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## The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality, 25 J. Marshall J. Computer & Info. L. 409 (2008)

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## ARTICLES

# THE FUTURE OF LICENSING MUSIC ONLINE: THE ROLE OF COLLECTIVE RIGHTS ORGANIZATIONS AND THE EFFECT OF TERRITORIALITY

NEIL CONLEY†

### I. INTRODUCTION

The right to control the performance of a creative work<sup>1</sup> represents for most songwriters and music publishers (“rights holders”)<sup>2</sup> their greatest source of income.<sup>3</sup> However, the current licensing regime practiced

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† The author will receive his LL.M. in intellectual property law at the George Washington University Law School in August of 2008. I would like to thank Ralph Oman, my professor, for his guidance, suggestions, and edits. I would also like to give many thanks to Marvin Berenson of BMI, Mike Huppe and Ryan Lehning of SoundExchange, Lee Knife of DiMA, and Bruce Lehman for taking so much time out of their busy schedules to answer my many questions. I would also like to thank Sam Mosenkis of ASCAP for his help in answering some questions. In addition, I would like to thank Jean Banks of BMI and Lynne Enman of ASCAP for answering some questions about their respective organization’s licensing practices. I would also like to send many thanks to Tilman Lüder, Head of the E.U. Commission’s Copyright Unit, Tobias McKenney of the E.U. Commission’s DG of Internal Market and Services, and Alain Andries of the E.U. Commission’s DG of Competition for taking the time to answer questions that I sent them via emails. I would also like to thank Erik Verzijl of BUMA for taking the time to answer some questions via email. Finally, I would like to thank my parents for their continued support.

1. See Part II for a discussion of the performance right.

2. Throughout this paper the term “rights holders” is used to describe the individuals or entities that own the copyright in a musical composition. For example, such people include songwriters or music publishers, those individuals or entities that own the copyright in sound recordings, performers or record labels. Part II.A., *infra*, will discuss how a copyright in a song entails numerous exclusive rights that can be either licensed or assigned. “Rights holders,” more broadly stated, refers to the individuals or entities that own some or all of these exclusive rights.

3. DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 667 (5th ed. 2007).

by collective rights organizations (“CROs”)<sup>4</sup> for online music is preventing rights holders from being able to reap the financial benefits that the Internet<sup>5</sup> and digital transmissions of music can provide. The problem is that CROs license online music on a restrictive, national basis, where the online transmission of music is worldwide and unrestricted by national boundaries. Licenses to transmit music online are restricted on a national basis because of agreements entered into between the CROs and the rights holders that require the rights holders to grant licenses only on a national basis. These territorially restrictive agreements have no place in the licensing of online music where digital transmissions are not limited by national boundaries. The present licensing system is inefficient, costly, and hinders the development of online music providers’<sup>6</sup> ability to distribute music to consumers. Ultimately, this system prevents rights holders from realizing the full financial benefit the Internet offers.<sup>7</sup> This paper will discuss why the present system of territorially restrictive licensing for online music is unnecessary and why the CROs, if not of their own accord, then at the behest of rights holders, should replace this territorially restrictive regime with a multiterritorial licensing regime.

Part II of this paper will provide an overview of the legal basis, in the United States, for the right of public performance. Part III will provide a brief history of the public performance right in the United States. Part IV will explore the different relationships in the music industry

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4. The term “collective rights organizations” refers to the organizations that license one or a few of the exclusive rights for many rights holders who have allowed the CROs the ability to do so.

5. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 156 (Columbia Law Review Ass’n et. Al. eds., 18th ed. 2005) (using Internet to describe citations of online sources); see also Wikipedia.org, *Internet Capitalization Conventions*, [http://en.wikipedia.org/wiki/Internet\\_capitalization\\_conventions](http://en.wikipedia.org/wiki/Internet_capitalization_conventions) (last visited May 1, 2008). However, there is a push to start spelling Internet with a lower-case I. See Wikipedia Internet Convention, *supra* note 5. Some publications started to use the word internet with a lower-case “I” See Tony Long, *It’s Just the “internet” Now*, Wired.com, <http://www.wired.com/culture/lifestyle/news/2004/08/64596> (last visited May 1, 2008).

6. “Online music providers” are any service that provides music on the Internet, including, webcasters, simulcasters, online Internet radio stations, and online download services. See E.U. Commission Staff Working Document: Study on a Community Initiative on the Cross-border Collective Management of Copyright (July 7, 2005), available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf) (using the term “online music provider” in the same way it is used in this Article).

7. See Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 18-19 (2007), available at, <http://law.fordham.edu/publications/articles/200flspub9536.pdf> (stating that online retailers see territorially restrictive license as an impediment to the roll-out of new cross-border online services); Assessment, *infra* note 207, at 6 (stating that rights holders feel that the territorially restrictive licensing regime deprives them of online revenue).

that involve the public performance right. Part V will look at how U.S.<sup>8</sup> performance right organizations<sup>9</sup> administer licenses on an international level. Part VI will look at types of digital transmissions and whether they constitute a public performance. Part VII will make a brief comparison of the performance right and CROs in the United States and Europe. Part VIII will explore multiterritorial licensing of music on the Internet, discussing the effect of territoriality on copyright law generally and will specifically discuss the problems of the present territorially restrictive licensing regime that a multiterritorial license would solve. Part VIII will also discuss other problems, independent of the present licensing system, that a multiterritorial licensing regime would solve. Part IX will look at possible solutions to territorially restrictive licensing of online music. Part X will discuss the future of multiterritorial licensing of online music. Finally, Part XI will conclude that the current licensing regime consisting of licensing music on a territorially restrictive basis is inefficient and unjustified in the online environment. This paper will suggest the elements that a multiterritorial licensing regime should have and the steps that CROs and rights holders need to take in order to fully realize the potential of the Internet and digital transmissions in general.

## II. PERFORMANCE RIGHTS

### A. THE LEGAL BASIS FOR THE PUBLIC PERFORMANCE RIGHT IN THE UNITED STATES

When one hears a sound recording of a song or a musical composition, one is hearing two copyrighted works. One work is the underlying musical composition, consisting of the actual words and musical notes. The author of the musical composition is the songwriter. The copyright owner (“rights holder”)<sup>10</sup> of a musical composition is usually the song-

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8. “United States” may be abbreviated to “U.S.” if used as an adjective. *See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* 72, 6.1(b) (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

9. Most other CROs outside the United States, for example many in the European Union, administer more than just the public performance right and those will be referred to as CROs. CROs that only administer a license for the performance right, such as BMI and ASCAP, are often referred to as performance right organizations (“PROs”). However, this Article will refer to BMI and ASCAP as CROs for the sake of continuity, and to minimize the number of acronyms used.

10. For the sake of consistency, “rights holders” will refer to those individuals or entities who own the copyright in either the musical composition or the sound recording, or both. A copyright either in the musical composition or in the sound recording of the composition gives the rights holder or copyright holder, various “exclusive rights” that can be fragmented or licensed to other entities. A rights holder may license an exclusive right without restrictions or with restrictions as to the duration, geography, or scope. For example, a music publisher in country A, who is the rights holder in a repertoire of songs, may

writer or a music publisher to whom the songwriter has assigned their rights in the composition. The rights holder in a musical composition usually has the full right of public performance, in addition to other rights.<sup>11</sup> The other copyrighted work is in the sound recording, i.e. musical performance, of the underlying musical composition. The authors of the sound recording are the performers<sup>12</sup> and producers who created the performance of the musical composition. The rights holder of a sound recording is usually the record company that commissioned the work.<sup>13</sup> Rights holders in a sound recording enjoy only a limited right of public performance.<sup>14</sup> Below is the statutory language granting the performance right in the United States to the rights holders of musical compositions and sound recordings.

### 1. *The Public Performance Right in the Musical Composition*

According to the United States Copyright Act, to perform music means to “recite, render, [or] play . . . it, either directly or by means of a device or process.”<sup>15</sup> The right of performance is the exclusive right to perform, or authorize to perform, a work publicly, whether for profit or not.<sup>16</sup> The act of publicly performing music means:

(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . in the same place or in separate places and at the same time or at different times.<sup>17</sup>

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license the public performance right of the repertoire to a publisher in country B. This allows the publisher in country B to license the public performance of the repertoire in country B.

11. The rights holder of a musical composition enjoys the exclusive rights of reproduction, creation of derivative works, distribution, public performance, and public display of the musical composition. See 17 U.S.C. § 106 (2007). These exclusive rights are subject to statutory exceptions. See *id.* at §§ 107-112.

12. Performers (sometimes referred to as artists), for purposes of this Article, will include vocalists and musicians.

13. AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1312 (3d ed. 2002).

14. See 17 U.S.C. § 106(6) (granting rights holders in sound recordings the exclusive right to publicly perform their works only if the works are transmitted via digital audio transmissions).

15. *Id.* § 101.

16. *Id.* § 106(4).

17. *Id.* § 101.

## 2. *The Public Performance Right in the Sound Recording*

Congress has granted rights holders of a sound recording the right to authorize the public performance of the recording for certain digital audio transmissions.<sup>18</sup> However, this right is limited.<sup>19</sup> For example, if the transmission is a non-subscription, non-interactive transmission or the retransmission of a non-subscription terrestrial broadcast, then the transmission is exempt from acquiring a license for the public performance of the sound recording.<sup>20</sup> However, if the transmission is interactive, then the service providing the transmission is required to obtain a license for the public performance of the sound recording from the rights holders of the sound recording, i.e. the record company.<sup>21</sup> Part V of this Article will further discuss the differences between interactive, non-interactive, and subscription services.

Recently introduced legislation, if passed, will grant owners of sound recordings a full performance right. On December 18, 2007, a bill called the "Performance Right Act" was introduced in the House. Currently, section 106(6) of the U.S. Copyright Act reads, "in the case of a sound recording, to perform the copyrighted work publicly by means of a digital audio transmission."<sup>22</sup> The bill would amend section 106(6) of the U.S. Copyright Act to read "in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission."<sup>23</sup> The bill would also amend section 114(d)(1) by striking "by means of a digital audio transmission" and replacing it with "by means of an audio transmission."<sup>24</sup> In essence, the bill eliminates the distinction between digital and terrestrial transmissions and gives rights holders a full performance right for sound recordings. For the music publishers and songwriters, section 5 of the bill is the most important. Entitled "No Harmful Effects on Songwriters," section 5 explicitly states, "[n]othing in this act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or rights holders of musical works."<sup>25</sup>

This legislation is not without controversy, however. This bill rekindles a long-standing dispute over whether to grant sound recordings a

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18. *Id.* § 101(6).

19. *Id.* § 114(d).

20. *See* 17 U.S.C. § 114(d)(1) and (2) (2007).

21. *Id.* § 114(f).

22. *Id.* § 106.

23. Performance Right Act of 2007, H.R. Res. 4789, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-4789>. On January 14, 2008, the bill was referred to the House Subcommittee on courts, the Internet, and intellectual property. *See* <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR04789:@@X>, (last visited Apr. 16, 2008) (describing the status of the bill).

24. Performance Act, *supra* note 23, at Section 2(b).

25. *Id.* at Section 5.

full performance right. The same parties have taken their familiar stances in regards to this bill. The rights holders of sound recordings, which are predominantly record companies, obviously support the legislation. The U.S. CROs are uneasy, worrying that they and their members, which are the music publishers and the songwriters, will lose royalties to the owners of sound recordings.<sup>26</sup> The broadcasters also do not want the bill to pass because they are already paying royalties to the songwriters and publishers for the public performance of the underlying musical composition and do not want to pay royalties to the owners of sound recordings, too. In an attempt to kill the Performance Right Act, the broadcasters filed a resolution with Congress, expressing their view that Congress should not grant sound recordings a full performance right.<sup>27</sup>

#### B. HISTORY OF THE PERFORMANCE RIGHT IN THE UNITED STATES AND THE SUBSEQUENT CREATION OF THE PERFORMANCE RIGHT ORGANIZATIONS

As noted above, a song contains two copyrights. If a person or entity wants to play, i.e. perform, a song publicly, they must obtain a license from the rights holder of the musical composition, and in some instances for the sound recording.<sup>28</sup> With the granting of the right of public performance to the rights holders of musical compositions came the need for performance right organizations to administer the performance right on behalf of the rights holders. Songwriters and composers needed a way to enforce their right of public performance of their musical compositions. Most, if not all, did not have the resources to police every theatre, bar, restaurant, hotel, etc. to make sure the proprietors of those establishments had a license to play their music. In addition, it was not practical, and likely impossible, for the owners of these establishments to obtain a license from each rights holder of each musical composition that was played in their establishments. Therefore, rights holders needed CROs

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26. See ASCAP: Legislation, [http://www.ascap.com/legislation/history/performing\\_rights\\_act244.aspx](http://www.ascap.com/legislation/history/performing_rights_act244.aspx) (last visited Apr. 16, 2008).

27. Supporting the Local Radio Freedom Act, H.R. Res. 244, 110th Congress (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=hc110-244>. This Resolution points out Congress' long history of denying terrestrial performance rights to sound recordings. *Id.* In addition, the resolution claims that allowing record companies to collect performance royalties on sound recordings would cause economic hardships for small radio stations, bars, and restaurants. *Id.*

28. This is only one right for which a music provider or user of music must obtain a license. A terrestrial radio station for example, would only be required to obtain a license for the public performance of the musical composition. A webcaster, however, must obtain a public performance license for the musical composition *and* for the sound recording. Music providers who provide download services are required to obtain a mechanical license for the reproduction and distribution of both the musical composition and the sound recording.

for efficiency and practicality reasons. CROs, under authorization of their member songwriters and publishers, granted blanket licenses to users of songs, i.e. radio stations, restaurants, hotels, etc., policed users to make sure the users had a license for songs they were playing, collected royalties from users, and distributed these royalties to their member songwriters and publishers.

1. *The History of the Performance Right in Musical Compositions in the United States and the Creation of ASCAP and BMI*

The 1897 revision of the U.S. Copyright Act established, for the first time, a songwriter's exclusive right of public performance.<sup>29</sup> However, rights holders did not initially enforce this new right.<sup>30</sup> Many songwriters and composers felt that the public performance of their songs was the best method of advertisement for sheet music of their compositions, which, at the time, was their major source of income.<sup>31</sup> The 1909 revision of the U.S. Copyright Act provided that a license for the public performance of a copyrighted song was only required if the performance was rendered "publicly for profit."<sup>32</sup> The initial interpretation of the 1909 revision was that a license was required only if there was an admission fee charged to hear the performance.<sup>33</sup> This limitation, of course, exempted restaurants, hotels, bars, and other places whose primary business was not in charging patrons to hear the music played, but that just played music in the background.<sup>34</sup> However, in 1914, during dinner at The Lambs in New York City, a group of songwriters, including Irving Berlin and John Philip Sousa, listened to fellow songwriter Victor Herbert's frustration at having heard one of the songs he had written played at a nearby expensive restaurant.<sup>35</sup> Herbert expressed his frustration to the group that the restaurant could play his song without compensating him.<sup>36</sup>

To remedy this problem, in 1914, this group of songwriters formed a performance right society, the first CRO in the United States, the American Society of Composers, Authors and Publishers ("ASCAP").<sup>37</sup> Three

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29. KOHN, *supra* note 13, at 904.

30. MAKEEM FOUAD MAKEEM, COPYRIGHT IN A GLOBAL INFORMATION SOCIETY: THE SCOPE OF COPYRIGHT PROTECTION UNDER INTERNATIONAL, U.S., U.K. AND FRENCH LAW 19 (2000).

31. MAKEEM, *supra* note 30, at 19.

32. 17 U.S.C. § 1(d) (2007); KOHN, *supra* note 13, at 904.

33. KOHN, *supra* note 13, at 904.

34. *Id.* at 904-05.

35. *Id.* at 904.

36. *Id.*

37. *Id.* There must be something about hearing one's song played in a restaurant that fills a composer or songwriter with the desire to form a CRO. In 1847, in France, the French composer Alexandre Bourget, along with Victor Parizot, and Paul Hernion went to



years later, in 1917, the group took a case to the Supreme Court, which changed how “publicly for profit” was to be interpreted.<sup>38</sup> The case involved a suit by ASCAP against a New York restaurant for an unauthorized public performance of the ASCAP musical composition, “Sweetheart,” by Victor Herbert.<sup>39</sup> Chief Justice Oliver Wendell Holmes held that when the service in question is offered for profit, such as a restaurant, then the playing of a song by the service provider constitutes a public performance.<sup>40</sup> This case opened the door to public performance licensing. ASCAP proceeded to license any establishment or service that operated for a profit and played music.<sup>41</sup>

In 1923, the District Court of New Jersey handed down another landmark decision for performance rights, holding that songs played during radio broadcasts were played for profit and required a license from the rights holder of the song.<sup>42</sup> In 1944, a court held that the broadcasting of copyrighted music by non-commercial stations was also a public performance.<sup>43</sup> In 1926, the advent of coast-to-coast radio networks created an incredible source of revenue for songwriters.<sup>44</sup> However, negotiations between radio broadcasters and ASCAP regarding licensing rates became more and more difficult as the years passed.<sup>45</sup>

Due to the difficulties in negotiations with ASCAP, in 1940, a group of broadcasters, consisting of major radio networks and almost 500 inde-

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“Les Ambassadeur café” in the Champs-Élysées in Paris. MAKEEM, *supra* note 30, at 14. While at the café, Bourget heard one of his musical works being performed. *Id.* Bourget, angry that the proprietor of the restaurant had not paid Bourget for the public performance of his song, refused to pay for his drinks. *Id.* Bourget filed suit against the owner of the café and, in 1847, the court awarded Bourget an injunction against the owner for having others perform Bourget’s songs. *Id.* at 15. The court broadened the scope of a 1791 decree that was originally passed to break the monopoly of the Comédie Française over theatres. *Id.* The 1791 decree provided French authors of dramatic works the exclusive right to perform their works in public theatre, which the Comédie Française had historically controlled. *Id.* at 14. On the heels of his success, Bourget and others established the Société des Auteurs, Compositeurs et Editeurs de Musique (“SACEM”), which is the French performance right CRO. *Id.* at 19.

38. KOHN, *supra* note 13, at 905. Note that the present law grants rights holders in a song the right of public performance whether the performance is for profit or not. 17 U.S.C. § 106(4) (2007).

39. KOHN, *supra* note 13, at 905.

40. *Id.* (citing *Herbert v. Shanley*, 242 U.S. 591 (1917)).

41. *Id.*

42. *Id.* at 905-06 (citing *Whitmark & Sons v. Bamberger and Co.*, 291 F. 776 (D. N.J. 1923)).

43. MAKEEM, *supra* note 30, at 40 (citing *Associated Music Publishers v. Deb Mem'l Radio Fund*, 141 F.2d 852 (2d Cir. 1944)).

44. KOHN, *supra* note 13, at 905.

45. *Id.*

pendent radio stations, formed Broadcast Music, Inc. (“BMI”).<sup>46</sup> Paul Heineke, a European music publisher, established the third CRO in the United States, SESAC, in 1931.<sup>47</sup> Today, ASCAP and BMI represent the majority of songwriters and publishers, with SESAC licensing only about 1% of all performance rights in the United States.<sup>48</sup>

2. *The History of Protection of Sound Recordings in the United States and the Creation of SoundExchange*<sup>49</sup>

Sound recordings first received protection under the U.S. Copyright Act on February 15, 1972, when a law enacted in 1971 became effective, giving exclusive federal rights of reproduction and distribution to rights holders of sound recordings.<sup>50</sup> However, rights holders of sound recordings were not granted a public performance right. This meant that users such as radio and television stations, bars, etc. who performed sound recordings publicly, were not obligated to obtain a license to do so from the record companies. The reason that the rights holders of sound recordings were not granted a public performance right was, and continues to be (at least in regards to a full performance right), the strong opposition from the broadcasting industry, jukebox operators, and wired music services.<sup>51</sup> These groups already pay royalties to songwriters and publishers for the right to perform the musical compositions publicly in a song; they also do not want to pay record companies for the right to perform

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46. *Id.* at 906. BMI claims it was formed by “radio executives to provide competition in the field of performing rights . . . .” See BMI.com, Tradition, <http://www.bmi.com/about/entry/C1508> (last visited Apr. 16, 2008). However, the formation of BMI likely hurt the very entities who formed BMI, i.e. the radio stations. Interview with Bruce Lehman, Senior Counsel at Akin Gump in Washington D.C. and former Secretary of Commerce and Commissioner of the United States Patent and Trademark Office (Apr. 15, 2008) [hereinafter Lehman Interview]. Once formed, BMI had to compete with ASCAP for members, i.e. songwriters and publishers. *Id.* In order to get members, BMI had to offer songwriters and publishers greater royalties. *Id.* To obtain greater royalties, BMI had to charge users, such as radio stations, more money. *Id.*

47. KOHN, *supra* note 13, at 907. The SESAC website, however, states that SESAC was founded in 1930. See Sesac.com, <http://www.sesac.com/aboutsesac/about.aspx> (last visited Apr. 24, 2008). SESAC originally formed to license European music and gospel music. *Id.* However, its repertoire now spans many genres. *Id.*

48. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 225 (6th ed. 2006).

49. SoundExchange is always spelled as one word. Email from Ryan Lehning, Senior Counsel at SoundExchange (June 19, 2008, 11:44 EST) (on file with author).

50. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971); David O. Carson, Statement Made to General Counsel, U.S. Copyright Office, Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 108th Congress 4 (July 15, 2004), available at <http://www.copyright.gov/docs/carson071504.pdf>.

51. Carson, *supra* note 50, at 4.

sound recordings publicly.<sup>52</sup> In addition, songwriters, music publishers and the CROs who license the performance right of these rights holders' musical compositions fear that if rights holders of sound recordings are given a public performance right, then the royalties paid to the songwriters and publishers for their right of public performance would decrease.<sup>53</sup> Of course, the record companies, represented by the Recording Industry Association of America, and performers and artists, represented by the American Federation of Musicians, believe entities that profit from the public performances of sound recording should compensate record companies, i.e. the rights holders of sound recordings.<sup>54</sup>

The development of digital technology and the Internet created serious issues for performers and the record companies because, unlike a terrestrial broadcast, a digital transmission of a song over the Internet provides the listener with an exact copy of the song with no degradation in sound quality. Therefore, online services, specifically interactive services that allow consumers to download music or that allow consumers to control what songs they hear and when they hear them, were seen as threats to CD sales.<sup>55</sup> In 1995, the Digital Performance Right in Sound Recording Act ("DPRA") granted rights holders of sound recordings the exclusive right, subject to certain limitations, to perform their works publicly by means of digital audio transmissions.<sup>56</sup> The DPRA added paragraph (6) to section 106 of the U.S. Copyright Act, giving the owner of a sound recording "the exclusive right to perform the copyrighted work publicly by means of a digital audio transmission."<sup>57</sup> However, the right was limited to interactive and non-subscription services.<sup>58</sup> Non-interactive, non-subscription online transmissions, therefore, were exempt.<sup>59</sup> Interactive services were required to obtain a license directly from the rights holders, the record companies. Certain subscription services were subject to a compulsory license, provided certain restrictions were in place.<sup>60</sup>

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 8.

