enquiry has switched to measuring lost output and the choice of business models to deal with digital rights management and the like. Some, particularly those in policy-making positions, have apparently even mislaid the notion of the consumer as having a stake in the welfare outcome of policy changes! What has been also been lost in the transition is what copyright does for artists rather than the industries to which they supply content.

## What Copyright is and does

Copyright law protects authors and performers by establishing statutory property rights that enable them to control the exploitation of their works, granting them the exclusive right to authorize their use. It applies to works by an author or other ‘creator’. A work may be a musical composition, a book, a poem, a painting etc. and it may also be the creation of a sound recording or master copy of a film or broadcast. Copyright is in fact not just one thing but consists of an array of distinct rights and ‘works’. In order to qualify for copyright protection, a work must be original, meaning that it was not copied from another work. This is a rather weak notion of ‘originality’ as telephone directories and TV listings are also protected by copyright law. In most Western countries, copyright lasts for 70 years after the author’s death (50 years after the first fixation for a film or sound recording<sup>5</sup>) and, as long as the work continues to be sold over that period (though most are no longer in the catalogue), the author or her heirs receive income from their copyrighted works.

Copyright law creates property rights that, when enforced, overcome what economists call the 'free-rider problem' associated with information goods that are non-rival and non-excludable, that is, that have the characteristics of public goods, implying that creators of such works cannot be fully (or even partly) compensated for their skill and effort expended in producing them. It does so by giving authors exclusive rights to control the exploitation of their works on the market (the so-called 'economic rights') and ensuring that authors are identified as the creator and that their reputation and the integrity of their work is protected (the 'moral' rights). Besides protecting authors, some of the bundle of rights that constitute copyright law also protect publishers (through publication and distribution rights, and now the making available right for online distribution). 'Neighbouring rights' or 'rights related to copyright' (public performance rights are an example) apply to performers and firms or organisations in the cultural industries, for example, makers of sound recordings (phonogram producers) and broadcasters.

The simple economic rationale for copyright is that once a work has been set down in fixed form (printed, recorded, filmed), it can be copied and thus becomes a public good. Without 'privatisation' by statutorily created property rights, the creator could cover the fixed cost of creation because a copier would only have to incur the marginal cost of making a copy, and with modern copying technologies, that is typically very low. An unauthorised copier can therefore supply the market at a price that does not cover the fixed cost, which decreases (or destroys) the incentive to create and distribute works, as well as avoiding the risk of failure the first publisher takes (copiers don't copy 'lemons').

A couple of other features of copyright are worth mentioning here. Copyright law protects expressions but not ideas – a work may not be copied without authorisation but the underlying idea is not protected (for a full discussion of this see Landes, 2002). So anyone is free to make her own version of pickled sheep as long as she does not actually copy a work by Damian Hirst. Another copyright doctrine is 'works-for-hire', according to which copyright is conferred on the employer where the employee was directed to do the work; that is typically the situation for Hollywood script-writers and animators, for example. Therefore the initial allocation of the exclusive right of copyright depends on the type of contract the artist has. Overall, this means that the less full-time employment there is, the more important copyright is for freelancers. From the management point of view, it may be better economic sense to hire artists on an employment contract in order to retain the copyrights of their work. A further point is that a 'good' in the economic sense often embodies a bundle of such rights created by different economic agents; for example, a CD embodies the rights of the composer, lyricist, performers, sound recording, the artist/designer of the artwork and the author of any text accompanying the sound recording. Often, joint ownership and mergers of firms are seen as the best way to manage conflicts of interest and avoid hold-up problems in so complex a situation.

Authors mostly have to have their work marketed by 'publishers' (record, film, TV, publishing companies, art galleries and so on – firms in the creative or cultural industries) who act on the assignment or licence of the copyright by the creator. The typical contract is a royalty contract, which may or may not include an advance payment, sharing the sales revenue of the publisher for a fixed percentage, often 10 or 15 percent. Once economic rights have been assigned, however, the artist has little control over exploitation (though moral rights may not be alienated). When a publisher decides to delete works from the catalogue, artists can rarely do anything to stop them. It is important to understand that copyright enables artists to earn from their investment but it does not ensure they do so, despite the repeated claims of the many interest groups that seek to promote copyright; moreover, how much they earn from royalties depends on market forces. It is well known that superstar earnings are disproportionately higher than 'middle income' artists: that is also the case with copyright royalty income. Because superstars

have greater bargaining power with firms in the cultural industries, they are able to strike a better bargain than 'ordinary' artists (Caves, 2000). 'Average' artists' royalty earnings, by contrast, are typically low (Towse, 2001a). Copyright law apparently not only does nothing to counteract this situation but, at least so far, has simply added to the high earnings of the top few.

