Copyright in the digital era: how the creative industries can cash in

Why authors, songwriters, composers, music publishers, movie producers, scriptwriters as well as digital service providers have everything to win in finding a consensus on copyright in the digital era.

Back in July 2015, I wrote a detailed article on neighbouring rights in the digital era and how the music industry may cash in on this exponentially expanding source of income.

Two years down the line, and further to attending the 2017 Cannes Film Festival and Midem, I am convinced that the dominance of digital distribution channels, and streaming in particular, is accelerating in the creative industries.

Focus 2017, the report on world film market trends published by the Marché du Film at the 2017 Cannes Film Festival, notes

that, while films available on transactional Video On Demand ("**TVOD**", such as iTunes) and subscription VOD ("**SVOD**", such as Netflix or Amazon Prime) are on the rise, there are still barriers to release on VOD in Europe. The main obstacle being the perception that the level of revenues from VOD exploitation is still low, with 80 percent of revenues generated by 20 percent of films as well as high marketing costs. Another hurdle to full scale development of VOD services is the legal protectionism that some countries, such as France with its "cultural exception", put in place to limit the disruptions that any blatant financial and commercial success of digital service providers would trigger, towards local theatres, national exhibitors, locally-made film productions and the local public.

Be that as it may, such obstacles will not pass the test of time and will be swept away by the sheer force of consumers' demands and expectations, driven by a more tailored, user-friendly and personalised approach to consuming audio or video content, at any point in time, in any geographical location and on any device.

Already, the music sector, which has always been the creative industry the most quickly affected and disrupted by the digital revolution, is much more attuned to the potentialities of streaming and adapting its own business model in order to monetise such digital revolution for the benefit of all stakeholders involved. For example, the largest digital music service provider, Spotify, confirmed that it had over 140 million active users worldwide, in June 2017, up from the 100 million figure that was declared a year ago.

At Midem 2017, much talk was made about transparency, fair remuneration, the value gap, to sensibilise Midem attendees and the music business in general, to the needs of including copyright owners in this digital success story. Indeed, how can such supply chain of great audio content work, if copyright owners (i.e. publishers, songwriters, composers)

feel disenfranchised and left out of the commercial and financial boon represented by streaming? They will just refuse to keep their songs on digital services providers' platforms, such as Spotify, Apple Music and Deezer, if they do not get well compensated for such use, potentially crippling the expansion of audio digital distribution channels in the process.

As I had promised I would do, in my earlier article on neighbouring rights, I now turn my attention to how deals are done with digital service providers, in the streaming arena, in relation to the licensing aspects of copyright, in particular performance rights for right owners in the musical composition (as opposed to the sound recording). Here, we focus only on copyright and the situation of right owners in songs and musical compositions – typically, songwriters, composers, music publishers – in films – typically, scriptwriters, film producers – and in books – typically, authors and press publishers.

1. Getting to grips with copyright in the digital era

Copyright was consecrated by law, step by step, in order to ensure that people who create, author and/or produce original content or work (such as authors, writers, composers, songwriters and artists) have exclusive rights for its use and distribution.

Copyright came about with the invention of the printing press and was established first in Britain, as a reaction to printers' monopolies at the beginning of the 18th century. The English parliament was concerned about the unregulated copying of books and passed the Licensing of the Press Act 1662, which established a register of licensed books and required a copy to be deposited with the Stationers' Company, thus continuing the licensing of material that had long been in effect.

Copyright has grown from a legal concept regulating copying rights in the publishing of books and maps to one with a significant effect on nearly every modern industry, covering such items as songs, films, photographs, artworks, architectural works, software, etc.

Such exclusive rights granted to content creators are usually for a limited time (in most jurisdictions, the author's life plus 70 years after the death of the author) and may be limited by exceptions to copyright law, such as fair use in the USA and fair dealing in the UK and Canada. Also, copyright protects only the original expression of ideas, not the ideas themselves, which is referred to as the "idea-expression dichotomy".

Copyright frequently includes reproduction, control over derivative works, distribution, public performance, transfer of these rights to others, and moral rights, such as attribution.

Copyrights are considered territorial rights, which means that they do not extend beyond the territory of a specific jurisdiction. However, the geographical scope of copyright has been extended thanks to international copyright agreements, such as the 1886 Berne Convention for the protection of literary and artistic works. The Berne Convention introduced the concept that a copyright exists the moment the work is "fixed", rather than requiring any registration: under the Berne Convention, copyrights for creative works do not have to be asserted, declared or registered, as they are automatically in force at creation. The Berne Convention also enforces a requirement that countries recognise copyrights held by the citizens of all other parties to the convention. Therefore, foreign authors are treated in the same way than domestic authors, in any country signed onto the Berne Convention. The regulations of the Berne Convention are incorporated into the World Trade Organisation's TRIPS agreement (1995), thus giving the Berne Convention effectively near-global application.