56. Digital Performance in Sound Recording Act of 1995, Pub. L. No. 104-39, 336 Stat. 109 (1995), available at <http://www.copyright.gov/legislation/pl104-39.html>.

57. 17 U.S.C. § 106(6) (2007).

58. Carson, *supra* note 50, at 9. The belief was that such services were not a threat to traditional CD sales. *Id.* See Part V.A. for a description of interactive, non-interactive, subscription, and nonsubscription services.

59. Carson, *supra* note 50, at 9.

60. *Id.* This was done to allow these services to avoid the difficulties in direct licensing and focus more on developing new business models to benefit consumers. *Id.* The restrictions included a prohibition on announcing songs in advance of playing the songs and playing too many songs from the same artist or same album in a given period. *Id.*; 17 U.S.C.

The DPRA, however, soon proved out-of-date and inadequate in light of the incredibly fast pace that technology and Internet services were advancing.<sup>61</sup> The main threat came from non-interactive, nonsubscription webcasting, which offers various formats of music to anyone with an Internet connection.<sup>62</sup> Among some of the webcasting formats that posed a problem were those that played songs from only one artist twenty-four hours every day or adjusted, in various ways, the songs heard by any given listener, based upon that listener's past listening preferences.<sup>63</sup> Therefore, in 1998, Congress again revised section 114 of the U.S. Copyright Act to protect the record industry from these new non-interactive, nonsubscription services by passing the Digital Millennium Copyright Act ("DMCA").<sup>64</sup>

The licensing regime in the United States for the public performance of sound recordings is as follows.<sup>65</sup> First, there is no public performance right for the terrestrial transmission of sound recordings. Second, non-interactive digital audio transmissions are exempt only if they fall into one of three categories: a) the transmission is part of a nonsubscription broadcast (i.e. traditional terrestrial broadcast) transmission;<sup>66</sup> b) the transmission is a retransmission of a nonsubscription broadcast transmission (provided certain requirements are met);<sup>67</sup> or c) the transmission falls within a certain category.<sup>68</sup> Second, digital audio transmissions not exempt in section 114(d)(1), eligible nonsubscription transmissions, and certain pre-existing satellite radio services are subject to a statutory license (administered by SoundExchange<sup>69</sup>) for the right to publicly perform sound recordings.<sup>70</sup> Third, there are interactive music services, which must negotiate a license directly with the

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§ 114(d)(2)(B)(i) (2007) (requiring one to go to section 114(j)(13) to find the definition of "sound recording performance complement," which lists all of the limitations that a non-exempt subscription transmission service must have to be eligible for a statutory license for the public performance of sound recordings by digital means).

61. Carson, *supra* note 50, at 9-10.

62. *Id.* at 10.

63. *Id.*

64. *Id.*

65. The following is a generalized overview. Section 114 has a myriad of exceptions to the public performance right of sound recordings, which are beyond the scope of this Article.

66. 17 U.S.C. § 114(d)(1)(A) (2007).

67. *Id.* § 114(d)(1)(B).

68. *Id.* § 114(d)(1)(C).

69. See note 75, *infra*, and accompanying text for a description of SoundExchange.

70. These are noninteractive services that are not exempt under section 114(d)(1). *Id.* § 114(j)(6). This means, basically, any noninteractive, nonsubscription service that is not part of, or a retransmission of, a non-subscription broadcast, such as a terrestrial radio transmission.

rights holder of the sound recording, the record label.<sup>71</sup> Therefore, section 114 creates a public performance right for sound recordings transmitted digitally, if the transmissions are not part of a terrestrial broadcast or a retransmission of such a broadcast. In addition, the DMCA creates a statutory license for ephemeral copies, which SoundExchange also licenses.<sup>72</sup> Finally, interactive services are obligated to obtain a license directly from the record companies.<sup>73</sup>

Although, the DPRA and DMCA finally granted the rights holders of sound recordings, i.e. the record companies, certain rights of public performance for their sound recordings in the realm of digital transmissions, a full performance right, such as for any public performance, digital or terrestrial, is still lacking. Many feel that there is no reason for music publishers and songwriters to enjoy a full performance right while performers and record companies do not.<sup>74</sup> The U.S. Copyright Office has repeatedly urged that sound recordings receive a full performance right, especially considering that sound recordings are the only copyrighted work that does not receive a full performance right.<sup>75</sup>

The U.S. Copyright Office designated SoundExchange to administer statutory licenses for certain non-interactive digital transmissions of

71. *Id.* §114(d)(3). In addition, the DMCA now requires users transmitting songs over the Internet

[T]o cooperate with rights holders to prevent recipients from using software or devices that scan transmissions for particular sound recordings or artists; to allow for the transmission of copyright protection measures that are widely used to identify or protect copyrighted works; and to disable copying by a recipient in the case where the transmitting entity possesses the technology to do so, as well as taking care not to induce or encourage copying by the recipient.

Carson, *supra* note 50, at 11 (citing 17 U.S.C. §§114(d)(2)(C)(v)-(viii)-(ii) (2007)). The words "record label" and "record company" refer to the same entity, i.e. a company that contracts performers to create a sound recording to which the company then owns the rights. The company then puts the recording on CDs, promotes the CDs and distributes the CDs. In addition, the company licenses users, such as iTunes, to offer the sound recordings as downloads for which the record company gets a percentage of the profits.

72. 17 U.S.C. § 112(e) (2007). During the course of a digital transmission, one or more ephemeral, or temporary, copies are made as buffers in the random access memory ("RAM") of computers to facilitate the transmission. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 345 (7th ed. 2006). The Copyright Royalty Board determines the rates for both statutory licenses under sections 114 and 112. See Soundexchange.com, About and Background, <http://www.soundexchange.com/> (last visited Apr. 24, 2008).

73. It seems that most record companies, however, have been reluctant to grant interactive services licenses or, if they have, it has been on a limited basis, which has severely hurt interactive webcasting. Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J. L. & TECH. 161, 179 (2005) (citing WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 105 (2004)).

74. Carson, *supra* note 50, at 13.

75. *Id.* (citing Report of the Register of Copyright, Copyright Implications of Digital Audio Transmission Services (October 1991)).

songs, pursuant to sections 112 and 114(f) of the U.S. Copyright Act.<sup>76</sup> SoundExchange is a non-profit organization that was established by the Recording Industry Association of America (“RIAA”).<sup>77</sup> In 2003, SoundExchange spun off from the RIAA and now operates independently.<sup>78</sup> SoundExchange collects royalties for its members, for non-members, and for its corresponding CROs in other countries with which it has reciprocal agreements.<sup>79</sup>

### III. IMPORTANT RELATIONSHIPS IN THE MUSIC BUSINESS AFFECTING THE PUBLIC PERFORMANCE RIGHT

The songwriters and composers of music are the fountainheads of the music industry. Through their gift of creativity, they put together words and melodies to create the musical compositions that become a part of our lives and a part of the international zeitgeist. It is, of course, their creations, their songs, that drive the music industry. The music industry has built itself around the reproduction, distribution, and performance of their songs. In order to fully understand the scope of the dispute, it is necessary to examine briefly the relationships in the music industry that facilitate the dissemination of performances of songs from the pen of the single songwriter to the masses.

#### A. SONGWRITERS AND MUSIC PUBLISHERS

The songwriter often enters into an agreement, called the “songwriter agreement,” with a music publisher.<sup>80</sup> The songwriter agreement sets out the share of the publishing income, i.e. the share of royalties that the songwriter and publisher will each receive.<sup>81</sup> The publisher and songwriter usually split the royalties 50/50.<sup>82</sup> In addition, the writer will usually assign to the publisher the rights to his or her songs.<sup>83</sup> The publisher then has administrative rights, which include the right to promote the songs by getting record companies to create commercial recordings, finding users, issuing licenses to users, collecting monies from

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76. *Id.*; 17 U.S.C. §§ 112 and 114(f) (2007). SoundExchange also administers licenses to digital cable and satellite television services and satellite radio services. Soundexchange.com, FAQ, <http://www.soundexchange.com/> (last visited Apr. 24, 2005).

77. See Soundexchange.com, <http://www.soundexchange.com/> (last visited Apr. 16, 2008).

78. Lehning Email, *supra* note 49.

79. Email from Ryan Lehning, Senior Counsel for SoundExchange (Apr. 14, 2008)(on file with author) [hereinafter Lehning Email 4/14/08]. See Part IV.A. for further explanation of SoundExchange’s relationship with foreign CROs.

80. KOHN, *supra* note 13, at 107.

81. *Id.*

82. PASSMAN, *supra* note 48, at 207.

83. *Id.*

these licensees, and paying the writers their share of the royalties.<sup>84</sup> Anyone may be a music publisher.<sup>85</sup> In fact, successful writers are increasingly acting as their own publishers.<sup>86</sup>

#### B. SONGWRITERS, PUBLISHERS, AND COLLECTIVE RIGHTS ORGANIZATIONS IN THE UNITED STATES

Music publishers in the United States affiliate themselves with one of the three performance right CROs in the United States.<sup>87</sup> The music publisher, through an agreement, grants to the CRO the right to license all of the songs controlled by the music publisher.<sup>88</sup> A CRO's repertoire is the CRO's entire collection of songs from the thousands of songwriters and music publishers that have entered into agreements with the CRO. The CROs then license the public performance right in its repertoire of songs, usually through blanket licenses, which cover the CROs' entire repertoire. CROs grant blanket licenses to users, such as radio stations and bars, who then have the right to perform the songs publicly.<sup>89</sup> Therefore, when a user in the United States, such as a radio station, requires a license to publicly perform music, the user goes to a CRO, such as BMI, and pays an annual fee for a blanket license to publicly perform an unlimited number of times any or all of the millions of songs in BMI's repertoire.<sup>90</sup> The CROs then collect the royalties from these

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84. *Id.*

85. M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 222 (9th ed. 2003).

86. *Id.*

87. PASSMAN, *supra* note 48, at 225. Technically the three CROs in the United States are called performance right organizations ("PROs") because these organizations only license the performance right. However, as previously stated, this Article will use the term CRO to refer to the U.S. PROs to create some continuity and to reduce the number of different acronyms used.

88. *Id.* The assignment to ASCAP or BMI, however, is a nonexclusive license, in accordance with court ordered consent decrees governing ASCAP and BMI's licensing practices. KOHN, *supra* note 13, at 916-17. The consent decrees were a result of antitrust litigation. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 322-24 (Daniel Gervais ed. 2006) [hereinafter *COLLECTIVE MANAGEMENT*]; *see also* note 95, *infra* (providing more information on the consent decrees). This means that songwriters and music publishers may also negotiate nonexclusive licenses directly with users, such as television and radio stations. KOHN, *supra* note 13, at 919. Therefore, although it rarely occurs because blanket licenses from CROs are usually more convenient and economical, members of these CROs may negotiate directly with users to license the rights to the members' songs. *Id.* at 919-20.

89. PASSMAN, *supra* note 48, at 225. If a user feels the fee charged by BMI or ASCAP is unfair then, according to either of the consent decrees that govern both CROs, the user may apply for a ruling on the fairness of the fee by a federal court. KOHN, *supra* note 13, at 918-19.

90. KOHN, *supra* note 13, at 918. The annual license fee depends on the type and size of the business requiring the license. *Id.* In 1998, the "Fairness in Music Licensing Act" was passed exempting food, drinking, and retail establishments from requiring a license to

licenses and, according to very complicated calculations,<sup>91</sup> determine the frequency with which each song was played.<sup>92</sup> Then, based on these calculations, the CROs distribute to their member publishers and songwriters the royalties that the CRO has calculated were generated by the songwriters' songs, giving the publisher's share directly to the publisher and the songwriter's share directly to the songwriter.<sup>93</sup> The U.S. CROs distribute royalties to writers and publishers on a 50/50 basis.<sup>94</sup> Songwriters, acting as their own publisher, may sign directly with one of the three CROs in the United States.<sup>95</sup>

### C. PERFORMERS, RECORD LABELS, AND SOUND EXCHANGE

In addition to licenses for the public performance of a musical composition, there are mechanical licenses, which cover the reproduction and distribution rights of songwriters<sup>96</sup> and music publishers. A music publisher will enter into an agreement with an agency, usually the Harry Fox Agency, which allows Harry Fox to grant statutory mechanical licenses pursuant to section 115 of the U.S. Copyright Act to record companies.<sup>97</sup> The mechanical license grants to record companies the right to reproduce and distribute songs on a tangible medium, which today is predominantly CDs.<sup>98</sup> Harry Fox then collects mechanical royalties from the record companies, takes a percentage for its own services, and distributes the rest to the publishers who will then give the writers their

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play songs in their establishments if certain criteria were met in regards to size of the establishment and the number and size of speakers and audiovisual equipment used. *Id.* at 919; see Fairness in Music Licensing Act of 1998, 17 U.S.C. § 110, *available at*, <http://www.copyright.gov/legislation/s505.pdf>.

91. KOHN, *supra* note 13, at 924.

92. *Id.*; see ASCAP.com, About ASCAP: Royalty Calculation, <http://www.ascap.com/about/payment/royalties.html> (last visited Apr. 17, 2008) (describing how ASCAP generally calculates royalties).

93. ASCAP.com, How You Get Paid at ASCAP, <http://www.ascap.com/about/payment/paymentintro.html> (last visited Apr. 17, 2008).

94. KOHN, *supra* note 13, at 317.

95. KRASILOVSKY, *supra* note 85, at 222. BMI and ASCAP are required, pursuant to court-ordered consent decrees aimed at limiting their monopoly on the licensing of musical rights, to encourage people to become publishers. *Id.* The first consent decree was entered into in 1941 and has been modified several times since. See Justice Department Agreement to Modify ASCAP Consent Decree, Sept. 5, 2000, *available at*, [http://www.usdoj.gov/atr/public/press\\_releases/2000/6404.htm](http://www.usdoj.gov/atr/public/press_releases/2000/6404.htm).

96. When the author mentions songwriters as being the rights holders in a musical composition, the author is referring to songwriters who did not assign the rights in their songs to a music publisher.

97. KOHN, *supra* note 13, at 223.

98. PASSMAN, *supra* note 48, at 213; see also Harry Fox Agency, Licensing Through HFA, <http://www.harryfox.com/public/licenseHome.jsp> (last visited Apr. 16, 2008).



share.<sup>99</sup> In 1995, the DPRA made the compulsory mechanical license apply to digital phonorecord deliveries, i.e. permanent downloads of music files.<sup>100</sup> Therefore, the Harry Fox Agency now licenses digital phonogram deliveries, which are downloads of music from the Internet.<sup>101</sup>

Before the record companies begin manufacturing CDs, records, or cassettes; however, they need to create a sound recording.<sup>102</sup> Record companies will sign performers and producers to create sound recordings of songs, under contract with the record company. The relationship between the artist and the record company is usually one of employer and employee. The record company, being the employer, becomes the sole owner of the sound recording under the “work for hire” doctrine, allowing the record company to license the reproduction, distribution, making of derivative works, and public performance of the recording for certain digital broadcasts.<sup>103</sup>

As discussed in Part II.B.2., SoundExchange is the only organization that administers compulsory licenses for the public performance of digital audio transmissions of sound recordings under section 114 of the U.S. Copyright Act. When distributing the royalties for the compulsory licenses that it administers, SoundExchange gives 50% directly to the artists (45% to featured artists and 5% to non-featured artists, if any), and 50% to the record companies who own the recording.<sup>104</sup> SoundExchange collects royalties for all featured performers and record companies, regardless of whether the performers or record companies have joined

99. PASSMAN, *supra* note 48, at 213. Mechanical royalties are monies paid on the sales of records by record companies who make and distribute them. *Id.* at 212. The mechanical license is a compulsory one and is pursuant to section 115 of the Copyright Act. The statutory rate under a mechanical license is set by the Copyright Royalty Board. KOHN, *supra* note 13, at 1317. A compulsory license is a license created pursuant to legislation, meaning the rights holders (in this case music publishers) cannot prevent users (in this case record companies) from obtaining a license to use the copyrighted works (for example, the making and selling of CDs by record companies).

100. KOHN, *supra* note 13, at 1317.

101. See Harryfox.com, Digital Licensing, <http://www.harryfox.com/public/licenseeServicesDigital.jsp> (last visited Apr. 16, 2008). In addition, Harry Fox offers “New Media” licenses for limited-use downloads, interactive streaming, ringtones, lyrics, and more. *Id.*

102. KOHN, *supra* note 13, at 1306. The standard agreement between a record company and an artist states that the artist is to make recordings exclusively for the record company for a certain duration, which is measured by a certain number of recordings. KRASILOVSKY, *supra* note 85, at 11-12. The record company agrees to pay all of the recording costs involved in the recording of a song with the costs being later recouped from royalties, if any, payable to the artist. *Id.* at 24. Artists are usually compensated pursuant to a contract. *Id.*

103. KRASILOVSKY, *supra* note 85, at 24.

104. See Soundexchange.com, <http://www.soundexchange.com/> (last visited May 1, 2008).

SoundExchange.<sup>105</sup> SoundExchange then attempts to locate all performers and record companies to whom royalties are owed, if SoundExchange has their required contact information.<sup>106</sup>

If the online digital audio transmission service is not exempt under section 114(d)(1) of the U.S. Copyright Act or subject to a compulsory license under section 114(d)(2) of the U.S. Copyright Act, then the service must license directly with the record companies for the public performance right of the sound recording. Record companies prefer this because they may deny licenses or they may negotiate any royalty fee or terms that they wish. In addition, the record company will then collect the royalties from the music service directly, recouping the performers' contractual share against the money the record company spent on the performers in producing and marketing the sound recording. This contrasts with the compulsory license administered by SoundExchange under section 114(d)(2), whereby SoundExchange collects the royalties and distributes the performer's share directly to the performer.

#### IV. THE LICENSING OF PERFORMANCE RIGHTS INTERNATIONALLY

Licensing the public performance right of music is big business. According to the National Music Publishers' Association's latest International Survey of Music Publishing Revenues, internationally, 46% of royalty income collected by all CROs was for the performance right.<sup>107</sup> This 46% constituted over \$3 billion dollars.<sup>108</sup> For the U.S. CROs, the total revenue from performance royalties domestically and internationally in 2001 was approximately \$915 million dollars.<sup>109</sup> The greatest area of income growth for ASCAP and BMI in recent years has been the royalties received from foreign CROs.<sup>110</sup> This rise in overseas revenues has been the result of the increased popularity of United States music and an increase in the number of foreign television and radio stations.<sup>111</sup>

##### A. PUBLIC PERFORMANCE OF MUSICAL COMPOSITIONS

Every country in the world that has a major music market has a

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105. Interview with Mike Huppe, General Counsel of SoundExchange, in Alexandria, VA (Mar. 21, 2008).

106. *Id.*

107. NMPA International Survey of Music Publishing Revenues 7, Chart 2, *available at*, [http://www.nmpa.org/pressroom/surveys/twelvth/NMPA\\_International\\_Survey\\_12th\\_Edition.pdf](http://www.nmpa.org/pressroom/surveys/twelvth/NMPA_International_Survey_12th_Edition.pdf).

108. *Id.* at Table 6.

109. *Id.*

110. BIEDERMAN, *supra* note 3, at 669.

111. *Id.*

CRO.<sup>112</sup> In order to collect royalties for the public performance of their repertoire of songs in a foreign country, CROs enter into a reciprocal agreement with the CRO in that foreign country.<sup>113</sup> Each CRO has entered into a reciprocal agreement with most, if not all, of the world's CROs.<sup>114</sup>

All CROs use some form of blanket licensing to license out the public performance right of the repertoire of songs belonging to their members as well as the repertoire of other CROs with whom they have a reciprocal agreement.<sup>115</sup> BMI, for example, which is a United States CRO, grants to U.S. online music providers a blanket license to perform any song in BMI's repertoire publicly. However, the license grants the online music provider the right to perform the repertoire publicly *only* within the United States.<sup>116</sup> The blanket license that BMI grants includes the repertoire of songs belonging to BMI's affiliates,<sup>117</sup> in addition to all of the songs in the repertoires of each foreign CRO that BMI has entered into a territorially restrictive reciprocal agreement with. In addition to collecting royalties on behalf of its own affiliates, BMI, pursuant to the reciprocal agreements, collects royalties for the performance in the United States of the songs in the repertoires of the foreign CROs that BMI has entered into an agreement with.<sup>118</sup> After deducting an administrative fee, BMI forwards the royalties collected in the United States for the public performance of the foreign repertoires to the foreign CROs who, in turn, distribute the monies to their songwriter or publisher members.<sup>119</sup>

In addition, pursuant to the reciprocal agreements they have with BMI, the foreign CROs license BMI's repertoire in their respective territories and collect public performance royalties for the public performance of BMI's repertoire in their respective territories.<sup>120</sup> The foreign CROs, after deducting an administrative fee, send these royalties to BMI, who

112. KOHN, *supra* note 13, at 317. If a country does not have a CRO, one of the bigger CROs from another country will administer the collection of performance royalties in that country. *Id.*

113. *Id.*

114. BIEDERMAN, *supra* note 3, at 669.

115. KOHN, *supra* note 13, at 317.

116. Dr. Lucie Guibault, *When Will We Have Cross-Border Licensing of Copyright and Related Rights in Europe?*, eCopyright Bulletin, April-June 2005, at 2, available at, [http://portal.unesco.org/culture/en/files/27418/11514153461guibault\\_en.pdf/guibault\\_en.pdf](http://portal.unesco.org/culture/en/files/27418/11514153461guibault_en.pdf/guibault_en.pdf) (noting how the traditional agreements between CROs result in the CROs being restricted to grant licenses to online music providers that are valid only within the territory of the granting society).

117. BMI refers to its members as "affiliates." See BMI.com, BMI Affiliate Overview, <http://www.bmi.com/international/entry/C2259?link=footer> (last visited Apr. 24, 2005).