## Management of Copyrights

Copyright is basically managed in two ways: the royalty contract requires that publishers pay authors directly in what we can call the 'primary' market for sales of the good in question (a book, CD, photograph). However, many goods protected by copyright law can be reused in a secondary market – eg. public performance of sound recordings, photocopying of books, use of images – and this necessitates a complex system for managing payments for 'secondary' use rights, which is done by collecting societies through CRM. Collecting societies operate on a collective rather than on an individual basis, pooling the transaction costs of licensing, monitoring use and distributing payments to members. They are mostly non-profit, self-managed membership organisations. The typical method of administering copyrights is by means of a 'blanket' licence for their members' repertoire, which is efficient in reducing transaction costs but inefficient as an individual incentive. In addition, national collecting societies managing the same rights make reciprocal international agreements so that there is an effective 'one-stop-shop' for a particular right; again, this reduces administration costs for the society and for users but it further dilutes the signal to the individual artist. So, although copyrights (including related rights) are granted to the individual, the practice of CRM for secondary use and that is growing fast due to the growth of copying technologies. This is the context in which digital rights management (DRM) is being debated along with technological protection measures (TPMs) that protect DRM (see next section).

It remains to consider whether a policy of 'strengthening' copyright law or 'increased copyright protection', both much touted by the cultural industries and their pressure groups as assisting artists (as well as themselves). That is a complex question that has been little researched. Strengthening copyright for artists, for example, by lengthening its duration, takes more work out of the public domain, thus also increasing the cost of creation to subsequent authors (Landes, 2002). It is also believed to benefit the cultural industries more than individual artists (Towse, 1999).

So we may sum up by saying that copyright gives rights but it cannot ensure the rewards. What determines rewards is a complex interaction of the law, market forces and institutional arrangements. Copyright gives rights to authors and performers but they only have financial value when transferred in some way to the cultural industries: control over works follows the economic logic of the allocation of property rights, usually ending up with the industry rather than the artist (Caves, 2000). It enables artists to earn money in the future from the success of their works, giving them an incentive to do good work in the future, but the 'price' of that is that they get only a small share of the revenues and share the risk for success or failure. The incentive to artists from copyright is therefore weakened by market conditions in the cultural industries (mostly oligopoly), which, paradoxically, are strengthened by their ability to own the human capital of artists through the combination of the long duration of copyright with copying technologies that alienate the work from the artist. However, for precisely the same reasons, it may also play a role in encouraging the artistic equivalent of oligopoly – the superstar phenomenon. "Copyright giveth and copyright taketh away". The unintended consequences threaten the intended consequences. What copyright does not intend, however, is to stimulate

or protect only work that is original in the aesthetic sense, though much lip service is paid to the effect of copyright on 'creativity'.

## Recent Changes to Copyright Law

There have been numerous changes to copyright law over the last century: many are part of the logic of copyright and require the law to be updated to take account of new technologies not envisaged when the earlier law was drafted. The WIPO 'Internet Treaties', the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are the first to address the digital network environment, and they require national legislatures bring in measures to create a new exclusive right in favour of copyright owners, including sound recording producers and performers to make their works available on-line to the public (known as the *making available* right); to prohibit the circumvention of copyright protection (TPMs – technological protection measures); and, to prohibit tampering with rights management information (DRM – digital rights management).

In Europe, the European Union has addressed compliance of these international obligations of its member states by means of Directive 2001/29/EC *on the harmonisation of certain aspects of copyright and related rights in the information society*, the so-called 'Copyright Directive', finalised in 2001. Member states are now reforming (most have reformed) their national copyright law where necessary in compliance with the Directive. In the US, the Digital Millennium Copyright Act (DMCA) complies with the Treaties.

