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One-Stop-Shop Online Licensing in the Cross-border Cloud Environment

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Overview

- Cross-border licensing: particular interest in EU (internal market); general, not cloud-specific
- Factual and legal aspects of cross-border licensing
- Policy and practical measures and options from EU point of view
- Conclusions

EU perspective on cross-border licensing

- Basic aim: internal market/free movement of (online) services; development of online legal market; facilitate cross-border licensing

- Many measures and communications by Commission; in particular:
 - 2005 Music online Recommendation and preparatory documents on rights management (2004 Communication, Staff Working Document 2005)
 - Digital content online
 - Copyright in the knowledge economy (Green Paper 2008, Communication 2009)
 - Orphan works directive, MoU on out-of-commerce works, 2011
 - Green Paper on online distribution of audiovisual works, 2011
 - IP Strategy for the internal market 2011
 - DG InfoSoc: Digital Agenda, Digital Libraries
 - Unleashing the Potential of Cloud Computing in Europe (27 September 2012)



Factual and legal aspects of cross-border licensing

- Online cross-border licensing: bundle of aspects to consider (need to differentiate)

- Kinds of uses?
 - Generally (depending on business models): On-demand/interactive uses, e.g.: via internet, cable, satellite; upload, streaming, download; for limited time („rental“) or download to own for listening/watching/to burn on DVD („sale“));

- Different receivers, e.g.: PC, IPTV/set-top box, mobile phone, tablets, game consoles



Factual and legal aspects of cross-border licensing

■ Different business models

- content provided by cloud provider or by user;
- subscriber-based (pay per view/listen, pay per period of time), advertisement-based/free for consumer)



Factual and legal aspects of cross-border licensing (2)

- The rights to be licensed (depending on situation, e.g.: personal locker, scan and match etc., synchronisation; private cloud; public cloud; national law differences)
 - Making available
 - (if non-interactive; simulcasting): communication to the public
 - Reproduction (upload; download)
- Possible application of exceptions and limitations (e.g., private copying)

Factual and legal aspects of cross-border licensing (3)

■ The right owners at stake

- Authors (including authors of pre-existing works for AV works)
- Performers
- Phonogram producers, film producers, or other holders of related rights
- And/or derived right owners



Factual and legal aspects of cross-border licensing (4)

■ The right owners at stake – licensors to users

- Arts: authors and their agents, CMOs
- Music: Split rights: Music publishers, CMOs; platforms (after 2005 Recommendation)
- Audiovisual works: film producers (own and derived rights); CMOs for music

Factual and legal aspects of cross-border licensing (5)

- Different users (who performs the relevant act?):
 - Professional users (cloud service providers)
 - Individual consumers



Factual and legal aspects of cross-border licensing (6)

■ Cross-border clearance of rights:

- Are there rights to be cleared, and if so, which ones? (Specification of uses recommended (rather than „cloud/on-demand/online rights“))
- or does an exception/limitation apply? What about TPMs and related rules?
- Who is the right owner that can grant a license?
- Who performs the relevant act and thus needs a license?
- According to what law can these questions be answered (next panel on applicable law)?
- In addition, if several laws apply: take account of rules in other MS, e.g., mandatory contract law/licensing rules; moral rights



Policy and practical measures and options from EU point of view

- Fine arts (paintings, sculpture, artistic photography):
 - OLA model (OnlineArt): 16 CMOs beyond EU cooperate; common server, with registration of all licenses granted by one of the 16 CMOs (One-stop shop)
 - Common tariffs, and sometimes taking into account of individual requests by artists through individual negotiation based on tariffs
- Audiovisual works:
 - Practice: mostly licensed by producers/distributors EU- (world-)wide, except for music (CMOs)
 - AV Green Paper: options offered for consideration by stakeholders:
 - „country of origin“-principle (extension to online environment already rejected earlier, for good reasons („forum shopping“; int. law: act includes transmission, taking place also in receiving state, etc.)



Policy measures and options from EU point of view (2)

- Audiovisual works, Green Paper (ct'd):
 - Extended Collective License? Questionable (workable cross-border?)
 - Common legal framework for CMOs (transparency et al.) generally useful (here: esp. for music)
 - Regulation („Code“) on copyright
 - Unitary title
 - Questionable: legal basis (118 TFEU: arguably only for industrial property)
 - For whom would it be mainly useful (if so) (majors?/cultural diversity aspect); registration
 - Complexity of copyright enhanced, less „user“-friendly, many open questions (right holder(s)?)

Policy and practical measures and options from EU point of view (3)

- Audiovisual works, Green Paper (ct'd):
 - Possibly: Technological measures to facilitate licensing, but also needed:
 - (not mentioned in GP): revision of E-commerce Directive/liability rules for ISPs; stakeholder solution (2011 agreement in USA) to enable stronger legal market



Policy and practical measures and options from EU point of view (4)

- Music: 2005 Recommendation (harshly criticized by EP and others)
 - Situation before Recommendation:
 - One CMO per branch and country manages world repertoire for exploitation on domestic market;
 - on basis of network of reciprocal agreements (per se approved under EC competition law);
 - one licence per country according to principle of country of destination (rationale in analogue world: local monitoring needs)

Policy and practical measures and options from EU point of view (5)

- Music: 2005 Recommendation, main contents:
 - Competition between CMOs in favour of right owners
 - Withdrawal of rights from other CMOs and conclusion of (mostly) exclusive contract(s) with one (or few) CMO(s)
 - Replacement of network of reciprocal representation contracts by single-repertoire multi-territorial licence



Policy and practical measures and options from EU point of view (6)

- Music: 2005 Recommendation, main criticism in EP Report 2007 :
 - not user-friendly (no one-stop shop);
 - disregard of principle of territoriality;
 - aim of more competition would probably not be reached; instead: concentration/oligopolies;
 - negative effects on cultural diversity



Policy and practical measures and options from EU point of view (8)

- Music: 2005 Recommendation, reactions in the marketplace:
 - Mainly major publishers (mainly Anglo-American repertoires) withdrew rights from CMOs, to platforms:
 - CELAS (MCPS/PRS and GEMA with EMI)
 - D.E.A.L. (SACEM/SDRM with Universal)
 - P.E.D.L. (MCPRS/PRS/STIM et al. And Warner Chappell Music)
 - PAECOL (GEMA and Sony/ATV MusicPublishing)
 - Peermusic with MCPRS/PRS and SGAE
 - Alliance Digital (MCPRS/PRS and Independants)
 - Armonia; Nordic model

Conclusions

- Diversity of markets is high, single solution to all: not useful
- AV-producers may offer multi-territory licences (but: music: CMOs)
- CMOs: competition between CMOs in different countries in favour of rights owners instead of reciprocal agreements (2005 Music online Recommendation) does not lead to one-stop shop for world repertoire, but only for single repertoire (multi-territory/single-repertoire licenses)
- OLA model as solution? (but: competition law questions)
- Work in progress....