118. BIEDERMAN, *supra* note 3, at 669.

119. *Id.*

120. *Id.*

distributes the royalties to its songwriter and publisher affiliates.<sup>121</sup> Royalties collected for the public performance of the repertoires of foreign CROs are distributed to the foreign songwriters and publishers according to the distribution ratio used by that foreign CRO.<sup>122</sup>

Many music publishers, however, bypass the CROs. Music publishers do this by entering into an agreement with a publisher in each major overseas market, whereby the foreign publisher collects performance royalties in the foreign country for the other publisher's repertoire.<sup>123</sup> This process is called subpublishing.<sup>124</sup> In the subpublisher arrangement, publishers are designated as either an original publisher or a subpublisher, depending on which one is collecting or distributing royalties at any given time.<sup>125</sup> This method may be preferred for various reasons, including expedited collection of royalties, better vigilance in claiming rights, and retention of foreign revenue for local expenditures.<sup>126</sup> If a publisher has a subpublisher in a foreign country, the publisher, the original publisher, will inform the CRO of that foreign country that the CRO is to distribute the original publisher's royalty share to the original

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121. *Id.*

122. An example may be helpful. Let us look at the distribution of royalties between ASCAP and BUMA, the Dutch CRO. BUMA must distribute the royalties from ASCAP's songs in a 50/50 manner between the U.S. writers and publishers represented by ASCAP, as is done in the United States. Therefore, BUMA would distribute fifty percent of the royalties to the writers, which means BUMA pays ASCAP fifty percent of the royalties, which ASCAP distributes directly to its U.S. writer members. BUMA will distribute the U.S. publisher's fifty percent share directly to ASCAP as well. ASCAP will then distribute the royalties to its U.S. publisher members. However, if a U.S. publisher has appointed a subpublisher in the Netherlands, the U.S. publisher will inform BUMA of such. BUMA will then pay the Dutch publisher, who is acting as the subpublisher for the U.S. "original" publisher, the U.S. original publisher's share instead of giving the share to ASCAP. KOHN, *supra* note 13, at 331. However, not all CROs distribute to writers and publishers on a 50/50 basis like the U.S. CROs. In the Netherlands, BUMA distributes two-thirds of royalties to writers and one-third to publishers. Therefore, when ASCAP collects royalties for BUMA's songs played in the United States, ASCAP gives two-thirds of the royalties to BUMA, who distributes the royalties to the writers represented by BUMA. The remaining one-third is given to BUMA to distribute to the Dutch music publishers. If a Dutch publisher has a U.S. subpublisher, then ASCAP gives that Dutch publisher's, i.e. the "original" publisher's, one-third share to the U.S. subpublisher, who then distribute it to the Dutch "original publisher."

123. KOHN, *supra* note 13, at 315.

124. *Id.*

125. *Id.* For example, a U.S. music publisher such as Warner would enter into an agreement with a German music publisher. Warner, in the position of original publisher, would have the German publisher (sub-publisher) promote Warner's songs and collect Warner's royalties and income in the German market. Conversely, if the German publisher is in the position of original publisher and Warner is in the role of sub-publisher, then Warner will promote the use of the German publisher's music, and collect and distribute the German publisher's royalties and income.

126. KRASILOVSKY, *supra* note 85, at 150.

publisher's subpublisher in that country and not to the CRO of the original publisher's country.

The major reason publishers resort to subpublishing, however, is the large amount of foreign performance royalties not paid to United States rights holders because of difficulties in identifying American songs with translated or new titles.<sup>127</sup> Foreign subpublishers in agreement with a United States original publisher, for example, can identify U.S. songs in all their forms and under different titles and collect the performance royalties for these songs, which would otherwise go unidentified. The subpublisher, therefore, makes sure that the original publisher gets royalties for the performance of all of its songs, regardless of the song's translated title or version of the song. If the foreign subpublisher did not identify these U.S. songs and collect the royalties for the public performance of them, foreign CROs, unable to identify to whom the royalties should go, would place the undistributed royalties into general funds, which would then be distributed amongst foreign CROs and their members.<sup>128</sup>

## B. PUBLIC PERFORMANCE OF SOUND RECORDINGS

As discussed in Part II.B.2., the U.S. Copyright Royalty Board has designated SoundExchange to administer compulsory licenses for the public performance right of sound recordings under section 114 of the U.S. Copyright Act. The compulsory licenses cover only ephemeral copies and certain digital transmissions. SoundExchange administers these compulsory licenses to online music providers in the United States and collects the royalties from these licenses.

SoundExchange has also entered into reciprocal agreements with some foreign CROs, but not all.<sup>129</sup> The foreign CROs that SoundExchange deals with can be divided into three types, based on the rights that the foreign CRO manages.<sup>130</sup> Some CROs license and collect royalties only for the record companies, others license and collect only for performers, and still others collect for both record companies and performers.<sup>131</sup> The following is a description of how SoundExchange collects royalties from foreign CROs for the public performance of U.S. sound recordings in foreign countries.

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127. *Id.*

128. *Id.*

129. Lehning Email, *supra* note 79. Negotiating reciprocal agreements with every CRO would be too much of a financial burden on SoundExchange at this point. *Id.* The logistics and operational issues surrounding these deals are quite complicated. *Id.*

130. Telephone Interview with Ryan Lehning, Senior Counsel SoundExchange (May 1, 2008) (on file with author) [hereinafter Lehning Interview].

131. *Id.*

As noted before, SoundExchange collects performance royalties for all U.S. rights holders, regardless of whether the rights holders have signed up with SoundExchange.<sup>132</sup> SoundExchange will make the effort to locate the non-member performers and record companies and give them their royalties, if SoundExchange has their contact information.<sup>133</sup> However, SoundExchange only collects the foreign royalties of its actual members (i.e. featured artists and record labels who have registered with SoundExchange and granted SoundExchange the right to collect foreign royalties).<sup>134</sup> Therefore, when SoundExchange contacts a foreign CRO, it presents the foreign CRO with a mandate, a list of all the sound recordings belonging to SoundExchange members.<sup>135</sup> The foreign CRO will then transfer to SoundExchange the royalties that the foreign CRO has collected for those songs.<sup>136</sup> However, because of material reciprocity, foreign CROs only distribute the royalties to SoundExchange for the very same rights for which SoundExchange collects in the United States.<sup>137</sup>

Once SoundExchange receives these royalties from the foreign CRO, it distributes them. For whom the foreign CRO has collected the royalties determines the distribution. If the foreign CRO only collects the public performance right for performers, then SoundExchange distributes the royalties to its featured performer members for whom the foreign CRO has collected.<sup>138</sup> If the foreign CRO only collects for record companies, SoundExchange collects and distributes the money to its U.S. record company members for whom the foreign CRO has collected royalties.<sup>139</sup> If the foreign CRO collects for both performers and record companies, it will inform SoundExchange what percentage of the royalties go to each party.<sup>140</sup> Large record companies do not ask SoundExchange to

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132. *Id.*

133. Lehning Email, *supra* note 49.

134. Lehning Interview, *supra* note 130.

135. *Id.*

136. *Id.*

137. *Id.* SoundExchange does not license or collect royalties for the public performance of sound recordings by terrestrial radio and television broadcasts or from interactive digital music services. Material reciprocity means that foreign CROs are not going to give SoundExchange royalties for certain public performances of U.S. sound recordings in their country if SoundExchange does not collect the same royalties for foreign artists in the United States.

138. *Id.* If the foreign CRO has collected for non-featured performers, SoundExchange does not distribute this money to U.S. non-featured artists. *Id.* Instead, SoundExchange distributes this money to two organizations: the American Federation of Musicians and the American Federation of Television and Radio Broadcasts. *Id.* For an explanation of what a "featured artist" is, see Soundexchange.com, Artist's Questions, "What is a featured artist?", <http://www.soundexchange.com/> (last visited May 1, 2008).

139. Lehning Interview, *supra* note 130.

140. *Id.*

collect their foreign royalties. Instead, large record companies have foreign affiliates in each music market who collect foreign performance royalties on the large record company's behalf.<sup>141</sup>

## V. TYPES OF DIGITAL AUDIO TRANSMISSIONS AND THE RIGHTS INVOLVED

Songs and other information on the Internet transmit digitally in the form of binary code, which allows the receiver of the information to download or perceive, whether visually or auditorially, an exact copy of the information sent.<sup>142</sup> The digital transmissions that transmit music are called digital audio transmissions.<sup>143</sup> Below are the two main types of digital audio transmissions – streaming and downloading.

### A. STREAMING

Streaming results in temporary, buffer copies, called ephemeral copies, of the streamed media being stored on the random access memory ("RAM") of the user's computer.<sup>144</sup> The computer plays these buffered copies while the rest of the file transmits, buffers, and plays in a continuous process, leaving no permanent file on the user's computer.<sup>145</sup> This allows a user to view or listen within seconds to large, compressed files, such as audio and video files, instead of having to wait until the entire file downloads.<sup>146</sup> Files are not usually saved to one's computer as a result of streaming.<sup>147</sup> However, software is available that allows one to download streamed music.<sup>148</sup>

141. *Id.*

142. KOHN, *supra* note 13, at 1257.

143. *Id.*

144. Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 451 (2003).

145. The Linux Information Project, Streaming Definition, <http://www.lininfo.org/streaming.html> (last visited Apr. 16, 2008).

146. *Id.*

147. *Id.*

148. See Techcrunch.com, Freemusiczilla: Best Downloader I've Tested, <http://www.techcrunch.com/2008/01/02/freemusiczilla-best-music-downloader-ive-tested/> (last visited Apr. 24, 2005). Once downloaded, the software notes all songs streaming on sites like Last.fm, Pandora, Seepod, etc. and allows the user to download any songs streaming on these sites. *Id.* Radiotracker software tracks all the songs streamed by online radio stations. See All-streaming-media.com, <http://all-streaming-media.com/record-audio-stream/RadioTracker-Icecast-Shoutcast-grabber-Find-mp3-internet-radio-stations-playing-your-favorite-music-and-record-them.htm> (last visited Mar. 5, 2008). The consumer simply types in whatever songs he or she wants to download. *Id.* The Radiotracker software will monitor the playlist of numerous radio stations and will download the songs off the playlist as soon as one of the sites plays the song. *Id.* The software is able to anticipate which songs are about to play because each song has a digital code on it, providing information about the title, artist, etc. *Id.*

Webcasting is a type of streaming and usually refers to the non-interactive streaming of live or recorded broadcasts over the Internet.<sup>149</sup> In the United States, streaming and webcasting usually only constitute the public performance right and not the reproduction right.<sup>150</sup> A music provider who streams music in the United States must always acquire a public performance license from the U.S. CROs for the public performance right in the musical composition.<sup>151</sup> In addition, a music provider is required to obtain a license for the public performance of the sound recording. The type of license required, if any, depends on how the DMCA categorizes the streamed transmission service. The streamed transmission may require no license in certain circumstances, it may require a compulsory license,<sup>152</sup> or it may require that the service provider negotiate directly with the record companies for a voluntary license.<sup>153</sup>

There are two types of online services that transmit music: interactive and non-interactive services. An interactive transmission service is defined by the U.S. Copyright Office as “one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording . . . [that] is selected by or on behalf of the recipient.”<sup>154</sup> A non-inter-

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149. Wikipedia.com, Webcast, <http://en.wikipedia.org/wiki/Webcasting> (last visited Apr. 16, 2008).

150. KOHN, *supra* note 13, at 1258.

151. *Id.* at 1347. U.S. CROs grant blanket licenses to interactive websites, just as they do to terrestrial radio. *Id.* at 1328.

152. The Copyright Royalty Board recently concluded that the commercial webcasters usage fees are to be determined on a per-performance fee structure. In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, April 23, 2007, at 25 (CRB 2007), *available at*, <http://www.webcasters.org/publications/DWT%20-%20Internet%20Radio%20Handout.pdf>. Noncommercial services will pay an annual flat per-station rate. *Id.* at 29. Small commercial webcasters (those with less than \$1.2 million in revenue), were worried that the per song royalty fees would put them out of business. In 2002, the small commercial webcasters reached an agreement with the recording industry that allowed the webcasters to pay a percentage of their revenue. Davis D. Oxenford, Internet Radio: The Basics of Your Music Royalty Obligations, Aug. 2006, at 7-8, *available at*, <http://www.webcasters.org/publications/DWT - Internet Radio Handout.pdf>. This agreement resulted in the passage by Congress of the Small Webcasters Settlement Act. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 16 Stat. 2780 (2002), *available at*, <http://www.copyright.gov/legislation/pl107-321.pdf>.

153. KOHN, *supra* note 13, at 1347. A voluntary license means that the record company can charge any fee that it wishes. *Id.* If a service provides on-demand streaming, allowing users to choose the streamed songs, that service provider must obtain a mechanical license from Harry Fox, which covers the reproduction and distribution rights. Harryfox.com, Digital Licensing, <http://www.harryfox.com/public/infoFAQDigitalLicensing.jsp> (last visited Apr. 16, 2008).

154. 17 U.S.C. §114(j)(7) (2007). Transmission services will also be interactive if the songs transmitted “substantially consist” of songs picked by listeners and transmitted either to the entire audience or directly to the selecting individual within one hour after the songs are selected. *Id.* In addition, a transmission service will be interactive if the service



active service is similar to a broadcast in that it transmits to the public at large, without interaction from individual consumers.<sup>155</sup>

Interactive music services cannot acquire a compulsory license under section 114 of the U.S. Copyright Act.<sup>156</sup> Instead, providers of interactive online music services must negotiate directly with the rights holders of sound recordings, i.e. the record companies, for the right to perform the sound recordings online publicly.<sup>157</sup> The reason for this is if consumers are able to interact with a website, allowing them to choose hear a certain song whenever they wanted, it is likely that the consumer will not buy a recording of the song, whether on a CD or through a digital download.<sup>158</sup>

There are two types of non-interactive transmissions: subscription and non-subscription transmissions. The U.S. Copyright Office defines a “subscription transmission” as a transmission “that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission.”<sup>159</sup> A “non-subscription transmission is any transmission that is not a subscription transmission.”<sup>160</sup>

Simulcasting is another form of streaming on the Internet. Simulcasting is “the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals.”<sup>161</sup> Lastly, podcasting is a type of streaming that allows one to view syndicated programs on portable devices, such as iPods (hence the name “podcasting”).<sup>162</sup>

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“substantially consist(s)” of songs transmitted to listeners at times pre-designated by listeners. *Id.*

155. KOHN, *supra* note 13, at 1259. There are two types of non-interactive transmission services: subscription and non-subscription transmission services. *Id.* at 1333.

156. See Part II.B.A. for an explanation of the DMCA licensing regime.

157. Carson, *supra* note 50, at 20.

158. KOHN, *supra* note 13, at 1333.

159. 17 U.S.C. § 114(j)(14) (2007). Certain non-interactive, subscription and non-interactive, non-subscription services are eligible for a compulsory license in the U.S. *Id.* § 114(d)(2).

160. *Id.* §114(j)(9).

161. Commission Decision, Case No COMP/C2/38.014 IFPI “Simulcasting,” Oct. 8, 2002, at Part A.2., *available at*, <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38014/en.pdf>. Simulcasters, whose services are non-subscription, pay the fees for their terrestrial broadcast, which covers their simulcast signal of the broadcast over the Internet. Oxenford, *supra* note 152.

162. Lüder, *supra* note 7, at 18.

## B. DIGITAL PHONOGRAM DELIVERIES, I.E. PERMANENT DOWNLOADS

A digital phonogram delivery (“DPD”), or a permanent download of a music file, is defined as a music file that the receiver is meant to keep as his or her own.<sup>163</sup> The receiver of the music file can normally use the file forever, subject to digital rights management (“DRM”) software that may limit the number and kinds of copies that can be made of the file.<sup>164</sup> A “limited download,” however, allows the receiver of the downloaded song to use the song as long as their subscription to use the song is in effect.<sup>165</sup> Once the subscription has expired, DRM software attached to the downloaded song will prevent its further use.<sup>166</sup>

## VI. BRIEF COMPARISON OF ONLINE RIGHTS AND CROS IN THE UNITED STATES AND EUROPE

This Part will look at the music markets of the United States and the European Union (“E.U.”) for two reasons. First, these two music markets are the largest in the world.<sup>167</sup> Second, the E.U. will be the first market where CROs adopt a multiterritorial licensing regime, either of their own accord or pursuant to future legislation passed by the E.U. government.<sup>168</sup>

### A. LOOK AT THE UNITED STATES

Most of the rest of the world considers a download and a stream to constitute both a reproduction and a public performance.<sup>169</sup> Unfortu-

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163. Decision of the Board, Statement of Royalties to Be Collected by SOCAN for the Communication to the Public by Telecommunications, in Canada, of Musical or Dramatico-Musical Works [Tariff No. 22.A (Internet – Online Music Services) 1996-2006], at 4-5, Part III.[13], *available at*, <http://www.cb-cda.gc.ca/decisions/m20071018-b.pdf> [hereinafter Canadian Decision].

164. *Id.*

165. *Id.*

166. *Id.* DRM systems are causing subscription services to fail because the DRM technology would not allow users to transfer their downloaded songs to iPods. *See Forbes.com, Yahoo! Exits Music Subscription Biz*, by Louis Hau Feb. 4, 2008, [http://www.forbes.com/2008/02/04/yahoo-rhapsody-music-biz-media-cx\\_lh\\_0204bizyahoo.html](http://www.forbes.com/2008/02/04/yahoo-rhapsody-music-biz-media-cx_lh_0204bizyahoo.html) (last visited May 1, 2008) [hereinafter Forbes Yahoo] (describing how Yahoo! exited the subscription music market because DRM restrictions caused its subscription service to struggle).

167. *See* NMPA Survey, *supra* note 107, at 3, Chart 3 (listing the leading countries in royalty collection; the United States is first, with six of the other top ten spots held by countries in the E.U.).

168. *See* Part X *infra* for a discussion of the status of the E.U. legislative process regarding multiterritorial licensing.

169. Telephone interview and email correspondence with Marvin Berenson, General Counsel for BMI (Feb. 28 – Apr. 14, 2008) [hereinafter Berenson Interview] (on file with author); Assessment, *supra* note 225, at 8 (showing that in the EU downloads and streams constitute both a reproduction and a public performance right (described as a “right of communication”).

nately, it is not so clear in the United States. For example, in *United States v. ASCAP*, the court held that a download does not constitute a public performance.<sup>170</sup> However, this was an interlocutory decision to rule on motions for summary judgment. Therefore, the judge could have re-addressed the issue and held otherwise when he heard the case on the merits. However, in the final decision on the merits, the court did not re-address the issue. Therefore, the ruling that downloads in the United States do not constitute a public performance stands unless appealed to, and overturned by, the Court of Appeals for the Second Circuit.<sup>171</sup>

The traditional right of reproduction includes “the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be perceived, reproduced, or otherwise communicated, directly or with the aid of machine or a device.”<sup>172</sup> Traditionally, a record company has been required to obtain a “mechanical license,” which covers the right to reproduce the musical compositions (usually on CDs today) and the right to distribute those reproductions.<sup>173</sup> A mechanical license is a compulsory license under section 115 of the U.S. Copyright Act.<sup>174</sup> This means that companies that want to reproduce and distribute underlying musical compositions in a sound recording, or online music providers who want to sell DPDs, i.e. downloads of songs, are able to obtain a license at a rate set by the Copyright Royalty Board.<sup>175</sup> Digital downloads, such as downloading a song file from iTunes onto one’s hard drive, clearly constitute a reproduction requiring iTunes to obtain licenses in the United States to reproduce the underlying musical composition and the sound recording.<sup>176</sup>

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170. *U.S. v. ASCAP*, 485 F. Supp. 2d 438, 442 (S.D.N.Y. 2007).

171. Email from Marvin Berenson, General Counsel for BMI (May 5, 2008 9:37 a.m. EST) (on file with author); *U.S. v. ASCAP*, 2008 U.S. Dist. LEXIS 36226 (S.D.N.Y. Apr. 30, 2008).

172. GORMAN, *supra* note 72, at 345 (citing H.R. Rep. 94-1476, 94th Cong., 2d Sess. 61-62 (1976)) (internal citations omitted).

173. See Harryfox.com, “Do I need a mechanical license?”, <http://www.harryfox.com/public/mechanicalLicense.jsp> (last visited May 25, 2008).

174. 17 U.S.C. § 115 (2007).

175. *Id.* at § 115(c)(3)(d) (2007).

176. See Jonah Knobler, *Performance Anxiety: The Internet and Copyright’s Vanishing Performance/Distribution Distinction*, 25 CARDOZO ARTS & ENT. L.J. 531, 542 (2007), available at, <http://www.cardozoarlj.net/issues/08/Knobler.pdf> (providing a detailed discussion of the controversy in the United States as to what types of digital transmissions implicate the reproduction, distribution, and public performance rights). The iTunes service, by transmitting a song to the consumer to download, must obtain a “mechanical license” from the songwriter or publisher (usually through the Harry Fox Agency) for the reproduction right of the musical composition. In addition, iTunes must obtain a license from the record company for the reproduction of the sound recording. When iTunes provides downloads in certain foreign countries (where a download constitutes a reproduction and a public performance), it may be required to obtain a license from both the publisher and record com-

Section 112(e) of the U.S. Copyright Act requires online music providers who stream music to acquire a statutory license for the reproduction of the transmitted sound recordings because, during the transmission, the computer's RAM temporarily saves the sound recordings as buffered, ephemeral copies.<sup>177</sup> This buffering process allows for the instant playing of a video, music, or multimedia file without having to download the file onto the computer's hard drive first. Webcasters and broadcasters may create one ephemeral copy during the transmission of a song without charge.<sup>178</sup> If the transmission creates more than one ephemeral copy, however, webcasters and broadcasters are obligated to obtain compulsory, statutory license.<sup>179</sup> There is controversy, however, as to whether webcasters and broadcasters need the section 112(e) compulsory license. The U.S. Copyright Office has asked Congress to repeal the 112(e) compulsory license, stating that this compulsory license is an "aberration" because the temporary buffer copies for which the license is granted are made solely for enabling an already licensed right, i.e. the public performance of sound recordings.<sup>180</sup>

There is also controversy in the United States as to whether interactive transmissions, on-demand streams,<sup>181</sup> incidental DPD, and limited downloads should be required to obtain a compulsory mechanical license under section 115 of the U.S. Copyright Act.<sup>182</sup> The rights holders naturally want these transmissions and DPDs to constitute a reproduction

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pany for the reproduction and the public performance of their copyrighted compositions and sound recordings, respectively.

177. 17 U.S.C. § 112(e) (2007).

178. 17 U.S.C. § 112(a)(1); *see also* In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, CARP DTRA 1 & 2, 96 (CARP 2000) (providing a determination of the Copyright Arbitration Royalty Panel (now called the Copyright Royalty Board) to decide rates for the statutory license for ephemeral copies under § 112(e)(4) [hereinafter CARP Hearing].

179. *See* CARP Hearing, *supra* note 178, at 96.

180. Testimony of Rob Glaser, Chairman and CEO RealNetworks, Inc., before the United States Senate Subcommittee on Intellectual Property Committee on the Judiciary, Hearing on "Music Licensing Reform," July 12, 2005, *available at*, [http://judiciary.senate.gov/testimony.cfm?id=1566&wit\\_id=4447](http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4447).

181. There is also an issue of what level of interactivity is required to make a music service an interactive service, i.e. "on-demand" service. *See* Lüder, *supra* note 7, at 32 (describing the difficulty in describing exactly what level of interactivity constitutes "on-demand"). For example, the Pandora online music service transmits songs on the Internet using software that creates a unique "station" for each individual listener based on an individual's prior music selections. Pandora.com, <http://www.pandora.com/> (last visited May 1, 2008); *see also* Jango.com, <http://www.jango.com/> (last visited May 1, 2008).