The emphasis on DRM appears to be motivated by the idea that their adoption will lead to greater and more effective competition both for users and rights holders. This may, however, be disputed. In addition, there is as yet no standard for DRM, so systems are incompatible, but there is the possibility that whomsoever wins the standards battle may end up with a considerable dominance of DRM systems and market power far stronger than the existing collecting society arrangements. The tendency to what economists call natural monopoly has demonstrated itself strongly in CRM as well as in the cultural industries, and for the same economic reasons – marginal costs are very low and fixed costs high. Unregulated, individualised DRM of copyright may be a Frankenstein in the making and, far from increasing competition, it might reduce it while effectively disenfranchising small-scale creators (especially individual artists) by removing them from CRM. I explain these points in turn.

Perhaps the first point to note is that there is no agreed definition of DRM – is it rights management by digital means or the management of digital rights, such as the making available right? Collecting societies have computerised their databases of members' names and addresses and lists of works; standardised international identification codes (such as ISBN for books) are now used for several products, enabling swift matching of work and creator. This is 'digitised' management and can be applied to many products, not only those in digital form. One can think of it as being similar to a computerised box office system. When goods are produced digitally, such as CDs, another possibility is a digital implant containing information about rights owners (composer, performers, record label) that can be accessed by users (for example, radio stations or restaurants playing CDs), who are required to transmit information on works played to a collecting society or copyright owner. (It is worth noting that the former method of collection of revenues is paid for by the artists while the latter requires the producer or publisher to pay for the implant). 'Digital' rights – the exclusive right of authors and publishers to control the exploitation of digitally supplied works granted in the new making available right – can be managed directly by the owner upon licensing the right to use the work with the appropriate

DRM technology. This digital right management puts the brunt of the cost of collecting licence fees on the copyright owner, though the EC envisages that owners will 'shop around' for such DRM systems supplied by specialists (including the collecting societies) and buy the lowest cost one. This is how competition is to be encouraged in the supply of copyright administration services.

A recent paper by Kretschmer (2005) points out the dangers in this for the smaller copyright owner. Particularly the 'average' artist or performer relies on CRM to enable them to exercise copyright at all, let alone efficiently. Kretschmer calls this the 'solidarity' argument for CRM because it enables the sharing of costs of administration. However, these artists, at least in the 'analogue' world, have probably imposed greater than average costs on collecting societies. If the larger rights holders 'cherry-pick' among collecting societies, this could deprive individual owners and smaller enterprises of cost reductions that depend on the scale of the operation. Kretschmer distinguishes this from the transaction cost rationale for CRM, which argues that the number of transactions will be reduced by CRM. I myself do not think these arguments are very dissimilar but Kretschmer's point about solidarity is an important one.

The 'natural monopoly' argument mentioned earlier is consistent with this stance. However, it places more emphasis on the technological underpinnings of the supply of rights management services. That is consistent with the EC's reliance upon technological solutions. However, technology is only one side of it and that is apparently ignored by the EC: the economic result is that the possibility to forever reduce unit costs means the economic incentives tend to monopoly because new entrants cannot compete easily with incumbents. That is because the initial set up costs are very high – developing the systems, databases etc. Moreover, at the moment there is no standard DRM and so some suppliers and users will be 'locked in' to the wrong one, causing considerable switching costs to the emerging dominant system. The cost of failure may be too great for smaller players who are as a result excluded from exercising their copyrights. To some extent, we already see evidence of this in the music industry, with bands releasing downloadable material over the Internet without attempting to charge for it in the expectation that they can form a following that will buy their music and CDs: they choose not to exercise their copyright, possibly because they do not have the means to do so.

The 'natural monopoly' argument also explains the tendency to oligopoly on the 'information' industries. The large size of the conglomerates in the cultural industries makes cherry picking and its effects on others in the market even more likely. One might say that the EC would do a greater service to cultural development by curbing the mergers in these industries than by encouraging spurious competition among the collecting societies, which they are able to regulate under present CRM arrangements.

## Discussion

There are several angles from which these changes to copyright law can be considered. One question is how they will affect arts management at the level of the individual organisation. The need to protect their own intellectual property (IP) and also to clear the rights for the use of that of others is growing all the time. In the Netherlands, digitalisation in museums is causing headaches and the copyright implications are keeping information law departments quite busy. In the performing arts, the changes to performers' rights under WPPT may also present problems to management. They are certainly likely to present problems to collecting societies, which in some countries are not allowed to administer individual rights. Multi-media producers, though, need better 'one-stop shop' arrangements for copyright clearance so as to avoid hold-

ups and excessive costs of obtaining permissions. The day will probably come when arts organisations need to hire an IP manager, as universities in the UK now routinely do, to keep track of these matters.