These multilateral treaties have been ratified by nearly all countries, and international organisations such as the European Union ("**EU**") or World Trade Organisation require their member-states to comply with them.

Since works protected by copyright are consumed more and more online, on digital channels (VOD for video content and streaming and downloads for audio content), a new challenge has arisen to ensure that copyright owners can monetise the exploitation of their works online.

At the EU level, a whole legal framework has been put in place, in order to protect copyright within the 28 member-states and in the digital world. For example, the directive on the harmonisation of certain aspects of copyright in the information society (2001/29/EC) strives to adapt legislation on copyright to reflect technological developments, while the directive 2006/115/EC harmonises the provisions relating to rental and lending rights of works subject to copyright. However, it is mainly the directive 2014/26/EU on collective management of copyright (the "**CRM directive**") that reshaped the EU legal framework towards more efficiency in monetising copyright in the digital era.

2. Collecting societies, music copyright and the CRM directive: a step in the right direction for EU right owners

A copyright collecting society, also called copyright collective, copyright collecting agency or licensing agency, is a body created by copyright law or private agreement which engages in collective rights management. Collecting societies have the authority to license works protected by copyright and collect royalties as part of compulsory licensing or individual licenses negotiated on behalf of their respective members. Collecting societies collect royalty payments from users of copyrighted works and distribute royalties back to

copyright owners.

Collecting societies are organisations handling the outsourcing function of right management. Copyright owners transfer to collecting societies rights to:

- grant non-exclusive licenses;
- collect royalties on their behalf;
- distribute such collected royalties back to them;
- enter into reciprocal arrangements with other collecting societies around the world and
- enforce their rights.

To understand the role of collective rights management societies, we first need to talk about performing rights. Performing rights represent the greatest source of continuing royalty income. Throughout the world, writers and publishers receive in the area of USD6 billion in royalties each year, from performance rights. The performing right is a right of copyright which applies to the payment of licence fees by music users, when those users perform the copyrighted musical compositions of writers and publishers. This right recognises that a writer’s creation is a property right and that its use requires permission as well as compensation. For example, performances can be songs heard on the radio, underscores in a TV series or music performed live or on tape at a show, an amusement park, a sporting event, a major concert venue, a jazz club or a symphonic concert hall. Performances can be music on hold on a telephone or music channels on an airplane, or digital service providers such as Spotify and Apple Music.

Collecting societies also negotiate license fees for public performance and reproduction and act as lobbying interests groups. They grant blanket licences (i.e. they grant rights on behalf of multiple rights holders in a single blanket licence

for a single payment), which grant the right to perform their catalogue for a period of time.

Music users (those that pay the license fees) include the major TV networks, radio stations, pay cable services, digital service providers, websites, concert halls, the hotel industry, nightclubs, bars, theme parks, etc.

Copyright holders will join a collecting society as members and instruct it to license rights on their behalf. The collecting society charges a fee for the licence, from which it deducts an administrative charge before distributing the remainder in royalties. Collecting societies are typically not for profit organisations and are owned and controlled by their members, the right holders.

Most countries in the world have only one collective music rights management society (SACEM in France, SIAE in Italy, PRS in the UK) but the USA have decided to have three organisations, in order to avoid monopolistic and anti-competitive behaviour. Therefore, ASCAP competes with BMI and SESAC, with 96 percent of the licence fees in performance rights being generated by either ASCAP or BMI in the USA.

For many years, collective rights management societies had a quiet life, apart in the USA where ASCAP, BMI and SESAC fiercely compete with each other, in order to get the best catalogues and music hits in their respective roster.

However, around 2008, quite a few European collective rights management societies were facing serious performance issues, compounded by a highly protective attitude towards other European societies, and an inability to cope with the changes in the way music is getting increasingly distributed online, on the internet.

On 16 July 2008, the European Commission adopted a decision (the "**CISAC decision**") prohibiting 24 European collecting societies from restricting competition as regards to the

conditions for the management and licensing of authors' public performance for musical works. The collecting societies were found to have restricted the services they offered to authors and commercial users outside their domestic territory. While the CISAC decision made it easier for authors to select which collecting societies would manage their public performance rights (for example, an Italian author would become able to license his rights to PRS in the UK or SACEM in France), it was deemed to not be enough in order to force European collective rights management societies to make the necessary changes to open themselves up to the market.

Therefore, European institutions stepped up their game and, further to a proposal for a directive on collective rights management and multi-territorial licensing of rights in musical works for online uses, published on 11 July 2012, the EU adopted the CRM directive, the directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses.