182. KOHN, *supra* note 13, at 1328; *see also* Glaser, *supra* note 180 (discussing the disagreement as to whether section 115 extends to on-demand Internet radio services); Interview with Lee Knife, General Counsel for DiMA, Washington, D.C. (June 11, 2008).

and a public performance.<sup>183</sup> Rights holders' business argument for their position on this issue is that these types of online music services allow a consumer to choose which songs they hear and when they hear them, thereby displacing traditional CD sales and legal digital downloads. This, of course, will cause the rights holders to lose money.<sup>184</sup> It does not matter, they argue, that the hard drive on the consumer's computer made no permanent copy. If consumers can hear a song whenever they would like by having it streamed to their audio device, then, in essence, they are enjoying the same benefit that would result if they had an actual copy of the song on their listening device. The legal argument that rights holders use in front of the Copyright Royalty Board ("CRB") and courts, however, is that during any transmission the consumer's computer makes copies of the work.<sup>185</sup> They argue that these copies are reproductions that require a mechanical license.

Music providers, such as webcasters, however, want to pay as little as possible for the right to offer music. Therefore, they would like there to be a ruling by a court or the CRB that a download constitutes only a reproduction and that a stream only constitutes a public performance.<sup>186</sup> Any type of transmission, other than a pure DPD, may result in ephemeral copies on a consumer's computer, but these copies are only the temporary result of a public performance.<sup>187</sup> The Digital Media Association ("DiMA"), which represents webcasters, recently asked the CRB to rule that interactive streaming did not constitute a download. However, on February 5, 2008, the CRB ruled that whether a transmission is interactive or non-interactive is a factual determination that judges must decide and not a legal question that the Register of Copyrights would decide.<sup>188</sup> Every five years the CRB makes a rate determination for the compulsory

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183. The Harry Fox Agency, publishers, songwriters, and record companies want streaming and webcasting to encompass the reproduction right also. This, of course means that webcasters and providers of streamed music would be required to obtain mechanical licenses to transmit songs on the Internet. The U.S. CROs, songwriters, publishers, and record companies all want downloads to constitute a public performance instead of just a reproduction. Again, this means more licenses and more money for the songwriters and publishers.

184. KOHN, *supra* note 13, at 1329.

185. Knife Interview, *supra* note 182.

186. KOHN, *supra* note 13, at 1328.

187. Knife Interview, *supra* note 182.

188. BMI.com, Copyright Royalty Board Begins Mechanical Rate Hearing, January 30, 2008, <http://www.bmi.com/news/entry/535989/> (last visited Apr. 16, 2008). DiMA, representing webcasters, recently asked the CRB to have the Register of Copyrights, Mary Beth Peters, decide whether webcasters owe songwriters and publishers mechanical royalties. *Id.* Another issue that the CRB may soon be forced to resolve is whether an on-demand stream is the same as an interactive stream. Wired Blog Network, Listening Post, *Copyright Royalty Board Denies DiMA Request*, by Eliot Van Buskirk, Feb. 5, 2008, <http://blog.wired.com/music/2008/02/copyright-royal.html> (last visited Apr. 16, 2008).

mechanical license under section 115 that will apply for the subsequent five years.<sup>189</sup> During the writing of this paper, there was an ongoing rate determination for the compulsory mechanical license under section 115.<sup>190</sup> One of the main issues was whether interactive and on-demand transmissions, incidental DPDs,<sup>191</sup> and limited downloads<sup>192</sup> required a mechanical license.<sup>193</sup> DiMA and the music publishers, who were on opposing sides of this issue, were able to come to a settlement on their own.<sup>194</sup> However, the CRB has suggested, to the surprise and disagreement of all the parties, that it may decide whether interactive and on-demand transmissions, incidental DPDs, and limited downloads require a mechanical license anyway, completely disregarding the parties' settlement agreement.<sup>195</sup> This agreement, however, only applies for the next three years, at which point the parties will again argue whether interactive and on-demand streaming, incidental DPDs, and limited downloads require a mechanical license.<sup>196</sup>

Another controversial subject in the United States is limited downloads.<sup>197</sup> For example, what if one subscribed to have a song streamed to them five times, whether at different times, at set times, or simply five times in a row?<sup>198</sup> What if one paid for a song file which one could listen to an unlimited amount of times for thirty days, at which point the song file would cease to operate?<sup>199</sup> Services such as these and many others blurred the line between what is interactive and non-interactive. Interestingly, the subscription music services are quickly disappearing, being replaced with free online music services, whose sole

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189. Knife Interview, *supra* note 182.

190. *Id.*

191. *Id.* Incidental DPDs are described as "digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery." 17 U.S.C. § 115(c)(3)(C)(i) (2007). Congress, however, failed to define an "incidental DPD," which naturally leads to disputes as to what it does mean.

192. See notes 193-96 and accompanying text for a description of limited downloads.

193. Knife Interview, *supra* note 182.

194. *Id.* Mr. Knife, of DiMA, stated the settlement was kept confidential until the CRB decided on the rates for the mechanical license for the reproduction and distribution of music on CDs and for DPDs. *Id.* The reason for the secrecy was to allow the CRB to come to a decision on the rates, uninfluenced by the parties' settlement regarding interactive and on-demand streaming, incidental DPDs, and limited downloads. *Id.*

195. *Id.*

196. *Id.* The hearings have been going on for about two years, meaning once the CRB makes its final decision on October 2, 2008, the rates it sets will be retroactive two years. *Id.*

197. KOHN, *supra* note 13, at 1326.

198. *Id.*

199. *Id.* Some believe such transmissions should be considered a digital delivery, i.e. reproduction, and therefore, should be subject to the statutory mechanical license. *Id.*

revenue comes from advertising.<sup>200</sup>

Collective licensing in the United States differs from the rest of the world, specifically the countries of the European Union (“E.U.”), in three ways.<sup>201</sup> First, the European countries, and most countries in the rest of the world only have one CRO that administers the public performance right, whereas the United States has three.<sup>202</sup> Second, ASCAP and BMI, pursuant to court ordered consent decrees, may not negotiate exclusive licenses with songwriters and publishers for the rights to license out their songs as their European counterparts can.<sup>203</sup> Finally, the Harry Fox Agency does not have a monopoly on mechanical rights, i.e. reproduction and distribution rights, in the United States whereas European CROs administering the mechanical right do.<sup>204</sup>

## B. LOOK AT THE E.U.

The E.U. grants songwriters the rights of reproduction, communication to the public (i.e. public performance), and making available.<sup>205</sup> The making available right “is an exclusive right for authors, performers, and ‘phonogram producers’ to authorize or prohibit the dissemination of their works and other protected material through interactive networks such as the internet [sic].”<sup>206</sup> Rights holders, in other words, have the exclusive right to make their works available, in such a way that members of the public may access them whenever they would like.<sup>207</sup> Performers in the E.U. receive the exclusive right to allow reproductions of the fixation of their performances and the exclusive right to make available.<sup>208</sup> In addition, performers in the E.U. receive a guarantee of equitable remuneration anytime a wireless medium transmits their commercial sound

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200. Wired.com, *Dying DRM Means More Freedom for Music Fans*, by Eliot Van Buskirk, Oct. 15, 2007, [http://www.wired.com/entertainment/music/commentary/listeningpost/2007/10/listeningpost\\_1015](http://www.wired.com/entertainment/music/commentary/listeningpost/2007/10/listeningpost_1015) (last visited May 1, 2008); Forbes Yahoo, *supra* note 166.

201. COLLECTIVE LICENSING: PAST, PRESENT, AND FUTURE 30 (James M. Kendrick ed. 2002) [hereinafter COLLECTIVE LICENSING].

202. *Id.*

203. *Id.*

204. *Id.*

205. Lüder, *supra* note 7, at 24. The “making available” right was specifically created for the online environment and was implemented into the World Intellectual Property Organization (“WIPO”) treaties (the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). The WIPO Treaties: ‘Making Available’ Right 1 (Mar. 2003), *available at*, <http://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf> [hereinafter WIPO Article].

206. WIPO Article, *supra* note 205, at 1.

207. Commission Staff Working Document: Impact Assessment Reforming Cross-Border Collective of Copyright and Related Rights for Legitimate Online Music Services, SEC (2005) 1254, Brussels (Nov. 10, 2005), at 34, *available at*, [http://ec.europa.eu/internal\\_market/copyright/docs/management/sec\\_2005\\_1254\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf) [hereinafter Assessment].

208. Lüder, *supra* note 7, at 24.

recording.<sup>209</sup> Record companies in the E.U. receive the exclusive right to authorize reproduction and the making available of sound recordings.<sup>210</sup>

In the E.U., only songwriters and performers have the exclusive right of communication to the public.<sup>211</sup> However, the performer's exclusive right is limited to live performances.<sup>212</sup> Therefore, performers do not have an exclusive right of communication in the online environment.<sup>213</sup> However, performers do have the exclusive right to make their works available, which would apply to online downloads.<sup>214</sup> Although performers and record companies cannot control the public performance of their sound recordings, in most E.U. countries record producers and performers have the right to equitable remuneration<sup>215</sup> when their sound recordings are performed publicly, whether online or terrestrially.<sup>216</sup>

Therefore, in the E.U., CROs are collecting royalties for the public communication of sound recordings on terrestrial radio and television and in commercial establishments. The E.U. CROs are collecting these royalties for U.S. performers and record companies. However, United States record companies and performers never see any of this money because of material reciprocity.<sup>217</sup> United States CROs do not have the legal authority to collect royalties for the public performance of foreign sound recordings on terrestrial broadcasts.<sup>218</sup> Therefore, the CROs in other countries, based on material reciprocity, are not obligated to distribute to United States rights holders the royalties collected for the public performance of United States sound recordings on terrestrial broadcasts in those foreign countries. This means that United States rights holders of sound recordings are not receiving millions of dollars of royalties, ultimately keeping millions of dollars out of the pockets of U.S. record companies and U.S. performers.<sup>219</sup> Conversely, there is uncollected money for European rights holders. European rights holders of

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209. *Id.*

210. *Id.*

211. *Id.* at 31.

212. *Id.* at 32.

213. *Id.*

214. Lüder, *supra* note 7, at 32.

215. Equitable remuneration is "applying restitutionary fair market value awards in certain intellectual property disputes." David Brennan, What is Equitable Remuneration for Intellectual Property Use?, paper prepared for a seminar at Oxford Intellectual Property Research Centre, 25 January 2005, *available at*, <http://www.oiprc.ox.ac.uk/EJWP0105.pdf>.

216. Lüder, *supra* note 7, at 32 n.140.

217. Telephone Interview with Sam Mosenkis, General Counsel for ASCAP (Apr. 12, 2008).

218. *Id.*

219. See Cosmic Debris, Public Performance Money and the New Webcasting Royalty, <http://www.cosmik.com/aa-march03/mbm92.html> (last visited Apr. 16, 2008).



sound recordings, for example, would realize about \$25.5 million per year in royalties if the CROs in the United States could collect for the public performance of sound recordings during terrestrial broadcasts.<sup>220</sup>

In addition, most of the world considers a streamed transmission and a digital download of a song to implicate both the public performance right and the reproduction right.<sup>221</sup> For example, the Canadian Copyright Board, in a decision to set tariffs for the communication, i.e. public performance, of musical works over the Internet, held that a download, like a streamed transmission, constitutes a reproduction and a public performance.<sup>222</sup> In the E.U., the right of reproduction online consists of the right to reproduce the work by making intangible, i.e. digital, copies by means of an upload, download, on-demand transmission by streaming, or storage on a hard disk.<sup>223</sup>

In the E.U., a public performance occurs when a simulcast or webcast transmits a song or when a consumer downloads a song.<sup>224</sup> An online music provider, such as iTunes, would only be required to license the mechanical, i.e. reproduction and distribution, right in the United States for providing a downloading service. However, in Europe, iTunes would be required to license the public performance of the songs it transmits to consumers to download because the E.U. recognizes that a digital download constitutes a “communication to the public” and a

220. Lüder, *supra* note 7, at 12 n. 45.

221. Berenson Email, *supra* note 169; Assessment, *supra* note 207, at 8 (showing that in the E.U. downloads and streams constitute both a reproduction and a public performance or “communication to the public” right).

222. Canadian Decision, *supra* note 163, at 29 ¶ 97. In holding that a download is a communication, the Board reasoned that there is ultimately no difference between a download and a stream. *Id.* at 28 ¶ 95. Both are broken into packets and transmitted to users upon request. *Id.* Neither is initially audible because both are stored, even if temporarily in the case of streams, before they can play. *Id.* The fact that a download has resulted in the user receiving the content was, for the court, evidence that the content was communicated. *Id.* Next, the Board reasoned that the communicating of the download was public because “downloads are targeted by an aggregation of individuals.” *Id.* at 28 ¶ 97. It does not matter that various individuals do not listen to the communication simultaneously. *Id.* at 29 ¶ 98. Would an Internet poster of a copyrighted text not be liable for communicating the text to the public even though numerous users may not read the unauthorized posting of the text simultaneously? *Id.*

223. Assessment, *supra* note 207, at 8. Brussels Court of First Instance held that news articles stored on Google servers constituted a violation of the rights holders’ right of reproduction. Lüder, *supra* note 7, at 30. It did not matter that the images were stored as code. The only relevant fact was that a fixation had occurred. *Id.* German courts have held that thumbnail images used by search engines on the Internet infringed the rights holder’s right of reproduction. Although the user triggered the copy when visiting the search engine’s website, the search engine initiated the reproduction by making the thumbnails available. *Id.* at 31.

224. Assessment, *supra* note 207, at 8.

reproduction.<sup>225</sup>

In most E.U. Member States, CROs administer the songwriters' reproduction, public performance, and right to make works available.<sup>226</sup> In some E.U. Member States, separate CROs administer the right of reproduction and public performance.<sup>227</sup> The performers' and record companies' right to receive equitable remuneration is administered by one CRO in most E.U. Member States.<sup>228</sup> Record companies manage their own right to make works available.<sup>229</sup>

## VII. THE PRESENT SYSTEM OF TERRITORIALLY RESTRICTIVE LICENSING

### A. TERRITORIALITY IN COPYRIGHT

Copyright law is territorial in nature.<sup>230</sup> The copyright laws of the country in which protection is sought protects a musical work. If one country protects a work or a certain right in that work, it does not necessarily mean that another country protects the work to the same extent.<sup>231</sup> In the United States, for example, the courts have historically been reluctant to apply United States copyright laws to any actions occurring outside of the borders of the United States.<sup>232</sup> Article 5(2) of the Berne Convention further supports the fact that copyright is territorial. Article 5(2) provides that copyright protection "shall be governed exclusively by the laws of the country where protection is claimed."<sup>233</sup> This means that if a rights holder in country X sues an infringer in country Y for infringement in country Y, the determination of whether there was an infringement will be decided by the copyright laws of the forum, Y, the protecting country and not the copyright laws of X, the country of

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225. *Id.*

226. Lüder, *supra* note 7, at 24-25; see Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Brussels, July 7, 2005, at 59-60, available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf) (providing a chart of all the major European CROs and the rights that they administer) [hereinafter Commission Study].

227. Lüder, *supra* note 7, at 24-25.

228. *Id.*

229. *Id.*

230. Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800 (1998).

231. *Id.*

232. See Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997) (describing the presumption against extraterritorial application of United States copyright law and United States law in general).

233. Reindl, *supra* note 230, at 800; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 5(2), UNTS 221, 232.

origin for the copyright.<sup>234</sup>

The current licensing regime between CROs of different countries consists of territorially restrictive reciprocal agreements.<sup>235</sup> ASCAP and BMI, for example, grant public performance licenses only for the United States and its territories and only to users with a residence in the United States.<sup>236</sup> The practice of reciprocal agreements began in the 1800s. The first European CRO, Société des Auteurs, Compositeurs et Editeurs de Musique ("SACEM"), was established in 1851 in France.<sup>237</sup> SACEM did not have reciprocal agreements with other CROs because other CROs did not yet exist in Europe.<sup>238</sup> Therefore, SACEM would collect royalties for its French repertoire of songs by going directly into countries such as Switzerland, Belgium, and the United Kingdom.<sup>239</sup> However, in 1914, the United Kingdom ("U.K.") established its own CRO, called the Performing Rights Society ("PRS").<sup>240</sup> There was naturally resentment on the part of PRS that SACEM was enforcing direct payments from U.K. citizens, within the territory of the U.K., based upon the enforcement of copyrights that existed only under French law.<sup>241</sup> Therefore, the first territorially-based reciprocal agreement was entered into between PRS and SACEM where PRS collected royalties for the use of the French repertoire of songs in the U.K. and distributed the royalties to SACEM. SACEM collected royalties for the use of U.K. songs in France and distributed these royalties to PRS.<sup>242</sup>

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234. Paul Edward Geller, *Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. COPYRIGHT Soc'y U.S.A. 315, 329 (2004).

235. See Guibault, *supra* note 116, at 2 (describing the current system of reciprocal agreements between societies).

236. See BMI Web Site Music Performance Agreement, at Part 3.B., *available at*, <http://www.bmi.com/forms/licensing/internet.pdf>. The BMI online license states,

[t]he territorial scope of the grant of rights with respect to any musical works which are affiliated with BMI through a non-U.S. performing right licensing organization not listed on the New Media Territories List is limited to public performances in the U.S. Territory. Public performances of such musical works outside of the U.S. Territory may be subject to appropriate separate licensing.

*Id.* ASCAP's online license agreement states, "[t]his license is limited to the United States and to transmissions originating from the United States, its territories and possessions, and the Commonwealth of Puerto Rico." See ASCAP Experimental License Agreement for Internet Sites & Services, at Part 6.(c.), *available at*, <http://www.ascap.com/weblicense/release5.0.pdf>.

237. See *supra*, note 37.

238. Lüder, *supra* note 7, at 47.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

## B. THE ONLINE MUSIC MARKET

As more people get access to the Internet, the number of potential music listeners increases. Consumer spending on online music more than doubled from 2005 to 2008.<sup>243</sup> In 2007, 17.8% of the world's population used the Internet.<sup>244</sup> With the increase in listeners comes increased profits in the form of payments for downloads of songs, subscription fees for subscription services, and advertising fees for non-subscription services such as webcasters.

Digital music sales worldwide were approximately \$2 billion in 2006.<sup>245</sup> Single track downloads worldwide were about 795 million in 2006, up 89% from 2005.<sup>246</sup> Online sales of entire albums in the United States increased from six million to thirty-three million from 2004 to 2006 – a 450% increase.<sup>247</sup> In 2007, there were over 500 legitimate, i.e. legal, music services in over forty countries.<sup>248</sup> By 2010, it is estimated that one quarter of all music sales will be digital downloads.<sup>249</sup> In addition, Internet advertising will likely exceed advertising on traditional radio broadcasting by 2010.<sup>250</sup>

Individuals and companies realize the incredible potential for profit on the Internet and are constantly finding new ways to provide music to consumers around the world. Some of the new means for transmission of music online are through downloads to music phones and phones with 3G technology.<sup>251</sup> Cell phones now have the ability to play actual sound recordings as ring tones.<sup>252</sup> Online networks such as MySpace are providing a new market for the music industry.<sup>253</sup> Music subscription services, such as Napster and Rhapsody, grew by 25% in 2006, reaching 3.5 million users in 2007.<sup>254</sup> Last.fm, with over 20 million users, is a free

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243. Lüder, *supra* note 7, at 16.

244. Internet World Stats: Usage and Population Statistics, <http://www.internetworldstats.com/top20.htm> (last visited April 15, 2008). Compare this to 15.7% of world in 2005. BIEDERMAN, *supra* note 3, at 897.

245. IFPI 207 Digital Music Report, at 4, *available at*, <http://www.ifpi.org/content/library/digital-music-report-2007.pdf> [hereinafter IFPI Report].

246. *Id.*

247. Knobler, *supra* note 176, at 533. CDs sales in the United States decreased by 17.5% from 2006 to 2007 with digital downloads increasing over 38% during the same period. RIAA Year End Shipment Statistics, *available at*, <http://76.74.24.142/81128FFD-028F-282E-1CE5-FDBF16A46388.pdf>.

248. IFPI Report, *supra* note 245, at 8.

249. *Id.* at 3.

250. *Id.* at 12.

251. 3G technology, which has taken off in Asia, is a third generation mobile technology that allows for faster downloads of music and video files as well as faster streaming. *Id.* at 10.

252. IFPI Report, *supra* note 245, at 10.

253. *Id.* at 12.

254. *Id.* at 13.

on-demand online music service that pays royalties to rights holders with advertising fees.<sup>255</sup>

This rapid development of new methods and platforms for transmitting and delivering music online is resulting in an increase in the cross-border transmission of online music.<sup>256</sup> Despite the fact that Internet transmissions are cross-border, CROs still license music online in a territorially restrictive manner. This rapid development of cross-border transmissions increases the need to dispense with the territorially restrictive licensing of online music and to replace it with a multiterritorial or global licensing regime.

### C. PROBLEMS THAT TERRITORIALLY RESTRICTIVE LICENSING OF ONLINE MUSIC CREATES

The main issue is whether the traditional method of granting territorially restrictive reciprocal agreements is adequate in the online environment. The answer is no. Territorial licensing, which is restricted to national boundaries has no place in the licensing of music online.<sup>257</sup> Territorial licensing began in Europe in the eighteenth century. Musicians and composers formed national rights organizations in an attempt to control and license the reproduction of sheet music and the public performance of their songs in cafes and restaurants. The need for CROs in the pre-Internet world was obvious. Individual performers did not have the means to police every public establishment to enforce their right of public performance by making sure establishments had a license to perform their songs. Conversely, public establishments did not have the means to seek out every songwriter and composer in order to obtain a

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255. Last.fm Becomes Fastest Growing Free Online Music Network in the U.S., PR Newswire Association LLC, Feb. 22, 2008; *see also* Blog.wired.com., All Major Labels to Stream Music Free on Last.fm., <http://blog.wired.com/music/2008/01/liveblog-the-cb.html> (last visited May 2, 2008).

256. Lüder, *supra* note 7, at 17.

257. Guibault, *supra* note 116, at 3 (noting how the current system of licensing music online using licenses which are territorially restrictive is incompatible with the cross-border transmissions of the Internet); *see also* Herbert Ungerer, Application of Competition Law to Rights Management in the Music Market, Panel: Independent Music Companies Association ("IMPALA"), June 11, 2003, COMP/C2/HU/rdu, at 5, *available at*, [http://ec.europa.eu/comm/competition/speeches/text/sp2003\\_018\\_en.pdf](http://ec.europa.eu/comm/competition/speeches/text/sp2003_018_en.pdf) (stating that the "territorial restrictions in the administration of rights can no longer be seen as indispensable for effective management of rights"); Patrick Boiron (Partner at Moquet Borde et Associés), The Simulcast Decision: Toward a Competitive Environment for Collective Administration Societies, , at 2, *available at*, [http://www.iael.org/media/IAEL\\_article\\_Boiron.pdf](http://www.iael.org/media/IAEL_article_Boiron.pdf) (stating that the present system of only licensing music on a national level is no longer compatible with digital transmissions that are accessible worldwide). This system requires online music providers to obtain a license in each country where their transmissions are accessible, resulting in complicated procedures, costs, and generalized disregard of copyright and other rights.

license for each song the establishment played. The solution to this logistical problem was a CRO that acted as a clearinghouse and an enforcement entity for the public performance and/or the reproduction right for a multitude of compositions or recordings.