These may be seen as essentially practical problems. There are, however, wider issues that present themselves to a host of specialists – lawyers, media and cultural studies experts and even cultural economists. Economists have become involved in the evaluation of changes to copyright law in various ways. National governments and international organisations setting the agenda for copyright reform (in particular, the World Intellectual Property Organisation (WIPO) and the World Trade Organisation, WTO) want to know what is the effect of copyright on markets so as to assess the economic effect of potential reforms. It has become common to measure the ‘economic impact of copyright’ on the cultural industries and apparently thereby to demonstrate the effect of copyright reforms on economic growth.<sup>6</sup> That, of course, begs the question of how significant copyright is as an economic incentive. At one level, one must ask oneself how much of an incentive copyright *can be* to an author or performer, whether judged in economic or other terms. So, one criterion for judging copyright reform must be does it stimulate creativity (always remembering that in economics this is a question of *marginal* incentives)? That raises difficult fundamental problems about artistic motivation that economists and others have so far not really grappled with, for example, whether cultural policy can directly stimulate individual creativity and, if so, by what means?<sup>7</sup>

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## Notes

- <sup>1</sup> Copyright law in the Anglo Saxon tradition applies to both authors, performers and ‘publishers’ – companies in the cultural industries, such as producers of sound recordings and film. In the European civil law tradition, authors’ rights pertain to human creators and neighbouring rights to the other groups. Here I use the term copyright loosely to refer to both types of rights.
- <sup>2</sup> Quoted in Hadfield (1992)
- <sup>3</sup> For a brief review of the economic analysis of copyright, see Towse (2001a) ch. 1. A full exposition is to be found in Hadfield (1992).
- <sup>4</sup> For a review of this early work on the economics of copyright, see Watt (2000)
- <sup>5</sup> That is so in Europe. In the USA, companies have been granted a 95 year term, the ‘Sonny Bono’ extension to copyright law that kept Mickey Mouse from going into the public domain.
- <sup>6</sup> WIPO (2003), Towse (2005)
- <sup>7</sup> Space does not permit further discussion of these important topics. See Frey (2000), Towse (2001b) and Towse (2004)

## References

- Bettig, R. 1996. *Copyrighting Culture*, Westview Press, Boulder.
- Caves, R. 2000. *Creative Industries*, Cambridge, Mass. Harvard University Press.
- Frey, B. 2000. *Arts and Economics*, Berlin, Heidelberg; Springer.
- Hadfield, G. 1992. “The Economics of Copyright: An Historical Perspective” *Copyright Law Symposium*, Vol. 38,p. 1-46. Reprinted in Towse, R. and R. Holzhauser eds. (2002) *The Economics of Intellectual Property*, Edward Elgar, Cheltenham and Northampton, Mass., p. 129-174.
- Kretschmer, M. 2005. “The Aims of European Competition Policy towards Copyright Collecting Societies” mimeo [mkretsch@bournemouth.ac.uk](mailto:mkretsch@bournemouth.ac.uk)
- Landes, W. 2002. “Copyright, Borrowed Images and Appropriation Arts: an economic approach” in *Copyright in the Cultural Industries*, R. Towse (ed), Cheltenham, Edward Elgar Publishing, p. 9-31.
- Throsby, D. 2001. *Economics and Culture*, Cambridge, Cambridge University Press.



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- Towse, R. 1999. "Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry", *Kyklos*, Vol. 52, n° 3; p. 369-390.
- Towse, R. 2001a. *Creativity, Incentive and Reward; an economic analysis of copyright and culture in the Information Age*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar Publishing.
- Towse, R. 2001b. "Partly for the Money: Rewards and Incentives to Artists", *KYKLOS*, Vol. 54, n° 2/3; p. 473 - 490.
- Towse, R. 2004 "Towards an economics of creativity?" paper presented at the *FOKUS Vienna Workshop on Creative Industries*. <http://www.recida.org/>
- Towse, R. 2005. "Economics and Copyright Reform: aspects of the EC Directive", *Informatics and Telematics*, Vol. 22, p. 11-24.
- WIPO 2003 *WIPO Guide to Surveying the Economic Contribution of the Copyright- Based Industries*, [http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr\\_10\\_4.pdf](http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_10_4.pdf)

## Appendix

IP/04/586

Brussels, 03 May 2004

Commission opens proceedings into collective licensing of music copyrights for online use