Consequently, in the EU, the conduct of collecting societies is now governed by national regulations which implemented the CRM directive in the 28 member-states by the transposition date of 10 April 2016. Further to the entry into force of the CRM directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, fairer competition – as well as sound collaboration – have at last arisen between all EU-based collecting societies.

The CRM directive aims to fulfil the following objectives:

- modernise and improve governance, financial management and transparency of the EU collecting societies, in particular ensuring that right holders have more say in the decision making process and receive royalty payments that are accurate and on time;

- promote a level playing field for multi-territorial licensing of online music and
- help create innovative and dynamic licensing structures that encourage the development of legitimate online music services.

EU collecting societies that grant multi-territorial licenses are now required to have "sufficient capacity" to process efficiently and in a transparent manner the data needed to administer multi-territorial licenses. "Sufficient capacity" includes at least capacity to invoice users, collect rights revenue and distribute amounts to rights holders. Also, EU collecting societies must, in response to a "duly justified" request from service providers, rights holders or other societies, provide up-to-date information regarding their online repertoire. Both these requirements are challenges to many EU collecting societies, as timely and accurate invoicing has never been a strong feature of collective licensing in Europe.

For digital service providers that wish to allow users to access easily a vast library of online content, the ability to obtain multi-territorial licenses is the critical factor in enabling service of a pan-European user-base. At a time where digital service providers are not only squeezed by labels, but pressured by authors and publishers to increase royalties, it is not yet clear whether the national transposition regulations of the CRM directive will go far enough to protect digital service providers' interests.

At least, EU collecting societies are now embarking themselves into pan-European licensing collaborations such as ICE (an online music rights licensing and processing hub formed by three of the EU largest collection societies, PRS (UK), STIM (Sweden) and GEMA (Germany)) and Armonia (another online music rights licensing and processing hub formed by SACEM (France), SGAE (Spain), SIAE (Italy), SACEM Luxembourg, SABAM

(Belgium), SUISA (Switzerland), AKM (Austria), SPA (Portugal), Artisjus (Hungary)) which both received clearance from the European Commission to enable faster and simplified rights negotiations for digital service providers operating in the EU. In May 2016, ICE signed its first license deal in the digital market place, partnering with Google Play Music.

3. The master stroke: copyright and the EU digital single market

In July 2014, ahead of his European Commission presidency, Jean-Claude Juncker published his political guidelines for a new Europe. Central to his agenda was a connected Digital Single Market ("**DSM**"), which triggered proposed EU legislation aimed at making the most out of digital technologies, and at the removal of restrictions to free movement of digital goods and services. Among the reforms, were changes to telecoms regulations (the end of mobile phone roaming charges), data protection (approval of the General Data Protection Regulation) and EU copyright laws.

The EU copyright reforms, in particular, are highly ambitious with a series of key proposals announced by the European Commission in September 2016:

- a EU regulation facilitating broadcasters by requiring only country of origin clearance for ancillary online services (for example, simulcasts, music, e-books, games or catch-up services) which are available across the EU, which was adopted on 8 June 2017;
- a EU directive and a EU regulation to implement the Marrakesh Treaty: the former providing a mandatory exception to facilitate access to published copyrighted works for people who are blind, visually impaired or print disabled, and the latter permitting the cross-border exchange of copies between the EU and other

countries that are party to the Treaty, and

- a proposal for a EU directive on copyright in the DSM (the "**DSM proposal**").

The key provisions of the DSM proposal include:

- providing rights of fair remuneration in contracts for authors and performers;
- creation of an ancillary right for press publishers;
- obligation on online service providers (social networks, platforms, etc) to take measures to prevent infringement;
- new mandatory exceptions to infringement, and
- facilitating the use of out-of-commerce works by cultural heritage institutions.

The DSM proposal aims at reducing the differences between national copyright regimes and allowing for wider online access to copyrighted works by users across the EU. It recognises that, despite the fact that digital technologies should facilitate cross-border access to works, obstacles remain, in particular for uses and works where clearance of rights is complex.

As regards audiovisual works, the DSM proposal sets out, despite the growing importance of VOD platforms, EU audiovisual works only constitute one third of works available to consumers on those platforms! Again, this lack of availability partly derives from a complex clearance process. The DSM proposal therefore provides for measures aiming at facilitating the licensing and clearance of rights process, to ultimately facilitate consumers' cross-border access to copyright-protected content.

In particular, the DSM proposal provides for fair remuneration

in contracts of authors and performers, in its articles 14 to 16. Since authors and performers often have a weak bargaining position when licensing their rights, the DSM proposal sets out a "transparency obligation" whereby member-states will be required to ensure that authors and performers shall have the right to information about the exploitation of their works. The obligation may be adjusted where it is disproportionate or disapplied where the contribution of the author is not significant. The provisions go on to provide a "contract adjustment mechanism" so that authors and performers can request additional remuneration from the party with whom they contracted when the remuneration originally agreed is disproportionately low to the subsequent revenues and benefits derived from exploitation of the works or performances. Member-states are also required to provide a voluntary, alternative dispute resolution mechanism. The EU parliament proposes two small amendments: recognising rights to equitable remuneration, and providing authors and performers with the option to appoint representatives for seeking contract adjustments on their behalf.