Based on the territoriality of copyrights and sovereignty of nation states, a CRO from country A was not able to go into country B to enforce country A's copyright laws by licensing songs and collecting royalties for the exploitation of songs belonging to citizens of country A. Therefore, if country A's works were accessible in country B, the CRO of country A would enter into a reciprocal agreement with the CRO in country B. This agreement would allow the CRO of country A to exploit the repertoire of country B commercially within country A. The CRO in country B would have the right to exploit the repertoire of country A commercially within country B. CROs in each country, through a network of reciprocal agreements with almost every other CRO, have been able to license their repertoire of music globally in a piecemeal manner.<sup>258</sup>

However, these reciprocal agreements, which include a territorial restriction clause, are inefficient and unnecessary for the licensing of music online. In fact, they are no longer justified.<sup>259</sup> They only perpetuate a long-established monopoly in the off-line market.<sup>260</sup> The monopoly consists of CROs controlling all transmissions within their respective territories and limiting the transmissions of their own repertoires on a territory-by-territory basis. These reciprocal agreements are based on the physical realities of the eighteenth, nineteenth, and early twentieth century and are not applicable to the licensing of music online.<sup>261</sup> In addition, these agreements hamper the development of the online music market by making it incredibly difficult and expensive for online music providers to clear rights (ensuring they are not infringing copyrights or reciprocal agreements in the country of destination) in each country in which their transmission will be accessible.<sup>262</sup>

An example of how territorially restrictive licensing works is helpful in understanding why there is no justification for it in the online environment.<sup>263</sup> For example, a webcaster based in the United States goes to

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258. Commission Study, *supra* note 226, at 9.

259. Email from Alain Andriés of the E.U. Directorate General for Competition (Apr. 16, 2008, 11:17 a.m. EST) (on file with author).

260. *Id.*

261. Lehman Interview, *supra* note 46. These territorially restrictive reciprocal agreements created a licensing monopoly for CROs in their respective territories. However, these monopolies were tolerated because they were the only effective means of protection for holders' rights. Ungerer, *supra* note 257, at 5.

262. Interview with Lee Knife, General Counsel for Digital Media Association ("DiMA"), Washington, D.C. (April 24, 2008) [hereinafter Knife Interview].

263. The problem with territorially restrictive licensing affects the licensing of all rights enforced by CROs, not just the public performance right. Therefore, the same problems

BMI, one of the three performance right CROs in the United States. The webcaster pays a fee to BMI for a blanket license to transmit BMI's entire repertoire only within the United States and its territories. However, the webcaster's Internet transmissions will not end at the U.S. border; they will be accessible by anyone in the world with an Internet connection. Therein lies the problem. BMI has its own repertoire, consisting of songs by U.S. songwriters. Technically, BMI could grant a worldwide license to the U.S. webcaster for BMI's own U.S. repertoire.<sup>264</sup> However, this does not happen because each territory has a reciprocal agreement with BMI restricting the granting of such a license.<sup>265</sup>

If the United States webcaster, in the above example, transmits "Crazy," written by Willie Nelson, that song will be accessible in every country with a computer and an Internet connection. When this happens, the territorially restrictive reciprocal arrangements between CROs create four potential problems for online music providers, all of which create legal uncertainty for the providers.

The first problem is that the present system of licensing causes an online music provider to infringe the public performance right of the rights holders residing in the territory that the provider resides. Using the above example, let us say that citizens in the U.K. will be able to access and listen to the song "Crazy," which is transmitted by the United States webcaster. The U.S. webcaster, with a blanket license from BMI, only has a license to perform the song "Crazy" publicly in the United States. However, a performance is also occurring in the U.K. (and any other country where a person is listening to the transmission). This means that the U.S. webcaster is infringing Willie Nelson's right of public performance<sup>266</sup> by publicly performing in a territory, the U.K., that Willie Nelson, through BMI, did not authorize. PRS, the CRO for the U.K., through a reciprocal agreement with BMI, has the exclusive au-

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arise when users like iTunes attempt to get mechanical licenses in each territory where it offers the downloading of songs from the Internet. In addition, some countries, such as those in Europe, have a "making available" right, which would also be subject to territorial licensing.

264. Andriés Email, *supra* note 259; Email from Marvin Berenson, General Counsel for BMI (May 1, 2008, 4:38 p.m. EST).

265. Songwriters and publishers could (especially if they were successful and had bargaining power) simply tell a CRO, like BMI, to grant music services a worldwide license for their works. Andriés Email, *supra* note 259. When asked why this does not happen, Mr. Andriés of the E.U. Directorate General for Competition noted that songwriters are not business persons or lawyers. *Id.*

266. Technically, Willie Nelson would likely have assigned the rights to his song over to his music publisher. Therefore, the music publisher would be the rights holder in Willie Nelson's song.

thority to license the public performance of "Crazy" in the U.K.<sup>267</sup> Therefore, PRS, on behalf of BMI and the rights holder (Willie Nelson) could bring a copyright infringement action against the U.S. webcaster. In order to prevent this and achieve legal certainty, the webcaster must go to PRS and obtain a license to perform "Crazy" (and the rest of BMI's repertoire of songs) in the U.K. This same scenario plays out in every territory that can access the webcaster's transmission outside of the United States.

The second problem is that the present licensing system causes online music providers to infringe the public performance right of foreign authors. This problem arises because CROs grant blanket licenses to users and providers of online music. The blanket licenses that BMI, for example, grants includes the repertoires of all the foreign CROs with which BMI has a reciprocal agreement. The reciprocal agreements that BMI has entered into with other CROs, however, have a territorial restriction clause, prohibiting BMI from granting global licenses for the repertoire of these foreign CROs.<sup>268</sup> The reciprocal agreement between BMI and PRS, for example, grants to BMI the exclusive right to license PRS's repertoire of songs *only* within the United States. The U.S. webcaster's blanket license from BMI allows the webcaster to transmit BMI's repertoire, as well as PRS's repertoire, *only* within the United States. Again, the webcaster's transmissions are accessed outside of the United States. Therefore, if the United States webcaster is transmitting a song from the PRS repertoire, for example "Wonderful Tonight," written by Eric Clapton, the webcaster would be infringing Eric Clapton's public performance right by transmitting and publicly performing "Wonderful Tonight" into the U.K. where the webcaster does not have a license to publicly perform "Wonderful Tonight."

The third problem is that the present system of licensing causes the online music provider to infringe a foreign CRO's exclusive right to license and collect royalties in its territory. BMI, for example, has a territorially restrictive reciprocal agreement with PRS. This agreement grants to PRS the exclusive right to license and collect royalties for the public performance of BMI's repertoire in the U.K. When the United States webcaster transmits a song from BMI's repertoire, for example "Crazy," into the U.K., it is infringing PRS's exclusive right to license that song in the U.K. Again, this same scenario plays out in every territory that accesses the webcaster's transmission outside of the United

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267. Commission Study, *supra* note 226, at 11 (stating that reciprocal agreements between rights CROs grants each CRO the exclusive right, within its territory, to license the repertoire of the other).

268. Email from Alain Andriés of the E.U. Directorate General for Competition (Apr. 16, 2008, 11:22 a.m. EST) (on file with author).



States because BMI has a territorially restrictive reciprocal agreement with each CRO in the world.

For example, GEMA,<sup>269</sup> the German CRO, under a reciprocal agreement with PRS to license the public performance of “Wonderful Tonight” within Germany, may bring an infringement suit against the United States webcaster for publicly performing “Wonderful Tonight” within Germany without a license. Again, this scenario could play out in every country that has an Internet connection because every CRO that PRS has a reciprocal agreement with gives that foreign CRO the exclusive right to license “Wonderful Tonight” within its territory. In order to prevent a possible infringement in the above example on the behalf of Eric Clapton and to achieve legal certainty, the webcaster must go to GEMA, the German PRO, and obtain a license to perform “Wonderful Tonight” in Germany. In this scenario, one would think that the U.S. webcaster could go directly to PRS to obtain a global license to perform “Wonderful Tonight” publicly on the Internet. However, PRS cannot grant such a license because it has already fragmented the performance right for its repertoire through territorially restrictive agreements with GEMA and every other CRO in the world.<sup>270</sup>

The fourth problem that territorially restrictive licensing creates for online music providers is that when they transmit songs outside of the territory for which they have a license, they are breaching their contract (blanket license) with the CRO, which only allowed the repertoire of songs to be transmitted within the CRO’s territory.

Theoretically, the above scenarios are possible. However, there does not seem to be any case of a CRO suing a foreign webcaster for infringement because the webcaster was streaming into the foreign country without any licenses from the CRO. In reality, the webcaster would likely negotiate a license if requested. However, ASCAP suggested that a webcaster with a license to transmit ASCAP’s repertoire in the United States would not require any other licenses from other CROs.<sup>271</sup> ASCAP stated:

All PROs are aware that the Internet is an international business and anyone world-wide could access content from any Web site. For that reason, it is usually sufficient for an Internet service to obtain a license

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269. Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte.

270. However, pursuant to the model reciprocal contract agreement of CISAC, the International Confederation of CROs of Authors and Composers, PRS would be restricted in licensing its own repertoire outside of the United Kingdom. Commission Study, *supra* note 226, at 11.

271. Email from ASCAP’s New Media and Technology Department (Apr. 7, 2008, 5:37 p.m. EST) (on file with author).

from the country where the music content originates.<sup>272</sup> One wonders then why there is so much talk about multiterritorial licensing and creating legal certainty.

First, ASCAP's reassurance is not that comforting to webcasters faced with legal uncertainty resulting from the four above-mentioned scenarios. Corporations want legal certainty. Online companies, especially online start-ups, require capital investment.<sup>273</sup> Investors do not like risk, and where there is legal uncertainty there is risk. Therefore, to reduce risk, users and online music providers need to make certain that they reduce legal uncertainty.<sup>274</sup> In the world of territorially restrictive reciprocal agreements, this entails going to each country's CRO and negotiating a license to be able to transmit into that territory. In reality, webcasters, especially smaller ones, do not have the resources to negotiate licenses with every CRO that oversees the territory that accesses their transmissions.<sup>275</sup> At best, webcasters try to negotiate licenses with larger CROs and CROs in countries that most heavily access their transmissions.<sup>276</sup> Time and resources prohibit creating complete legal certainty by negotiating a license with each CRO.<sup>277</sup>

#### D. WHY DO CROs ADMINISTER ONLINE RIGHTS TERRITORIALLY?

Why do CROs not simply grant each other the right to license their repertoires multiterritorially? They could, but they do not.<sup>278</sup> In fact, CROs have made it impossible to do so because of the network of reciprocal agreements that they have set up among each other. Due to the territorial restrictions in these agreements, a CRO is unable to grant a license for the exploitation of its repertoire outside of its own territory.<sup>279</sup> CROs base their reciprocal agreements on model agreements created by the international umbrella organizations CISAC,<sup>280</sup> which CROs have

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272. *Id.*

273. Knife Interview, *supra* note 262.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. Andriés Email, *supra* note 268; Lehman Interview, *supra* note 46.

279. Andriés Email, *supra* note 268.

280. In 1926 the International Confederation of Authors and Composers Societies ("CISAC") was created in Paris to strengthen and develop relations among copyright CROs of all types, not just music, throughout the world. The CISAC was created to adopt technical standards to increase the efficiency and interoperability of the CROs, to improve national and international copyright law and practices, and to retain a central database allowing CROs to exchange information efficiently. CISAC.org, <http://www.cisac.org/CisacPortal/afficherArticles.do?menu=main&item=tab2&store=true> (last visited Apr. 10, 2008). As of June 2007, 219 CROs from 115 countries were members of CISAC, including BMI and ASCAP. *Id.*

formed to create unity among each type of CRO.<sup>281</sup> These model agreements, however, apply a series of restrictions.<sup>282</sup> The E.U. Commission has expressed its view that these agreements, specifically two clauses in these agreements, constitute restrictive business practices.<sup>283</sup> First, these agreements force rights holders to have the CRO in their territory manage their rights.<sup>284</sup> Second, these agreements force online music providers to obtain a license only from the CRO in the provider's territory.<sup>285</sup> Additionally, these agreements perpetuate the domestic monopoly that each of these CROs enjoy and prevents new entities from entering the market for the management of rights.<sup>286</sup>

These agreements perpetuate a monopoly and are no longer justifiable for the licensing of online music. The present system of licensing based on reciprocal agreements is inefficient and allows for various hidden administrative costs.<sup>287</sup> CROs seem reluctant to change, perhaps fearing that any system other than their present system of territorially restrictive licensing that they have used since the 1800s will result in their demise or, at least a lessening of their monopoly and their revenue. The CROs' reluctance to change can be seen in their responses to the recent E.U. "Call for Comments" in which most of the CROs indicated that they did not want legislation governing the multiterritorial licensing of online music or legislation requiring transparency into their opera-

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281. Community Initiative, *supra* note 6, at 9. CISAC is the organization for CROs who administer the public performance right, BIEM (the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique) for CROs who administer the reproduction right, and the Societies' Council for the Collective Management of Performers' Rights ("SCAPR") and Institut pour la tutelle des artistes-interprètes et exécutants ("IMAIE") for CROs who administer the performers' rights in musical works. *Id.*

282. Press Release, European Commission, Commission market tests commitments from CISAC and 18 EEA collecting societies concerning reciprocal representation contracts (June 14, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/63&format=HTML&aged=1&language=EN&guiLanguage=en> (last visited June 1, 2008) (describing how the Commission issued a Statement of Objections regarding CISAC's model reciprocal agreement and the actual agreements between societies, which follow CISAC's model agreement).

283. Press Release, European Commission, Competition: Commission sends Statement of Objections to the International Confederation of Societies of Authors and Composers ("CISAC") and its EEA members, (Feb. 7, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/63&format=HTML&aged=1&language=EN&guiLanguage=en> (last visited June 1, 2008).

284. *Id.*; see also Community Initiative, *supra* note 6, at 10.

285. Press Release, *supra* note 283.

286. *Id.*

287. Lehman Interview, *supra* note 46. The author could not find any breakdown of what makes up the administrative costs for CROs on their websites. See *infra* note 299 for a discussion of the response that a BMI representative provided in regards to why the specifics of their administrative fees are kept secret.

tions.<sup>288</sup> By continuing with their present licensing practices, CROs hamper and slow the development of new platforms by which legal online music could be sold and distributed to the growing base of Internet users.<sup>289</sup>

Why do CROs not grant global licenses for their own repertoires? A representative from one of the CROs stated that CROs could grant global licenses.<sup>290</sup> However, CROs supposedly do not grant global licenses because the present system of reciprocal agreements allows local societies “to monitor local uses and enforce locally.”<sup>291</sup> It is hard to see how the granting of global licenses would not allow national CROs to monitor and enforce locally. CROs would be able to grant global licenses to online music providers residing in their territory and still monitor these providers, enforce locally, and retain a close relationship with their members, just as they have always done. The only difference would be that, with a global license, the provider would not have a license that is restricted to one territory, but would have a global license to transmit music into all other territories. Perhaps CROs are claiming they will not be able to monitor the providers in foreign countries who would have a global license for the CROs’ national repertoires properly. However, that would be no different from what presently goes on. BMI, for example, grants a U.S. webcaster a license to transmit GEMA’s repertoire only within the United States, but the transmission is accessible anywhere in the world by someone with the Internet. Moreover, GEMA is not monitoring what the U.S. webcaster is doing. Therefore, the only difference with a global license would be that the online music providers would have legal certainty.

Why do CROs not attempt to implement a regime similar to the Santiago Agreement<sup>292</sup> where CROs enter into reciprocal agreements with each other, allowing each to grant licenses to online music providers to transmit the CROs repertoire of songs into the other’s territory? Nothing prevents the CROs from entering into such agreements.<sup>293</sup> However, a CRO supposedly “wants to license its own repertoire in its own territory.”<sup>294</sup> This seems to support the idea that CROs are reluctant to change the present system of territorially restrictive licensing because they fear losing their monopoly. CROs do not seem to want online music

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288. E.U. Commission: Monitoring of the 2005 Music Online Recommendation 9 (Feb. 7, 2008), available at, [http://ec.europa.eu/internal\\_market/copyright/docs/management/monitoring-report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf) [hereinafter Commission Monitoring].

289. *Id.*

290. Berenson Email, *supra* note 264.

291. *Id.*

292. See Part IX.A. for a discussion of the Santiago Agreement.

293. Berenson Email, *supra* note 264.

294. *Id.*

providers from other countries to transmit music legally, specifically the CRO's own national repertoire of music, into the CRO's own territory. In addition, one CRO representative claimed that CROs do not enter into multiterritorial agreements because a "society has relations with its own members and wants to service its own members."<sup>295</sup> Again, it is hard to see why this is a valid obstacle to granting a multiterritorial license. If the CRO in country A grants an online music provider in country A the right to transmit into country B (pursuant to a reciprocal agreement between A and B to do so), the CRO in country A will still be able to service its members. The only difference would be that the online music provider in country A now has a license to transmit the repertoire of the CRO in country A into country B (the repertoire of country A would include the national repertoire of both country A and country B and any other CRO that was member of the multiterritorial arrangement).

Licensing is big business. ASCAP, for example, collected a record \$863 million dollars in royalties in 2007.<sup>296</sup> One possible reason that CROs do not want to change their present licensing system is a fear that the royalties they collect will diminish if they are no longer able to maintain their territorial monopolies. BMI and ASCAP, although technically non-profit organizations, deduct about 13%<sup>297</sup> and 11.9%<sup>298</sup> for administrative fees, respectively. The CROs are very secretive as to what exactly the administrative fees cover and what percentage of the administrative

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295. *Id.*

296. ASCAP.com, ASCAP Achieves Outstanding 2007 Financial Performance, [http://www.ascap.com/press/2008/0208\\_financial.aspx](http://www.ascap.com/press/2008/0208_financial.aspx) (last visited June 9, 2008).

297. Email from Jean Banks of BMI (June 6, 2008, 1:26 p.m. EST) (on file with author) (stating that, presently, BMI's administrative fees are under 13%). However, BMI's website states that, in 2001, BMI's administrative fees were 16%. See BMI.com, Where does your music licensing fee go?, <http://www.bmi.com/licensing/entry/C1282> (last visited Apr. 24, 2008).

298. ASCAP.com, Where Does the Money Go?, <http://www.ascap.com/licensing/licensingfaq.html> (last visited May 31, 2008). A representative from ASCAP curiously claimed and defended the position that ASCAP does not charge administrative fees, but rather deducts only "overhead costs," which she described as including salaries, policing, distribution of royalties, etc. Telephone interview with Lynne Enman of ASCAP's Member Services (May 30, 2008). When asked what the difference is between administrative fees and "overhead costs" she claimed, "I do not know what administrative fees are because ASCAP does not charge administrative fees." *Id.* Her description of "overhead cost" is curiously similar, however, to the definition of "administrative cost," which is an "[e]xpense incurred in controlling and directing an organization, but not directly identifiable with financing, marketing, or production operations. Salaries of senior executives and costs of general services (such as accounting, contracting, and industrial relations) fall under this heading." See Businessdictionary.com, 'Administrative Cost' definition, <http://www.businessdictionary.com/definition/administrative-cost.html> (last visited May 31, 2008). Perhaps ASCAP believes the term "administrative cost" sounds too self-serving and "overhead cost" has a more altruistic ring to it. BMI, however, is secure in describing administrative costs as "administrative costs." Banks Email, *supra* note 297.

fees go to each cost. One CRO representative claimed that detailed information about administrative fees was “competitive information” that must be kept “private and confidential.”<sup>299</sup> One expert feels that these secretive administrative fees could be lowered to about 5%.<sup>300</sup> Despite what may be excessive administrative fees charged by the United States CROs, it pales in comparison to the fees charged by some European CROs. In addition to their administrative fees, which are around 12-16%,<sup>301</sup> many European CROs take another 10% and donate it to a public fund for the performing arts.<sup>302</sup> Therefore, rights holders receive about 75% of the royalties collected. The real injustice, however, befalls the United States rights holders. BMI and ASCAP, through reciprocal agreements, collect public performance royalties in the United States for European repertoires.<sup>303</sup> If BMI takes 13% for administrative fees, that means European songwriters and publishers are receiving 87% of the total royalties collected by BMI. Compare that to about 25% that many European CROs deduct from the royalties collected for the performance of U.S. songs, 10% of which the European CROs deduct and donate to local European public funds for the arts without the consent of U.S. songwriters and music publishers.<sup>304</sup>

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299. Email from Jean Banks of BMI (June 10, 2008, 2:37 p.m. EST) (on file with author) (stating that the “powers that be” at BMI did not want that information to be given out). One wonders whether keeping such information secret actually gives a CRO a competitive advantage or whether CROs would rather no one find out where all of the administrative fees are going.

300. Lehman Interview, *supra* note 46.

301. MCPS-PRS-Alliance, What does MPSC charge? (Commission Rates), <http://www.mcps-prs-alliance.co.uk/membership/MCPSroyalties/MCPScommissionrates/Pages/MCP-Commissionrates.aspx> (last visited June 1, 2008) (stating MCPS-PRS (U.K. CRO) charges a 12% commission for Internet licenses); SGAE, We manage your rights: Where paid royalties go, [http://www.sgae.es/tipology/est/item/en/526\\_738.html](http://www.sgae.es/tipology/est/item/en/526_738.html) (last visited June 1, 2008) (stating SGAE (Spanish CRO) deducts on average 15.6% of royalties for administrative costs); SACEM, FAQ: Where does the money collected by SACEM go?, <http://www.sacem.fr/portailSacem/jsp/ep/channelView.do?channelId=536882058&channelPage=ACTION%3BBVCONTENT%3B0%3B%2Fep%2FprogramView.do&pageTypeId=536886879#FAQ11> (last visited June 1, 2008) (stating French CRO deducts 15.48% for administrative costs).

302. GEMA takes 10% for “social and cultural purposes.” GEMA.de, at Accounting Procedures: Ratings, <http://www.gema.de/en/members/accounting-procedures/ratings/> (last visited May 31, 2008); BUMASTERMA, Frequently Asked Questions, How much does BUMA/STERMA spend on sponsoring and promoting Dutch music?, <http://www.bumasterma.nl/en-US/Service/FAQ.htm> (last visited June 1, 2008) (suggesting that the 10% taken out for “social and cultural funds” is pursuant to “international agreements”). A representative from BUMA stated that 10% is taken out by societies pursuant to an agreement with CISAC. Email from Erik Verzijl, an employee of BUMA (June 12, 2008, 9:46 a.m. EST) (confirming that 10% is taken out of all royalties collected, including those that belong to U.S. performances).