***The European Commission has warned sixteen organisations that collect royalties on behalf of music authors<sup>1</sup> that their so-called Santiago agreement is potentially in breach of European Union competition rules. This is because the cross-licensing arrangements that the collecting societies have between themselves lead to an effective lock up of national territories, transposing into the Internet the national monopolies the societies have traditionally held in the offline world. The Commission believes that there should be competition between collecting societies to the benefit of companies that offer music on the Internet and to consumers that listen to it. This position reflects only a preliminary position of the Commission at this stage and the collecting societies have the right to defend their views in writing and at an oral hearing.***

The Santiago Agreement was notified to the Commission in April 2001 by the collecting societies of the UK (PRS), France (SACEM), Germany (GEMA) and the Netherlands (BUMA), which were subsequently joined by all societies in the European Economic Area (except for the Portuguese society SPA) as well as by the Swiss society (SUISA).

The purpose of the agreement is to allow each of the participating societies to grant to online commercial users "one-stop shop" copyright licenses which include the music repertoires of all societies and which are valid in all their territories.

The loss of territoriality brought about by the Internet, as well as the digital format of products such as music files, are difficult to reconcile with traditional copyright licensing schemes which are based on purely national procedures. Once uploaded onto the Internet, a musical work will be accessible from virtually anywhere in the world. The traditional licensing framework would require a commercial user wishing to offer to its clients such musical work to obtain a copyright license from every single relevant national society. The Santiago Agreement therefore seeks to adapt the traditional framework to the online world by envisaging the possibility of "one-stop" licenses allowing for the provision of legitimate services such as music "downloading" or "streaming".

The Commission strongly supports the "one-stop shop" principle for online licensing enshrined in the Santiago Agreement and fully acknowledges the need to ensure adequate copyright protection and enforcement, as clearly expressed in the Commission Decision of 8.10.2002 concerning the *IFPI Simulcasting* case<sup>2</sup>. However, the Commission also considers that such crucial developments in onlinerelated activities must be accompanied by an increasing freedom of choice by consumers and commercial users throughout Europe as regards their service providers, such as to achieve a genuine European single market. The structure put in place by the parties to the Santiago Agreement results in commercial users being limited in their choice to the monopolistic collecting society established in their own Member State.

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Recent history in the field of collective management of copyrights shows that the traditional monopolistic structure which has so far existed in Europe at national level is not required in order to safeguard the interests of right-holders in the online world.

The Commission exempted in 2002 the IFPI Simulcasting agreement which established pan-European licensing without imposing territorial exclusivity. In this case, TV and radio broadcasters will be able to get a license from any of the collecting societies located in the EEA in order to simultaneously transmit their music broadcasts via the Internet. The freedom of choice at the disposal of broadcasters means that they will be able to choose the most efficient society in Europe for the delivery of the license. Furthermore, the record producers' collecting societies also announced in 2003 the conclusion of a standard agreement for the purposes of Webcasting<sup>3</sup> licensing, pursuant to which commercial users will similarly enjoy freedom of choice as regards the licensor society in Europe.

The lack of competition between national collecting societies in Europe hampers the achievement of a genuine single market in the field of copyright management services and may result in unjustified inefficiencies as regards the offer of online music services, to the ultimate detriment of consumers. The Commission considers that the territorial exclusivity afforded by the Santiago Agreement to each of the participating societies is not justified by technical reasons and is irreconcilable with the world-wide reach of the Internet.

The Commission will examine carefully and with an open mind any proposals that the collecting societies may submit to render the current arrangements compatible with European competition law. The sending of a Statement of Objections does not prejudice the final outcome of the investigation and respects the rights of the notifying parties and other interested parties to be heard.

The collecting societies have two and a half months to reply to the Commission's objections. They can also request a hearing at which it would be able to submit their arguments directly to the representatives of the national competition authorities.

1 Music authors are lyrics writers and music composers NOT the recording companies, which have their own collecting societies

2 The IFPI Simulcasting concerned the collecting societies of the recording companies and the simultaneous broadcasting by TV and radio operators via the traditional way (hertzian wave, cable, satellite, etc) as well as the Internet. See Press Release [IP/02/1436](#) of 08 October 2002, case COMP/C2/38.014 *IFPI Simulcasting*, decision of 8 October 2002, OJ L107 (30.04.2003) p. 58.

3. Webcasting is the broadcasting of TV/radio programmes via the Internet only