Another reform set out in article 11 of the DSM proposal, aiming at efficiently monetising copyright in the digital era, is the ancillary right for press publishers. The European commission has said the proposed right aims to address the difficulties faced by press publishers in licensing their publications online: the problem comes from recouping their investment as against those who reproduce their content online for free. Article 11 of the DSM proposal strives to fight this problem by requiring member-states to provide "publishers of press publications" with rights to control the "reproduction" and "making available to the public" rights that are available to authors. This ancillary right is intended to last for twenty years from January 1 in the year following the press publication. A "press publication" is defined as a "fixation of a collection" of journalistic literary works. Similar laws have been introduced in Germany and Spain and it has been

reported that these have led to delisting of press publications on news sites, resulting in reduced traffic to publishers' own sites.

The European Commission proposes to address the so-called "value gap" between licensed streaming services, which pay for the content they host, and intermediaries, such as social media networks (Facebook) and online platforms (YouTube), which host infringing content. The e-commerce EU directive provides a "safe harbour" defence to these intermediaries, with a notice and take-down regime. However, rather than make amendments to the e-commerce EU directive, article 13 of the DSM proposal sets out that "*information society service providers that store and provide to the public access to large amounts of works uploaded by their users shall, in co-operation with right holders, take measures to ensure the functioning of agreements concluded with right holders for the use of their works or to prevent the availability on their services of works identified by rightholders through the cooperation with service providers*". The European Commission suggests that such measures may include the use of content-recognition technologies. This article 13 seems at odds with the e-commerce EU directive, its safe harbour provisions and the assurance of no obligation to monitor information transmitted or stored. Therefore, we can expect to see further discussion between the European commission and the EU parliament on how to properly address the "value gap". One thing that is for sure is that music copyright owners, publishers in particular, are particularly irritated by existing safe harbour laws in place in the EU and the USA and want intermediaries to become fully accountable for the damage that infringement on their platforms causes to copyright owners.

Another notable reform brought by the DSM proposal is the improvement of licensing practices and wider access to content. The European commission puts forward measures to

facilitate the digitisation and licensing of out of commerce works. These are works that are not available to the public through customary channels of commerce and which are often held by cultural heritage institutions. The purpose of these provisions is to provide wider access to these materials and to guarantee the cross-border effect of licensing agreements.

Let’s watch the space, as far as the DSM proposal is concerned, but it definitely constitutes a step in the right direction, in order to improve the monetisation of works protected by copyright in the EU single digital market.

4. Technological solutions to better monetisation of copyright in the digital era: a work in progress

Midem 2017 was a whirlwind of fancy technical propositions to tackle transparency, as well as efficient and accurate ways of paying royalties to copyright owners in the digital era.

The creation of a global database of musical copyrights and works was, yet again, envisaged, despite the fact that the Global Repertoire Database (“**GRD**”) was a resounding failure in 2014 due to a lack of appropriate coordination between, and funding from, various stakeholders such as Universal, EMI Music Publishing, tech companies such as Apple, Nokia and Amazon and collecting societies such as PRS (UK), STIM (Sweden) and SACEM (France).

Other technical suggestions envisaged were the use of sophisticated rights administration and management software solutions such as Counterpoint, the standardisation of data such as streamlining ISWC codes, the improvement of metadata provided to digital service providers by music publishers and labels, and using blockchain to structure a new database, with streamlined ISWC codes and accelerate payment of royalties through smart contracts and bitcoins.

It seems to me that all these technical solutions, in particular the creation of a copyrights' database and the implementation of clear ISWC codes and sets of metadata will only be implementable when their installation is coordinated by pan-European and mandatory regulations enforceable in the 28 member-states of the EU.

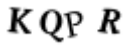
To conclude, while the interests of copyright owners are increasingly being looked after, thanks to both legal and technical processes and tools more adapted to the fluid changes triggered by new means of consumption of copyrighted works in the digital era, it still feels like it is a "touch-and-go" approach that is put in place here. Although both copyright owners and digital service providers have everything to win in increasing transparency and prompt collection of digital royalties, while substantially reducing the value gap which greatly benefits intermediaries protected by safe harbour, I am under the impression that they do not really communicate efficiently together and do not think that their interests are aligned.

Crefovi regularly updates its social media channels, such as Linkedin, Twitter, Instagram, YouTube and Facebook. Check our latest news there!

Subject

Your message

Send



Δ