303. Lehman Interview, *supra* note 46.

304. Verzijl Email, *supra* note 302.

E. WHY DO RIGHTS HOLDERS NOT URGE CROs TO GRANT GLOBAL OR  
MULTITERRITORIAL LICENSE FOR THEIR MUSICAL  
COMPOSITIONS AND RECORDINGS?

The territorial regime does not necessarily mean that cross-border licensing is unavailable.<sup>305</sup> Some CROs have started granting cross-border licenses in addition to the traditional national licenses.<sup>306</sup> Such initiatives, however, need to have the consent of the rights holders.<sup>307</sup> However, one may wonder why rights holders have not urged CROs to grant global licenses to online users and providers of music instead of territorially restrictive or even multiterritorial licenses. First, a true “global” license is likely not possible. If it is possible, it will be preceded first by a multiterritorial licensing regime. The reason for this is that the territorially restrictive network of reciprocal agreements that CROs have created would not make global licensing possible.<sup>308</sup> BMI, for example, cannot simply grant to United States online music providers a global license for its repertoire. Every CRO in the world has an agreement with BMI giving each CRO the exclusive right to license BMI’s repertoire within its respective territory. Therefore, BMI must go to each CRO and renegotiate the territorially restrictive license, creating an agreement between the two CROs allowing each to grant licenses to transmit its national repertoire only into the other’s territory.<sup>309</sup> Otherwise, if BMI granted worldwide rights to U.S. online music providers for its repertoire, BMI would be violating its restrictive reciprocal agreements with other CROs and United States users would be infringing various rights for reasons already stated.

In regards to musical compositions, the likely answer why songwriters and performers have not required all CROs to begin granting multiterritorial licenses is that they do not know any better. Most

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305. International Confederation of Music Publishers, Transcript of Hearing on June 14-16, 2006 4, available at <http://www.icmp-ciem.org/PUBLIC/NewsViews/ICMPCIEMOra1ObservationsCISACStatementObjections060616.pdf> [hereinafter *Oral Observations ICMP*].

306. *Id.* at 3.

307. *Id.*

308. Guilbault, *supra* note 116, at 2 (discussing how the present system of reciprocal agreements prohibits any type of global license because of its territorial limitations).

309. For example, GEMA (the German CRO) would negotiate a license with SACEM (the French CRO). GEMA would agree to allow SACEM to license GEMA’s repertoire online to the extent that French online music providers with a blanket license from SACEM would be allowed to transmit GEMA’s repertoire into Germany. Remember, the reciprocal agreement between SACEM and GEMA has allowed each CRO to license the repertoire of the other (traditionally only within their respective territories). Conversely, SACEM would grant GEMA the right to confer blanket licenses to German online music users and providers, which would allow these entities to transmit SACEM’s repertoire of French songs into France.

songwriters are not lawyers or business people.<sup>310</sup> In addition, most songwriters are not successful enough to change things. Those that are successful often set up their own publishing companies and license their own songs.<sup>311</sup> Moreover, most songwriters have assigned their rights to their songs over to large music publishing companies. The large music publishers, who often have agreements with record companies, are not going to change a situation that is making them a lot of money. As one person in the industry, who wished to remain nameless, stated in regards to record companies not wanting to change, “[i]t is hard to get someone to leave a party when their glass is still full of champagne.”<sup>312</sup> The large publishing companies, the CROs, and the large record companies have a certain way of doing things that currently still makes them a lot of money, although in the long term, their resistance to change will only hurt the industry by inhibiting the creation of new platforms of music providers.

With regard to sound recordings, the situation is similar. Most performers are not successful enough to change things. The record companies own the sound recordings, not the performers. Successful performers simply negotiate for themselves a better percentage of the royalty rates that the record companies receive. In addition, performers need the large record companies for promotion of their songs and for distribution of their music.

However, the large publishing and record companies are slowly adapting to the online environment, deciding to bypass the restrictive licensing regime currently followed by the CROs, and self-administer and license their rights online. As discussed earlier in this article, rights holders have the ability to fragment the rights in their copyrighted work. A record company, for example, may decide to grant online music providers a global or a multiterritorial license for the performance right in its sound recordings online. However, the record company may still allow CROs to continue to license the performance right of the company's sound recordings for terrestrial broadcasts. The record company has fragmented its performance right to maximize efficiency and profits. There are an increasing number of examples of the major publishing and record companies fragmenting their works in this way. For example, CELAS is a legal entity created to act as a one-stop-shop for licensing EMI Music Publishing's repertoire for online and mobile uses in forty European countries.<sup>313</sup> Warner/Chappell Music, GEMA, MCPS-PRS, and the Swedish CRO (“STIM”) have teamed up to offer E.U.-wide digital

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310. Andriés Email, *supra* note 259.

311. KRASILOVSKY, *supra* note 85, at 222.

312. The source of this quote requested that I not refer to his or her name.

313. Commission Monitoring, *supra* note 288, at 6. In January of 2008, CELAS signed its first E.U.-wide licensing end-user arrangement with mobile operator Omnitel. *Id.*



licenses for Warner's entire repertoire.<sup>314</sup> Universal Music Publishing Group ("UMPG"), another publishing giant, has signed an agreement with SACEM that will allow SACEM to administer E.U.-wide licenses covering the repertoire of UMPG and the repertoire of SACEM that UMPG publishes.<sup>315</sup>

## VIII. SOLUTIONS TO THE TERRITORIALY RESTRICTIVE LICENSING OF ONLINE MUSIC

### A. THE POSSIBILITY OF ONE OR ONLY A FEW CROS ADMINISTERING A GLOBAL LICENSE

As digital rights management ("DRM") technology and, more importantly, technology that allows tracking of songs, develops and becomes more accurate, uniform, and financially feasible to implement, it would be quite possible for there to be only one CRO to administer global licenses for the performance right of music online. Such a CRO could have branches in each media market, doing essentially the same that individual national rights CROs do.<sup>316</sup> A better situation would be several CROs that administered global licenses. This would add an element of competition and keep administrative costs down as the CROs continually developed technology to make tracking and licensing of songs and royalty payments more accurate and more efficient.<sup>317</sup> One sees this to a certain extent in the United States, where BMI and ASCAP, and SESAC compete for songwriters.

However, some are of the view that one organization for the licensing of the performance right of online music (or even a few organizations for different regions of the world) would not be practical.<sup>318</sup> National rights organizations, at least in regards to the licensing of performance rights, may still be indispensable for various reasons. National CROs may be better able to deal with differences in language. In addition, rights owners may prefer to have their rights organizations nearby.<sup>319</sup> However, as stated above, one, or a few, CROs licensing global online rights could have satellite offices in each country, performing the very same function that national CROs presently perform.<sup>320</sup> Nevertheless, there would be many hurdles to creating an international licensing re-

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314. *Id.* Warner granted these three societies the non-exclusive right to offer such licenses. *Id.* Other societies will be allowed to join at a later date. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. COLLECTIVE LICENSING, *supra* note 201, at 219. This was the view of a member of the Swedish Music Publisher's Association.

319. *Id.* at 220.

320. Lehman Interview, *supra* note 46.

gime. The main hurdle would be that countries would refuse or, would at least be very reluctant to give up their national CRO, granting a non-domestic entity control of the country's national repertoire. A country's music is, in many respects, a reflection and an expression of that country's culture and heritage. Rights holders may not like the idea of having a large, international CRO managing their rights. Rights holders may fear, perhaps rightly so, that a national CRO would offer a more personal level of service than an international or multiterritorial CRO.

The World Intellectual Property Organization ("WIPO") may, at first glance, seem like a possible candidate to administer global rights for online music. However, this will likely never happen for the same reasons as stated in the preceding paragraph. In addition, the governments who are members of the United Nations run WIPO. CROs, especially the larger ones, have a great deal of influence on their respective governments.<sup>321</sup> They will not lose their monopoly on the licensing of music to WIPO.<sup>322</sup>

#### B. MUSIC PUBLISHERS AND RECORD COMPANIES MANAGING THEIR RIGHTS ONLINE

Providers of online music in the United States already deal directly with the record labels for the licensing of digital phonogram deliveries, i.e. downloads, of sound recordings and for the public performance right of the sound recording for digital transmissions. Today, there are four multinational record companies ("major labels") that control over 90% of the physical product (mostly CDs) of recorded music worldwide.<sup>323</sup> These major labels have managed this through mergers and by affiliating themselves with numerous independent labels (often called "Indie labels").<sup>324</sup> In 2005, these independent labels released 81.6% of the albums in the world.<sup>325</sup> The major labels, with which these Indies are affiliated, have the production capacity and the distribution channels in place to produce the CDs for these albums and then distribute them.

In 2006, five music publishing companies controlled almost two thirds of the market share and revenues of the music publishing market.<sup>326</sup> The music publishing industry, however, has a wide range of smaller, independent publishers. One can see the vast number of music publishers by the number that the Harry Fox Agency represents –

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321. *Id.*

322. *Id.*

323. BIEDERMAN, *supra* note 3, at 706. The four major labels are Warner Music Group, EMI, Sony/BMG Music, and Universal Music Group. *Id.*

324. *Id.* at 707.

325. *Id.*

326. *Id.* These five music publishers are EMI, Warner/Chappell, Universal, Sony-ATV, and BMG. *Id.*

28,000.<sup>327</sup> The record industry has many independent labels, but these Indies often affiliate themselves with the four major labels. The main reason for the difference between the number of independent publishers and the number of independent record labels is that record companies need to manufacture and distribute product, i.e. CDs.<sup>328</sup> The large record labels are best equipped to do this, having the production capabilities and the distribution channels already in place to distribute CDs to many people as quickly as possible.<sup>329</sup> A publisher, on the other hand, could market a hit song simply by using a telephone, fax machine, or the Internet.<sup>330</sup> It would rarely be practical, therefore, for most online music providers to obtain a global license for the public performance right in songs by going directly to individual music publishers instead of getting a blanket license from a CRO.

Another reason why it would be impractical for most online music providers to seek global licenses from various publishers is fragmentation. Co-authors in songs may choose different music publishers to administer their rights in a musical composition. An online music provider who did not obtain a license from each music publisher representing each of the authors in a song would be infringing the rights of the author whose rights he did not license.

Finally, going directly to music publishers for a worldwide online public performance right would only be practical for large webcasters. First, large webcasters can gain the attention of a large publisher by making it worthwhile for the publisher to negotiate a license. Second, large webcasters have the financial resources to negotiate such licenses.<sup>331</sup> Webcasters want as much content as possible to attract a large audience, which means greater advertising revenues.<sup>332</sup> An example of the major labels finally taking advantage of the digital age is their agreement with Last.fm, which is now owned by the media giant, CBS.<sup>333</sup> The four major record labels, and over 150,000 independent labels, recently entered into an agreement with Last.fm, resulting in over 3.5 million songs being streamed for free.<sup>334</sup> Part VII.E. of this Article describes other platforms that the large publishers and record companies

327. *Id.*

328. BIEDERMAN, *supra* note 3, at 706.

329. *Id.* at 640.

330. *Id.*

331. Huppe Interview, *supra* note 105.

332. *Id.*

333. The Social, On Wednesday, CBS and Last.fm Will Announce . . . Something, [http://news.cnet.com/8301-13577\\_3-9855443-36.html](http://news.cnet.com/8301-13577_3-9855443-36.html) (last visited Jan. 22, 2008).

334. Posting of Eliot Van Buskirk to WIRED Blog Network, <http://blog.wired.com/music/2008/01/liveblog-the-cb.html> (last visited Jan. 23, 2008). Consumers will be able to listen to a song up to three times for free. *Id.* Last.fm is hoping to set up deals with iTunes and other download sites where consumers would have to pay for the fourth time they

have recently created for multiterritorial or even global licensing of their repertoires. However, the easiest and most efficient way for most online music providers, i.e the smaller and medium webcasters, to achieve more content is through blanket licenses from CROs rather than negotiating licenses with individual music publishers.<sup>335</sup>

### C. WILL DIGITAL RIGHTS MANAGEMENT ALLOW RIGHTS HOLDERS TO SELF-ADMINISTER THEIR RIGHTS?

There are two basic types of DRM: technological protection measures and technological identification measures.<sup>336</sup> Technological protection measures are addressed first.

#### 1. *Technological Protection Measures*

Technological protection measures (“TPMs”) are further divided into technologies that either protect access to a copyrighted work or control the ability to copy the work.<sup>337</sup> An example of a TPM protecting access to a work is an encryption mechanism on a digital work that prevents users from accessing the work unless they are authorized users with the correct “key” to access the content.<sup>338</sup> Technological measures that control use of a work include technologies that would only allow a user to make a certain number of copies of the work.<sup>339</sup> These new technologies allow rights holders to maintain some of the exclusivity in their ownership of their copyrighted works online.<sup>340</sup>

The natural reaction of the music industry is a defensive one when faced with new technology. The fear has always been that each new technology that allows for new means for the copying or distribution of music will be the death knoll of the music industry. The music industry once thought that the Player Piano would destroy the music business.<sup>341</sup> Then the industry saw cassette tapes as being the downfall of the industry.<sup>342</sup> The movie industry also fears new technology. For example, Jack Valenti, the former president of the Motion Picture Association of

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listen to a song. *Id.* In addition, the consumer can use the expired songs to create a customized Internet radio station. *Id.*

335. *Id.*

336. MUSIC UNLEASHED: LEGAL IMPLICATIONS OF MOBILE MUSIC DISTRIBUTION 140-41 (Rolf Auf der Maur & Marc Jacobson eds. 2004).

337. *Id.* at 142.

338. *Id.*

339. *See id.* at 143 (discussing the Serial Copyright Management System in the United States, which was part of the Audio Home Recording Act of 1992).

340. *Id.* at 155.

341. PRACTICING L. INST., MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS 345 (vol. 1 2001) [hereinafter MUSIC ON THE INTERNET].

342. David Salvator, Which Online Music Service is Best, <http://www.extremetech.com/article2/0,1558,1784304,00.asp> (last visited Apr. 25, 2005) [hereinafter Extremetech].

America graphically said, “[t]he VCR is to the movie industry as the Boston Strangler was to a woman alone.”<sup>343</sup> This fear of change caused the industry to wait ten years before providing a legal alternative to illegal peer-to-peer file sharing networks.<sup>344</sup> The record companies and the music industry in general, are slowly beginning to realize that the future of music is online and with digital transmissions in general. The sooner the industry whole-heartedly embraces this fact, the sooner it will be able to allow rights holders to reap the financial rewards of digital music distribution by providing legal alternatives that provide consumers with what they desire – variety in the selection of music, low cost, and the ability to play purchased downloads of music on various devices.

Instead of a purely defensive approach to licensing music online, a balance must be struck between rights holders’ ability to effectively protect their works from unauthorized use and the ability of consumers to lawfully obtain and use copyrighted works. If rights holders make access to copyrighted works too difficult or if subsequent use by purchasers of the works is too limited, consumers will find illegal ways to obtain a wider variety of works that are more user-friendly. For example, protection measures should not prevent a consumer from downloading a song and being able to transfer the song to a multitude of devices or mediums, such as an MP3 player, iPod, computer, or CD.

The E.U. Commission has recognized the need for more effective use of DRM systems. The Commission released a Directive that called for more cooperation between rights holders and industrialists to allow for effective TPMs and the normal operation of electronic equipment that has a “commercially significant purpose or use other than to circumvent the technical protection.”<sup>345</sup> Rights holders and CROs must embrace the Internet and the myriad of possibilities that it offers for selling and distributing music. When consumers access the Internet for digital music, legally or illegally, they do so primarily because of variety, not price.<sup>346</sup> Rights holders and CROs must come to realize that the best course of action is to maximize lawful, legitimate uses, instead of minimizing unlawful uses.<sup>347</sup> Attempts to limit access to music or use of downloaded songs are unpopular and often lead consumers to circumvent protection measures<sup>348</sup> or to seek out illegal ways to get a variety of music that is easily transferable. Effective use of DRM systems will allow CROs to streamline the tracking, management, and collection and distribution of

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343. MUSIC ON THE INTERNET, *supra* note 341, at 345.

344. Salvator, *supra* note 342.

345. MUSIC UNLEASHED, *supra* note 336, at 153.

346. IFPI:07 Digital Music Report, at 15, *available at*, <http://www.ifpi.org/content/library/digital-music-report-2007.pdf>.

347. COLLECTIVE MANAGEMENT, *supra* note 88.

348. *Id.* at xxii.

royalties, increasing accuracy and reducing administrative costs.<sup>349</sup>

However, perhaps the best solution is to eliminate TPMs completely. Apple, for example, must distribute music with DRM, specifically TPMs, that restricts the consumer to playing the purchased song only on certain devices.<sup>350</sup> This is because the record companies, specifically the four largest, require Apple to place DRM systems on their sound recordings that Apple sells online.<sup>351</sup> However, Steve Jobs, CEO of Apple, stated that a DRM-free world is the best alternative for the music industry<sup>352</sup> and noted, “DRM systems haven’t worked and may never work, to halt music piracy.”<sup>353</sup> The reason is quite ironic. Ninety percent of the songs sold by record companies are songs on CDs, which have absolutely no DRM because the CDs must play in CD players that support no DRM system.<sup>354</sup> Of course, this allows consumers to play these DRM-free songs on any player or computer. More importantly, however, DRM-free CDs allow consumers to upload DRM-free songs onto their computers where they can illegally distribute the songs on the Internet<sup>355</sup> via peer-to-peer file sharing services such as LimeWire. If 90% of the songs sold have no DRM systems, then why force the remaining 10%, which consists of legally downloaded online music, to have DRM systems?<sup>356</sup> Dispensing with DRM would not significantly hurt CD sales.<sup>357</sup> Furthermore, dispensing with DRM would encourage new companies to invest in new online stores and music players because they would not be burdened with the cost of implementing and updating a DRM system that a tech-savvy person quickly finds a way to bypass.<sup>358</sup>

## 2. *DRM Identification Technology*

TPMs allow rights holders to protect and control the use of their works online, but how will individual rights holders track the usage of their works? The answer is with DRM identification technology. An example of a technological identification measure is the Rights Manage-

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349. Community Initiative, *supra* note 6, at 14.

350. Steve Jobs, Thoughts on Music, <http://www.apple.com/hotnews/thoughtsonmusic/> (last visited May 1, 2008) [hereinafter Apple]. The DRM allows consumers to play a downloaded iTunes on up to five computers and an unlimited number of iPods. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. Apple, *supra* note 350.

357. *Id.*

358. *Id.*

ment Information System (“RMI”).<sup>359</sup> CISAC, in collaboration with its member CROs and the International Standard Organization (“ISO”) has developed the RMI system for the Internet.<sup>360</sup> CISAC touts RMI as something that will revolutionize how works are identified and licensed as well as how royalties are collected and distributed.<sup>361</sup> RMI refers to all of the data and international standards used to identify a creative work and the rights holders of the work.<sup>362</sup> For example, there is the International Standard Name Identifier (“ISNI”), which is used to identify, in multiple databases, the parties connected with a work.<sup>363</sup> In addition, this standard will allow CROs and third parties to exchange information regarding the work.<sup>364</sup> There is also a specific ISO identifier for musical works called the International Standard Musical Work Code (“ISWC”).<sup>365</sup> An ISWC can be assigned to any musical creation and provides information about that musical creation, including title, composer, author, or arrangers.<sup>366</sup>

The ISWC International Agency (“Agency”), was appointed by the ISO appointed to be the registration authority for the ISWC standard.<sup>367</sup> An ISWC will only identify the musical composition in a work. It will not identify the sound recording in a musical work.<sup>368</sup> Recognized member agencies of the Agency allocate unique ISWCs.<sup>369</sup> Agencies attach an ISWC to a song only after gathering certain identifying information about that song.<sup>370</sup> The Agency believes that within a maximum of two years, the ISWC system will cover almost the entire world repertoire of music.<sup>371</sup> An ISWC will permanently remain with a work that as it is transmitted digitally, allowing rights holders or CROs to accurately

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359. Email from Erik Verzijl, an employee of BUMA (June 8, 2008, 9:05 a.m. EST) (on file with author) (stating that BUMA uses a new technology called fingerprinting to track songs used for radio and television).

360. CISAC.org., *Managing Rights in a Digital World*, <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=851&method=afficherArticleInPortlet> (last visited Apr. 18, 2008).

361. *Id.*

362. *Id.*

363. CISAC.org., *Identifiers: The Nuts and Bolts of RMI*, <http://www.cisac.org/CisacPortal/listeArticle.do?numArticle=852&method=afficherArticleInPortlet> (last visited Apr. 18, 2008).

364. *Id.*

365. *Id.*

366. *Id.*

367. ISWC.org, <http://www.iswc.org/en/html/Home.html> (last visited Apr. 17, 2008).

368. ISWC.org, *FAQ*, <http://www.iswc.org/en/html/FAQA.html> (last visited Apr. 17, 2008).

369. *Id.*

370. *Id.*

371. ISWC.org, <http://www.iswc.org/en/html/Home.html> (last visited Apr. 17, 2008).

identify that work wherever it is transmitted, regardless of how often.<sup>372</sup> What is unique about an ISWC is that it will allow for the tracking and exchange of information regarding the musical works for such things as registration, identification, and royalty distribution.<sup>373</sup>

These new tracking technologies are very useful for copyright clearance in the digital environment because they allow users to identify the rights holders in the work and the rights that they will need to license before they can exploit the work.<sup>374</sup> Such technology will be especially helpful in the area of multimedia works that contain numerous rights for the video and music portions of the work the user must clear before the work can be exploited.<sup>375</sup> With these new technologies, commercial entities could offer services to publishers that provided for DRM of the publishers' works on the Internet, thus displacing the CROs.<sup>376</sup>

On the other hand, it will likely prove difficult for rights holders to manage their rights individually until CROs "unbundle" the rights that many of them control.<sup>377</sup> Many CROs control various rights, unlike in the United States where organizations such as BMI and ASCAP control only the performance right. Aside from the agreements between rights holders and the CROs in the United States, most agreements between rights holders and CROs allowing CROs to manage various rights (a "bundle" of rights) do not allow rights holders the option to later decide to manage some of these rights on their own.<sup>378</sup> Unbundling would allow rights holders the flexibility to manage some rights on their own and to allow CROs to manage other rights.<sup>379</sup>

With the ISWC standard for identifying and tracking the musical composition in a work, technological measures exist which allow for the precise tracking of digitally transmitted music. Once the world repertoire of music is digitized and tagged with tracking standards, such as the ISWC standard, it will become difficult for CROs to claim that blan-

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372. ISWC.org, FAQ, <http://www.iswc.org/en/html/FAQA.html> (last visited Apr. 17, 2008).

373. *Id.*

374. COLLECTIVE MANAGEMENT, *supra* note 88, at 23; MUSIC UNLEASHED, *supra* note 336, at 156.

375. COLLECTIVE MANAGEMENT, *supra* note 88, at 25.

376. *Id.* at 22.

377. Ungerer, *supra* note 257, at 8.

378. *Id.* In the United States, the court-ordered consent decrees that govern the agreements into which ASCAP and BMI enter allow rights holders the freedom to manage some of the rights associated with their musical works.

379. *Id.* at 8-9. The option for individual rights holders to use DRM systems to manage their rights must be allowed, providing individual rights holders the option of individual rights management or collective management of their rights. *Id.* at 10. Unbundling of rights will likely be a major topic in the near future. *Id.* at 9.



ket licensing is indispensable.<sup>380</sup> Setting reasonable fees for a blanket license “is perplexing in theory, impractical in practice, and dubious in outcome .”<sup>381</sup> The CROs claim that a per-song royalty rate would increase administrative fees and be impractical.<sup>382</sup> However, some think this is simply not true<sup>383</sup> and that CROs, like ASCAP and BMI, are simply not taking advantage of new technologies that would allow CROs to compensate each rights holder for the actual number of times their songs are played.<sup>384</sup> The present algorithms and methods of royalty computations, some claim, only benefit popular songs and neglects to compensate lesser-played songs.<sup>385</sup>

Alternatively, rights holders may be able to manage the use of their works in the digital environment through use of CISAC’s RMI.<sup>386</sup> By doing so, the individual user would keep the administrative fees taken out of their royalties by the CROs and increase the efficiency of the licensing process.<sup>387</sup> Individual songwriters would likely still need the backing of a publisher with the finances and the know-how to promote songs and the ability to get record companies to record their songs. However, large publishers and record companies, who control the rights to millions of songs, have already begun to license their online rights directly, circumventing the CROs.<sup>388</sup> In addition, large music publishers may not find it worthwhile to negotiate licenses with small or new online providers and, small or new providers may not have the financial resources to negotiate these licenses. In such instances, it is more practical that CROs continue to act as a clearing house of rights for online music.

It would be even more unlikely for an individual performer or band to manage their rights in a sound recording. There are now tens of thousands of singers and bands on MySpace and YouTube, hoping for their big break. The creation of a “demo tape” has become much easier and less costly to make with computers, new recording technology, and

380. Boiron, *supra* note 257, at 7.

381. U.S. v. ASCAP, 831 F. Supp. 137, 144 (S.D.N.Y. 1993).

382. Enman, *supra* note 298.

383. Lehman Interview, *supra* note 46.

384. See Shadoshea.com, The Ugly Truth About BMI and ASCAP, <http://www.shadoshea.com/services/royalties/index.php3> (last visited Apr. 25, 2008) (claiming that ASCAP and BMI use an antiquated method of calculating royalties that fails to pay many, if not most, less commercially successful performers for the public performances of their songs; arguing that the present system of calculating royalties needs to be replaced with one that uses new tracking technology that would allow all performers to be paid for actual usage of their songs).

385. *Id.*

386. COLLECTIVE MANAGEMENT, *supra* note 88, at 23.

387. Assessment, *supra* note 207, at 11.

388. See Part IX.B. *supra* for a description of some of the platforms and multiterritorial licensing systems record companies and music publishers have recently created.

song software. Although performers may not need expensive studio time to create a decent sound recording, they still require record companies for another reason – promotion.<sup>389</sup> If a singer or band is “discovered” on MySpace, for example, how will they sell their music? There is likely technology that allows performers to sell songs through a website. However, they will likely not become a national or international star, selling millions of records or downloads, without the backing of a large record label that will spend millions of dollars promoting the artist and their record.

Finally, even though new technology has provided the means for more efficient rights management, the Internet and digital media have created so many possibilities as to the manner and types of use that collective management of online rights may perhaps still be the best method.<sup>390</sup> At any rate, it seems that the technology is not yet advanced enough to allow individual rights holders to manage, promote, and license their works online. Until that happens, or to maintain their viability when it does, CROs will have to coordinate and integrate their use of electronic management to best serve rights holders and online music providers.<sup>391</sup>

One way that the new tracking technology will help collective CROs is in royalty collection. Royalties are often delayed because of inaccurate information or lack of information as to who should receive the royalty payments.<sup>392</sup> For example, BMI may receive royalty payments from foreign affiliates for a specific songwriter, composer, or publisher.<sup>393</sup> However, foreign affiliates often provide only the title of the musical work, which causes BMI to do extensive research to determine who the entitled parties are and how much they should receive.<sup>394</sup> Another problem with tracking songs and correctly distributing royalty payments results when foreign providers or distributors of music translate the title of a song into their own language.<sup>395</sup> Having a universal tracking standard, such as the ISWC, on every digital copy of a song would solve this problem, too.

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389. Knife Interview, *supra* note 262.

390. MUSIC UNLEASHED, *supra* note 336, at 155.

391. *Id.* For example, new technology will allow CROs to outsource some of their management services to specialists in order to reduce costs. Assessment, *supra* note 207, at 11 n. 20.

392. BMI, BMI Royalty Information, at 2, <http://www.bmi.com/brochures/royalty.pdf> (last visited July 22, 2008) [hereinafter BMI Royalty].

393. *Id.* at 13.

394. *Id.*

395. *Id.*

## D. A "UNILICENSE" GRANTED BY ONE CRO

Rights holders and CROs in the United States have proposed legislation to create a statutory blanket license to cover performance, reproduction, and distribution rights.<sup>396</sup> However, this proposal failed.<sup>397</sup> A unilicense will likely be the future of licensing rights holders' rights online.<sup>398</sup> As one industry representative suggested, each country would have one CRO that licensed a unilicense for the public performance, reproduction, and distribution of works in the digital and online environments.<sup>399</sup> For example, in the United States, the Harry Fox Agency (licensing the mechanical right, i.e. reproduction and distribution), ASCAP, BMI, and SESAC (all three licensing the public performance right) would no longer directly license mechanical and public performance rights for online music. The new CRO would grant unilicenses covering all three of these rights and collect the resulting royalties.<sup>400</sup> The new CRO would then distribute to the individual CROs the percentage they are owed, which the individual CROs would then distribute to their members.<sup>401</sup>

Ideally, however, the new CRO granting the unilicense would cut the individual CROs out of the equation altogether. In such a scenario, the new CRO would grant the unilicense, collect the royalties, and distribute the royalties directly to the appropriate songwriters, publishers, performers, and record companies. This would cut down on the administrative fees that the individual CROs would have deducted from the royalties (the new CRO having already deducted its administrative fees), giving rights holders more money. Further maximization of royalties could be achieved by having only one or only a few CROs in the world granting a unilicense.<sup>402</sup> If fewer CROs handle the royalties, then less

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396. Glaser, *supra* note 180; *see also* Music Licensing Reform: Hearing Before the Senate Judiciary Committee Subcommittee on Intellectual Property, 110th Cong. (2005) (statement of Irwin Z. Robinson, Chairman and CEO of Famous Music Publishing and Chairman of the Board of the National Music Publishers' Association), *available at*, [http://judiciary.senate.gov/testimony.cfm?id=1566&wit\\_id=4453](http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4453) (describing their proposal for a "unilicense").

397. Knife Interview, *supra* note 182.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* For example, if it is determined that 35% of the unilicense royalties were for the public performance of BMI's repertoire, then the new CRO would give BMI 35% of the collected royalties, which BMI would distribute (after taking out an administrative fee) to its affiliate songwriters and publishers.

402. Email from Bruce Lehman, Senior Counsel at Akin Gump in Washington D.C. and former Secretary of Commerce and Commissioner of the United States Patent and Trademark Office, (Apr. 18, 2008, 5:51 p.m. EST) (on file with author). The fewer CROs that handle the royalties, the fewer administrative fees charged, resulting in more royalties for rights holders. *Id.*

administrative fees are deducted and the more royalties rights holders will see. However, a prerequisite of going beyond the scenario of one new CRO in each country granting a unilicense for various rights within that country is that the unilicense must be granted on a multiterritorial basis. The unilicense will make it more efficient for online music providers to clear rights in musical works within each country. However, if the unilicense is territorially restrictive and not multiterritorial, then the same legal uncertainty issues will remain for online music providers.

#### E. MULTITERRITORIAL LICENSING

##### 1. *Would Competition Between CROs Hurt Rights Holders?*

Competition among CROs resulting from a multiterritorial licensing regime would not necessarily hurt rights holders.<sup>403</sup> To a certain extent, there is competition in the United States between BMI, ASCAP, and SESAC as they compete for rights holders to represent. However, the United States is unique in this regard. Most, if not all, countries only have one CRO that administers public performance rights. In addition, rights holders currently do not have the option to choose a CRO outside of the place of their economic residence because the reciprocal agreements between the CROs only allow CROs to license the rights of rights holders within their respective territories. Rights holders, if allowed to choose the CRO that administered their online rights, would likely go to the society that gives them the largest royalty distribution.

Therefore, competition would not hurt rights holders by reducing royalty distribution. Competition, rather, would force the CROs to become more efficient and transparent.<sup>404</sup> Competition would also force CROs to reduce their administrative costs and increase royalty distributions<sup>405</sup> in order to keep their members from going to another CRO. In addition, the CRO with the best service and highest royalty distribution would be able to attract more members. CROs that are the sole CRO in a country, therefore, do not want competition because they would then be forced to provide their members a higher percentage of the royalties, i.e. reduce their administration costs, in order to keep members or attract new members.<sup>406</sup> In a multiterritorial licensing regime or a global li-

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403. Email from Bruce Lehman, Senior Counsel at Akin Gump in Washington D.C. and former Secretary of Commerce and Commissioner of the United States Patent and Trademark Office (Apr. 18, 2008, 6:06 p.m. EST) (on file with author).

404. Commission Study, *supra* note 226, at 37. The E.U. Commission also stated that competition between CROs for rights holders would be “helpful in creating more efficient management of the online forms of copyright exploitation.” *Id.* at 55.

405. *Id.* at 56 (stating that competition between CROs for rights holders would “be a powerful incentive for collecting societies to provide optimal services to all its right-holders, irrespective of their location – thereby enhancing cross-border royalty payments.”).

406. Lehman Email, *supra* note 403.

censing regime, this fear is even more pronounced.

CROs fear that a multiterritorial licensing regime that allows rights holders and online providers of music to choose any CRO with which to deal, will lead to a “race to the bottom”<sup>407</sup> in regards to royalties. However, this will likely not happen if the multiterritorial licensing regime allows member CROs the option to forbid another member CRO from licensing their repertoire later if that other member was undercutting rates for the multiterritorial license. In other words, before a race to the bottom happens, CROs will prohibit those CROs who are undercutting the prices (likely smaller CROs who are trying to attract online music providers) from using their repertoires, essentially making the undercutting CROs irrelevant.<sup>408</sup> For example, if CRO A, who was a member of a multiterritorial licensing regime, began to undercut licensing fees by charging a lower rate for the multiterritorial license, the other CROs, whose repertoires CRO A was licensing as part of the multiterritorial license at the reduced rate, could forbid CRO A from further licensing their repertoires. Without the ability to grant a multiterritorial license that included all or even some of the other major CROs’ repertoires, online music providers would no longer seek a multiterritorial license from CRO A.

Rights holders may also indirectly prevent a race to the bottom. As a result of the reciprocal agreements that the CROs currently operate under, rights holders in country A, for example, must have the CRO in country A manage their rights. However, if rights holders in country A had the option under a multiterritorial licensing regime to allow any CRO that was a member of the multiterritorial licensing regime to manage their rights, the rights holders would take their musical compositions or recordings to the CRO that offered the highest royalty payments. Therefore, if the CRO in country A, in order to attract online music providers, began reducing royalty rates instead of, or in addition to, reducing its administrative fees, rights holders in country A would no longer allow the CRO in country A to administer their rights. Instead, rights holders in country A would likely seek out another CRO that charged licensees higher rates resulting in higher royalties for the rights holders. The result would be a loss of rights holders for the CRO in country A, which would mean a smaller repertoire for the CRO of country A. Faced with a

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407. Berenson Email, *supra* note 169. The fear is that one member CRO of a multiterritorial licensing regime may reduce the royalties it charges for a multiterritorial license for online music to attract a greater number of online music providers. Other CROs in the licensing regime, in order to grant licenses and collect royalties would have to charge the same rate or a lower rate. The one member CRO could then lower its rates again, causing the other CROs to match or lower their rates. This back and forth lowering of rates in order to attract licensees, i.e. online music providers, is called a “race to the bottom.”

408. Community Initiative, *supra* note 6, at 46.

loss of rights holders and licensing revenue, under-cutting royalty rates would not be an attractive option for the CRO in country A.

## 2. *Reasons Why a Multiterritorial License for Online Music is Needed*

In addition to the legal uncertainty issues mentioned in Part VII.C., which are a direct result of the present system of territorially restrictive licensing, there are a couple of other problems resulting in legal uncertainty that a multiterritorial license would alleviate. One problem has to do with fragmentation of rights. A copyright in a song consists of many different rights that the rights holder can either assign or license based on geographical restrictions, restrictions on the type of media used, duration of the rights, etc. Taking a previous example, the U.K. music publisher who owns the rights to “Wonderful Tonight” may have assigned or licensed the right to license the public performance of “Wonderful Tonight” in Germany to a German subpublisher. Therefore, when a United States webcaster transmits “Wonderful Tonight” into Germany, the German subpublisher may sue the United States webcaster for infringing its right to license “Wonderful Tonight” in Germany. To prevent legal uncertainty, the United States webcaster would be required to obtain licenses from the CRO in each territory into which the webcaster’s transmission is accessible in order to make certain that it is not infringing the right of an individual or entity that may have one of the fragmented rights in the musical composition or sound recording. As mentioned before, however, negotiating licenses in each territory to create legal certainty is an expensive and time-consuming process.

In addition, sovereignty poses a potential problem for the cross-border transmission of music. Sovereignty is defined as the “supreme authority within a territory.”<sup>409</sup> The principle of territoriality is an element of sovereignty in that a country’s sovereignty is defined by and encompasses the territory within its borders.<sup>410</sup> Based on sovereignty and the principle of territoriality, sovereigns have the authority to regulate anything within their territory, including digital transmissions, into their territory. Again, this potential problem results in more legal uncertainty. In reality, countries have attempted to regulate and control transmissions entering and exiting their territories to little avail.<sup>411</sup> A multiterritorial license would provide music providers authority to transmit into countries covered by the multiterritorial license and create

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409. Stanford Encyclopedia of Philosophy, Sovereignty, <http://plato.stanford.edu/entries/sovereignty/> (last visited Apr. 25, 2008).

410. *Id.*

411. See David R. Johnson and David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. R. 1367 (2006) (describing the affect of the Internet on the concept of sovereignty).

legal certainty that a sovereign will not charge an online music provider fees or make attempts to shut the provider down.

The primary reason that a multiterritorial license is needed is to create legal certainty for online music providers. The present territorially restrictive system of copyright licensing and management is inefficient and incompatible with the offering of music online. The limited licensing of music by CROs exists because the CROs have not obtained the right to license the foreign repertoire through a direct relationship with the actual rights holders.<sup>412</sup> Instead, CROs have obtained the right to license music through territorially restrictive reciprocal agreements with other CROs.<sup>413</sup>

Another reason, unrelated to legal certainty, why there needs to be a multiterritorial license is to provide the type of environment that allows music providers to create new methods of distributing music legally to consumers across the world. The present territorial system hinders the development and dissemination of new platforms of music services. The complexity and tedious nature of clearing rights in many different territories often delays the launching of new services. For example, Apple introduced its iTunes online music store in a staggered, piecemeal manner in Europe because it had to negotiate clearances of rights with every single country in the E.U.<sup>414</sup>

There have been a few attempts at multiterritorial licensing of online music. Not surprisingly, CROs within the E.U. have initiated all of the attempts. The E.U., through various treaties, has sought to create a common, open market.<sup>415</sup> The goal of the E.U. is to create competition by eliminating any agreement or activity that is restrictive to the free movement of goods and services. Two of the multiterritorial licensing agreements failed and one was renewed. Each agreement covered a different right – public performance, mechanical (i.e. reproduction and distribution), and simulcasting.

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412. Assessment, *supra* note 207, at 6.

413. *Id.*

414. Lüder, *supra* note 7, at 46 n. 200. This service was launched on 28 April 2003 in the all of the U.S. *Id.* There was no single launch date for the European Union in 2003. Instead, the service was introduced over a year later in the United Kingdom, Germany and France on 15 June 2004. *Id.* Consumers in Belgium, the Netherlands, Luxembourg, Spain, Italy, Portugal, Finland, Austria and Greece had to wait until 26 October 2004. *Id.* In Denmark, Norway and Sweden the service only became available on 10 May 2005—over two years after the U.S. launch date. *Id.* It appears that iTunes is still not available in some of the 10 States that joined the Community in May 2004, such as Slovenia, the Slovak Republic, Hungary, Poland or the Czech Republic. *Id.*

415. See Europa.eu, Summaries of legislation, Treaty establishing the European Economic Community, [http://europa.eu/scadplus/treaties/eec\\_en.htm](http://europa.eu/scadplus/treaties/eec_en.htm) (last visited June 10, 2008) (providing a history of the European Economic Community).

### 3. *Attempts at Multiterritorial Licensing*

#### i. *IFPI Simulcasting Agreement for the Multiterritorial Licensing of the Performance Right in Sound Recordings*

On November 16, 2000, the International Federation of the Phonographic Industry (“IFPI”), which represents the record industry worldwide,<sup>416</sup> applied to the E.U. Commission for a negative clearance, i.e. an exemption, under Article 81(3)<sup>417</sup> of the European Economic Community Treaty with respect to a simulcasting agreement (“Simulcasting Agreement”).<sup>418</sup> Through this Simulcasting Agreement, CROs representing record labels from around the world came together to offer a multiterritorial, multirepertoire license for the public performance of sound recordings used in simulcasts.<sup>419</sup> Each CRO who was a member of the

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416. IFPI.org, [http://www.ifpi.org/content/section\\_about/index.html](http://www.ifpi.org/content/section_about/index.html) (last visited Apr. 18, 2008).

417. See Commission Decision COMP/C238.014, Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, 2002/XXX/EC 2, *available at*, [http://www.aepo.org/usr/docs/ifpi/Commission decision simulcasting.pdf](http://www.aepo.org/usr/docs/ifpi/Commission%20decision%20simulcasting.pdf) [hereinafter Simulcasting Decision]. Article 81(1) of the European Community (“E.C.”) Treaty (the Treaty of Rome that established the European Economic Community) prohibits anticompetitive agreements and is as follows:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Treaty Establishing the European Community, art. 81, Dec. 24, 2002, O.J. C 325, p. 64-65, *available at*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E081:EN:HTML>. Article 81(3) contains exceptions to Article 81(1):

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
  - any decision or category of decisions by associations of undertakings,
  - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. *Id.*

418. *Id.* at 3.

419. *Id.* at 3-5.



Simulcasting Agreement entered into a bilateral agreement with every other member CRO, granting each other the non-exclusive right to offer a license to simulcast into each other's territory.<sup>420</sup> Royalties for the multiterritorial license are calculated according to the destination principle, i.e. the place where the transmission is received.<sup>421</sup> Therefore, in calculating royalties for the multiterritorial license, each member CRO will take into account the individual tariffs of the other member CROs.<sup>422</sup> The E.U. Commission had its reservations about this method, believing that this method could hamper competition by limiting the independence each society had in setting the royalty rates for the multiterritorial license.<sup>423</sup> However, the Simulcasting Agreement still provided for some competition by allowing online music providers to negotiate the commercial terms of the contract with the CROs.<sup>424</sup>

On June 21, 2001, the IFPI submitted an amended version of the Simulcasting Agreement.<sup>425</sup> The amendment allowed simulcasters located in the territory of a CRO that was a member of the Simulcasting Agreement to obtain a multiterritorial simulcasting license from any other member CRO.<sup>426</sup> This clause was the key difference between the Simulcasting Agreement and the Santiago Agreement, which covered the performance right, and was ultimately the reason why the E.U. Commission decided that the Simulcasting Agreement was allowable under Article 81 of the E.C. Treaty.<sup>427</sup> The clause meant that any broadcaster whose signal originated in the territory of any of the members of the Agreement could obtain a multiterritorial license from any of the CROs who were members of the Agreement.<sup>428</sup>

On May 22, 2002, the IFPI again amended the Simulcasting Agreement to require that member CROs specify which part of the tariff charged by CROs consisted of the CRO's administration fee.<sup>429</sup> Ultimately, the E.U. Commission authorized an exemption for the Simulcasting Agreement, concluding that the Agreement fulfilled the Article 81(3) conditions.<sup>430</sup>

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420. *Id.* at 6.

421. *Id.* at 7.

422. *Id.*

423. Guibault, *supra* note 116, at 6.

424. Simulcasting Decision, *supra* note 417, at 9.

425. *Id.* at 4; Simulcasting Decision, *supra* note 417, at 2.

426. Guibault, *supra* note 116, at 4-5.

427. Assessment, *supra* note 225, at 9.

428. Simulcasting Decision, *supra* note 417, at 8.

429. *Id.* at 2.

430. *Id.* at 31.

ii. *The Santiago Agreement – Multiterritorial Licensing Regime for the Songwriter’s Performance Right*

Five CROs started the Santiago Agreement: BMI, BUMA (Netherlands), GEMA (Germany), PRS (United Kingdom), and SACEM (France).<sup>431</sup> The Santiago Agreement was an attempt by these five CROs, and the twenty-one that joined before the Agreement expired,<sup>432</sup> to create a multiterritorial licensing regime for the public performance right of songwriters and publishers.<sup>433</sup> Each of the member CROs was free to enter into a bilateral agreement with any other member of the agreement that they chose.<sup>434</sup> Through these bilateral agreements, each CRO (e.g. CRO X) agreed to grant to every other CRO with which it had made an agreement, the nonexclusive right to transmit its (CRO X’s) national repertoire into its (CRO X’s) territory.<sup>435</sup> For example, the CRO of country A would enter into a bilateral agreement with the CRO of country B, which would give the CRO of country B the nonexclusive right to transmit the national repertoire of country A into the territory of country A, and vice versa. Ideally, each CRO would enter into a bilateral agreement with every other CRO, providing users with the broadest license possible. CROs were to apply the tariff in the country of the destination of the download, if there was any tariff.<sup>436</sup> The Santiago Agreement expired before the societies and the Commission came to an understanding on the tariff to be charged.<sup>437</sup>

The Santiago Agreement expired in 2004 because the CROs did not want to allow content providers the ability to obtain a multiterritorial license from any member CRO the provider chose.<sup>438</sup> This “economic residence” provision of the Santiago Agreement required that users and providers of online music with an economic residence in the territory of a member CRO obtain a multiterritorial license from that CRO. In other words, online music providers could not shop around. This created a *de facto* monopoly for CROs over online multiterritorial music licenses in their own territory, negating any possibility of competition as to licensing terms or administration fees.<sup>439</sup> Users of music and online providers

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431. COLLECTIVE MANAGEMENT, *supra* note 88, at 13 n. 24. ASCAP did not join, fearing antitrust issues with the E.U. Directorate General, which is what ultimately happened. Mosenkis Interview, *supra* note 217. BMI eventually left for undisclosed reasons, before expiration of the Agreement.

432. Telephone Interview with Marvin Berenson, General Counsel for BMI (Feb. 25, 2008).

433. *Id.*

434. *Id.*

435. *Id.*

436. COLLECTIVE MANAGEMENT, *supra* note 88, at 13-14 n. 24 (citation omitted).

437. Berenson Email, *supra* note 264.

438. Assessment, *supra* note 207, at 9.

439. Guibault, *supra* note 116, at 8.

of music complained about this provision.<sup>440</sup> This provision risked the development of online music services and technology and likely would have been harmful to rights holders.<sup>441</sup> The E.U. Commission's Directorate General of Competition investigated and concluded that the "economic residence" provision was anticompetitive.<sup>442</sup> The solution was to allow online music providers to obtain a multiterritorial license from any CRO that was a member of the Santiago licensing regime. The CROs, however, feared that there would be a "race to the bottom," i.e. one CRO would undercut prices to attract online music providers, forcing other CROs to do the same.<sup>443</sup> The Commission, however, said that there would not be competition for online music providers, but rather, there would be competition for songwriters and publishers.<sup>444</sup>

Some of the larger CROs then worked on a Recommendation with the Commission that would amend the Agreement to have CROs competing for product, i.e. songwriters and publishers, rather than users.<sup>445</sup> The Commission was in agreement with the proposal. However, there was still a host of other issues, such as transparency in calculating rates, that the Commission still required answers to.<sup>446</sup> The smaller CROs also feared that they would become obsolete. They believed that the large CROs would dominate the licensing regime, deciding the percentage of royalties owed to each society, which the smaller societies feared would result in a very small percentage for them. Ultimately, these issues were not resolved and the Agreement expired.

The main issue, however, was the economic residence provision. CROs claim that their songwriters and publisher members are served best if the provider who is using their music is in close proximity to them, the CRO.<sup>447</sup> The CROs did not want to amend the economic residence provision to allow users with economic residence in any of the

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440. Paul Meller, *EU Hearing on Online Song Rights*, INT'L HERALD TRIB. NOV. 16, 2004, at XX, available at [http://www.iht.com/articles/2004/11/16/music\\_ed3\\_.php](http://www.iht.com/articles/2004/11/16/music_ed3_.php).

441. Guibault, *supra* note 116, at 8 (citation omitted). The Santiago Agreement also required each subsidiary of a multinational corporation that provides online music, which is located in a different country to be licensed separately, regardless of where the corporation's website is hosted or distributed from. *Id.* at 9. This meant that each subsidiary must obtain a separate license from the CRO in the territory in which the subsidiary company is located. *Id.*

442. Council Regulation in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126), (EC) No 1/2003 of 17 Aug. 2005, O. J. C 200, 11 — 0012, ¶ 6 and 7, available at, [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817\(03\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52005XC0817(03):EN:HTML).

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. Assessment, *supra* note 207, at 9.

member states to obtain a license from any member CRO.<sup>448</sup> The CROs argue that they cannot properly enforce their members' rights and collect license fees and royalties if music providers are in different countries.<sup>449</sup>

The BIEM/Barcelona Agreement provided for a multiterritorial license for an author's online reproduction rights that covered webcasting, on demand, streamed transmissions, and downloading.<sup>450</sup> The Agreement expired in 2004 for the same reason that the Santiago Agreement was not renewed.<sup>451</sup>

## IX. FUTURE OF MULTITERRITORIAL LICENSING

It is possible for CROs to enter into reciprocal agreements with each other that would allow each CRO to grant licenses permitting online music providers to transmit the repertoire of one CRO into the territory of the other. However, the present system of territorially restrictive reciprocal agreements limits transmissions, legally speaking, to only one territory. Songwriters, publishers, and record companies are the rights holders, not the CROs. As the rights holders, they may determine how many territories in which to license their rights.<sup>452</sup> The principle of territoriality only determines which law applies to the use or exploitation of the work.<sup>453</sup> Therefore, although rights to musical compositions are licensed on a territorial basis, there is no legal requirement that they must be.<sup>454</sup> One would think that the rights holders would eventually assert their rights and break away from the inefficient and inapplicable system of territorial licensing for purposes of transmitting music online. However, most individual songwriters and performers need music publishers, record companies and CROs to fund their work, promote their work, license their work, and collect royalties for use of their work. Therefore, large publishers and record companies control most of the works and there is usually one CRO in each territory that licenses the works. If these entities are reluctant to change, there is not much the individual songwriters and performers can do. However, some of the larger publishers and record companies have begun to embrace the online environment. For example, record companies and CROs that administer their rights in the sound recordings have digitized and licensed over

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448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. Assessment, *supra* note 207, at 10 n. 19.

453. *Id.*

454. *Id.*

one million tracks to various online music providers.<sup>455</sup> However, CROs that administer rights in musical compositions have been reluctant to adopt a similar business model, claiming the authors are best served when CROs are in close proximity to the users, i.e. online music providers.<sup>456</sup> These CROs claim that proper administration of rights cannot be accomplished at a distance, even with the use of digital technology.<sup>457</sup> It seems clear, therefore, that there needs to be a multiterritorial licensing regime set in place because the market will likely not produce effective cross-border licensing on its own.<sup>458</sup>

#### A. THE E.U.: WHERE THE NEXT MULTITERRITORIAL LICENSING REGIME WILL BE DEVELOPED

The E.U. is the crucible in which to implement a multiterritorial license, either through legislation or by CROs fearing legislation. The E.U. Commission has expressed its concerns regarding the present licensing practices of CROs. The Commission feels that it will be increasingly difficult to justify the licensing of online music on a national level as digital technology develops, reducing the cost advantages that had been the benefit of allowing CROs to manage rights on a territorial basis.<sup>459</sup> CROs need to license multiterritorially in order to again become indispensable.<sup>460</sup> On May 18, 2005, the E.U. Commission issued a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services.<sup>461</sup> A Recommendation is a non-binding instrument that is often the first step in preparing legislation.<sup>462</sup> Commentators see the 2005 Recommendation as a first step in the multiterritorial management of legitimate online music services.<sup>463</sup> The Commission recognized the need for multi-territorial licensing to increase the legal certainty for commercial users of musical works on the Internet and to foster legitimate online services, which would increase

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455. *Id.* at 25; see also Part VII.E. *supra* (discussing other platforms created or joined by publishers and record companies, allowing them to license their works multiterritorially or globally).

456. Assessment, *supra* note 207, at 9.

457. *Id.*

458. Commission Study, *supra* note 226, at 23.

459. Assessment, *supra* note 207, at 11.

460. *Id.*

461. Report on the Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, Eur. Parl. Doc. A6/0053 19 (2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef://EP//NONSGML+REPORT+A6-2007-0053+0+OC+PDF+V0//EN> [hereinafter Commission Recommendation].

462. Lüder, *supra* note 7, at 20.

463. *Id.* at 13-14.

royalties for rights holders.<sup>464</sup>

The E.U. Recommendation recognized that rights holders and users should be able to choose any CRO they wish to manage their rights.<sup>465</sup> The Member State of residence or the nationality of either the rights holder or the CRO will not have any bearing on which CRO the rights holder may entrust its work.<sup>466</sup> In its subsequent Study, the Commission proposed three options in dealing with licensing of music in the digital environment, ultimately choosing "Option 3," which gave "right-holders the choice to authorise [sic] a collecting society of their choice to manage their works across the entire EU" as the preferred option.<sup>467</sup> In addition, the Recommendation stated that rights holders may determine the territorial scope of the CRO's mandate to administer the rights holders' rights in a work.<sup>468</sup> The Recommendation set guidelines for the conduct that CROs and commercial users were to engage in.<sup>469</sup>

However, the Recommendation failed to address the problem of territorial rights management.<sup>470</sup> Multiterritorial harmonization of rights management is seen as "indispensable" in making the Internet a greater source of income for rights holders.<sup>471</sup> Users and providers of online music desire multiterritorial licensing because the present state of diverging local laws hinders effective cross-border licensing.<sup>472</sup> Providers of online music also see multiterritorial licensing as a means to facilitate new online business models.<sup>473</sup> There has even been talk of creating a Community copyright that would cover the E.U. and displace the national copyright laws and the territoriality problems that result.<sup>474</sup> An argument in favor of the Community copyright is that the current territory-by-territory licensing only benefits the collecting CROs who administer most of these "national" rights.<sup>475</sup> The E.U. Commission has also noted that there needs to be competition between CROs to increase "transparency, accountability, royalty distribution and quality of enforcement."<sup>476</sup> Rights holders should be able to know how their royalties are collected and distributed.<sup>477</sup>

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464. Commission Recommendation, *supra* note 461, at 54 ¶ 8.

465. *Id.* at 3 ¶ 3.

466. *Id.*

467. Commission Study, *supra* note 226, at 5.

468. Commission Recommendation, *supra* note 461, at 3 ¶ 3.

469. *See id.*

470. *Id.* at 14.

471. *Id.*

472. *Id.* at 14 n. 55.

473. *Id.*

474. Commission Recommendation, *supra* note 461, at 15.

475. *Id.*

476. Community Initiative, *supra* note 6, at 32.

477. *Id.*

In 2007, the European Parliament (“Parliament”) issued a report on the Commission’s 2005 Recommendation in which the Parliament expressed a strong interest in adopting a directive, i.e. binding legislation, that would regulate collective management of cross-border music services.<sup>478</sup> However, in this 2007 Report, the Parliament admonished the Commission’s Recommendation for various reasons. One reason was that, in creating the Recommendation, the Commission “circumvented the democratic process” by not consulting the Parliament or the E.U. Council. Another reason was that the Parliament felt that some of the provisions of the Recommendation would hurt national music repertoires and cultural diversity.<sup>479</sup> Parliament asked the Commission

[t]o present as soon as possible – after consulting closely with interested parties – a proposal for a flexible framework directive to be adopted by Parliament and the Council in codecision with a view to regulating the collective management of copyright and related rights as regards cross-border online music services, while taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires, on the basis of the principle of equal treatment . . . .<sup>480</sup>

However, the Commission is not legally obligated to follow the Parliament’s Report on the Commission’s Recommendation.<sup>481</sup> The Commission alone has the right to initiate legislation and make Recommendations under Article 211 of the Treaty Establishing the European Union.<sup>482</sup>

BUMA, the Dutch CRO and one of the smaller European CROs, fears, as did the European Parliament, that the E.U.’s 2005 Recommendation will lead to an over-centralized market with the larger CROs and

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478. Report on the Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, Eur. Parl. Doc. A6/0053 19 (2007), at 8 ¶ 1, *available at*, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0053+0+OC+PDF+V0//EN> [hereinafter Parliament Report].

479. Parliament Report, *supra* note 478, at 4-5.

480. *Id.* The Commission proposes legislation. The Parliament and European Council amend the proposed legislation and then vote on the final proposal. *See* Chemicalspolicy.org, What is the EU?, <http://www.chemicalspolicy.org/whatistheeu.shtml> (last visited May 2, 2008) (providing a short overview of the E.U. governance structure and legislative process).

481. Email from Tobias McKenney, European Commission’s Directorate General of Internal Market and Services (May 19, 2008, 10:55 a.m. EST) (on file with author).

482. *Id.*; *see also* Treaty Establishing the European Community, Article 211, *available at*, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

the major commercial publishers displacing the smaller ones.<sup>483</sup> BUMA claims that this will be detrimental to “cultural diversity” in Europe.<sup>484</sup> The E.U. Commission actually agreed with BUMA in a March 13, 2007 resolution.<sup>485</sup> BUMA is now lobbying to have the 2005 Recommendation changed to note this concern.<sup>486</sup>

Subsequent to the Recommendation, the Commission published a “call for comments,” which would be used to monitor commercial developments.<sup>487</sup> This monitoring allows policy makers to determine if there is a need to adopt binding legislation with respect to multiterritorial licensing of online music.<sup>488</sup> If there were such a need, the process would indicate the type of rules that would be most suitable.

In its Monitoring Report, which is a summarization of its “Call for Comments,” the E.U. Commission noted that CROs were mixed as to whether binding legislation regarding European-wide licensing was preferred to a non-legislative approach.<sup>489</sup> A majority of CROs are against legislation in the areas of transparency and governance.<sup>490</sup> Publishers were unanimous in wanting a non-legislative approach at this point to allow E.U.-wide licensing models to develop.<sup>491</sup> Users would like to see legislation, but do not agree as to the subject matter of the legislation.<sup>492</sup> Most Member States of the E.U. would like to see legislation.<sup>493</sup> However, some states fear that legislation is not appropriate because it would be unable to keep pace with rapidly changing markets.<sup>494</sup>

## B. ATTEMPTS AT MULTITERRITORIAL LICENSING

The Commission, in its Monitoring Report, noted that its Recommendation had caused an impact in the licensing marketplace, causing new multiterritorial licensing regimes to be developed and proposed.<sup>495</sup>

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483. Billboard.biz, CROs Promote Pan-European Licensing, [http://www.billboard.biz/bbbiz/content\\_display/industry/e3i8302b5a754f42f186b0a136a7fe73f9c](http://www.billboard.biz/bbbiz/content_display/industry/e3i8302b5a754f42f186b0a136a7fe73f9c) (last visited Apr. 25, 2008).

484. *Id.*

485. *Id.*

486. *Id.*

487. Lüder, *supra* note 7, at 20 (citing European Commission Call for Comments of 17 January 2007, available at [http://ec.europa.eu/internal\\_market/copyright/docs/management/monitoring\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/monitoring_en.pdf) [hereinafter Call for Comments]).

488. Assessment, *supra* note 207, at 20-21.

489. Commission Monitoring, *supra* note 288, at 4.

490. *Id.*

491. *Id.*

492. *Id.* at 5.

493. *Id.*

494. *Id.*

495. Email from Tilman Lüder, Head of the European Commission’s Copyright Unit (May 5, 2008, 3:00 p.m. EST).



There has been recent activity among some of the European CROs as they attempt to come up with a multiterritorial regime on their own before the E.U. Commission proposes a Directive that would force them to do something they may not wish to do.<sup>496</sup> For example, Belgium's CRO, SABAM,<sup>497</sup> announced the creation of SOLEM, Société pour l'Octroi de Licences Européennes de Musisque (Society for the granting of European Music Licenses), which is to be a "one-stop-shop" for the collection of multinational rights, and notably those relating to online exploitations.<sup>498</sup> SACEM, in France, has designed several technological tools to facilitate the exchange of information regarding the exploitation of works, with real-time access, by international record producers and content providers.<sup>499</sup>

Alliance Digital, started by MCPS-PRS<sup>500</sup> (the U.K.'s CRO) is a new platform for offering E.U.-wide licenses for the repertoires of songs administered by small and medium sized publishers.<sup>501</sup> SACEM, SGAE<sup>502</sup> (the Spanish CRO), and SIAE (the Italian CRO) have created a "one-stop-shop," called ARMONIA or Joint Venture Alliance ("JVA"), for the licensing of their repertoires online and with mobile uses.<sup>503</sup> The project appears to be open to all CROs who may grant JVA an exclusive mandate to manage their online rights.<sup>504</sup> GEMA, the German CRO and MCPS-PRS, formed the Central European Licensing and Administration Service ("CELAS").<sup>505</sup> Large music publishing and record companies have also created a number of multiterritorial licensing platforms.<sup>506</sup> There are also a number of other multiterritorial licensing initiatives that stakeholders mentioned to the E.U. Commission, but which had not, at the time of the Commission's Monitoring Report, been implemented.<sup>507</sup>

The stakeholders told the E.U. Commission that they see three obstacles to CROs setting up an E.U.-wide licensing regime themselves.<sup>508</sup>

496. Billboard.biz, *supra* note 483.

497. Société Belge des Auteurs, Compositeurs et Editeurs

498. Billboard.biz, *supra* note 483. SABEM has stopped SOLEM's activities while it waits for a European model of collective management that is supported by publishers and CROs. *Id.*

499. *Id.*

500. Mechanical Copyright Protection Society – Performing Rights Society

501. Commission Monitoring, *supra* note 288, at 5. The Alliance will "offer a competitive rights management services that comprise quarterly distributions, low administration charges, access to online databases of the repertoire, license databases and audit results, distribution in accordance with high standards and full transparency." *Id.*

502. Sociedad General de Autores y Editores.

503. Commission Monitoring, *supra* note 288, at 6.

504. *Id.*

505. *Id.*

506. *Id.*

507. See Commission Monitoring, *supra* note 288, at 6-7 (listing the other initiatives).

508. *Id.* at 7.

First, CROs are heavily engaged in litigation against each other, which impedes progress in setting up the above-mentioned multiterritorial licensing initiatives.<sup>509</sup> The reason for the litigation is disagreement amongst the CROs about the preferred licensing model and one CRO questioning another CRO's mandate to license its repertoire of songs on an E.U.-wide basis.<sup>510</sup> The second obstacle is that each Member State applies a withholding tax in all licensing arrangements that involve parties based in more than two territories.<sup>511</sup> The third obstacle is the identification of works.<sup>512</sup>

## X. CONCLUSION

The E.U. Commission noted, when assessing the Santiago Agreement, that territorially restrictive licensing of music online "is not justified by technical reasons and is irreconcilable with the world-wide reach of the Internet."<sup>513</sup> It is not clear what new types of technology will be developed to facilitate the distribution and enjoyment of music to the masses or what types of new technology will be developed to allow rights holders to better manage their rights in the digital environment. However, one thing is clear: the present licensing regime based on territorially restrictive reciprocal agreements has no place in the online licensing of music. If this restrictive system is not replaced with a multiterritorial licensing regime it will continue to inhibit new platforms for the distribution and selling of music online and will prevent rights holders from realizing the rewards that the online environment has to offer. The traditional rights management of copyrighted music has remained territorial, based on national borders, whereas the digital age and the Internet has resulted in transmissions reaching across all borders.<sup>514</sup> The current licensing system forces online music providers to obtain a license for more than one territory in order to provide legal certainty and insurance against infringement suits and other legal uncertainties in territories that access their transmissions of music.<sup>515</sup> The territory-by-territory management of most copyrights and related rights hinders the development of legitimate cross-border online music services and is an inefficient way to obtain multi-repertoire licenses.<sup>516</sup>

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509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.*

513. Commission Opens Proceedings into Collective Licensing of Music Copyrights for Online Use, IP/04/586 (May 3, 2004), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586>.

514. Lüder, *supra* note 7, at 18.

515. See Assessment, *supra* note 207, at 5.

516. *Id.* at 5.

In addition to a multiterritorial licensing regime, a “unilicense” for online rights would be ideal. Rights holders and CROs in the United States have proposed legislation to create a statutory blanket license to cover performance, reproduction, and distribution rights.<sup>517</sup> However, nothing has come of it. In addition, perhaps someday there will be one, or a few, entities administering one unilicense for the public performance right, distribution, and reproduction right for music transmitted online. This would eliminate some of the administrative fees deducted by a foreign CRO before sent to the domestic CRO for distribution.<sup>518</sup> However, these proposals for a “unilicense” or one entity administering a “unilicense” would be very hard to implement considering how large and entrenched CROs, publishers, and record companies are with the way things are conducted now. In addition, countries would likely be wary of one entity controlling their national repertoire of songs, even if the entity only licensed online rights.

CROs, however, could change their licensing practices now, but they do not. When asked why, CRO representatives state that territorial licensing allows CROs to be close to rights holders, which allows for better service.<sup>519</sup> However, if this is the sole reason for continuing territorially restrictive licensing of online music, then there is absolutely no reason why it should continue. CROs can better serve their rights holders by issuing multiterritorial licenses, which would make it easier for new platforms of music to develop. The present licensing regime hinders the development of new platforms for providing music online. New providers of music would need licenses to transmit or sell music, which would mean more royalties for rights holders. In addition, the competition that a multiterritorial licensing regime would cause between CROs would benefit rights holders by making the CROs more efficient. Royalty payments would no longer depend on a system of territorially restrictive agreements, but on the relationship between rights holders and the CRO of their choice.

Rights holders could facilitate the licensing of their rights multiterritorially or even globally. However, large publishing and record companies hold the rights in most works and are slow to change on their own, as most large entities tend to be. However, within the last year some of these large publishers and record companies, through various platforms,

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517. Glaser, *supra* note 180, at III.2.ii.; *see also* Music Licensing Reform: Hearing Before the Senate Judiciary Committee Subcommittee on Intellectual Property, 109th Cong., at “Online Music Licensing Reform,” (July 12, 2005) (containing the statement of Irwin Z. Robinson, Chairman and CEO of Famous Music Publishing and Chairman of the Board of the National Music Publishers’ Association), *available at*, [http://judiciary.senate.gov/testimony.cfm?id=1566&wit\\_id=4453](http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4453) (describing their proposal for a “unilicense”).

518. Lüder, *supra* note 7, at 27.

519. Berenson Email, *supra* note 264.

have begun to license their works multiterritorially and even globally. If CROs are not willing to change, technological advances may allow larger music publishers and record companies to administer the online rights for their music themselves, without assistance from a CRO.

The main obstacle for the Santiago Agreement was the economic residence provision. Any future multiterritorial regime must allow users whose residence is within one of the members of the licensing regime to obtain a license from any one of the other member CROs. In addition, any agreement will have to be transparent as to how royalties are calculated. This was also a main point that the E.U. Commission was seeking clarification on from members of the Santiago Agreement.<sup>520</sup> It also seems apparent that a tariff based on the destination principle, i.e. the place of exploitation, must be implemented if such an agreement will be accepted by CROs.<sup>521</sup>

The Santiago Agreement and the E.U. Commission's studies, reports, Assessment, and Recommendation indicate that a multiterritorial licensing regime must have certain characteristics. These characteristics are: (1) the ability of rights holders to choose any CRO within the licensing regime to administer their rights online, i.e. no "economic residence" clause; (2) transparency requirement as to how royalties are calculated, collected, and distributed and what, specifically, makes up a CRO's administrative costs; (3) the ability of rights holders to decide which of their rights they want a CRO to administer and which rights the rights holders would like to self-administer; and (4) a method for calculating rates that is based on the destination principle.

In addition to these four main characteristics that a multiterritorial license must have, there are other points that may be added to satisfy certain interest groups. For example, the European Broadcasting Union ("EBU") has expressed some concerns that it would like to see addressed in the next attempt at multiterritorial licensing.<sup>522</sup> A multiterritorial license must come with a guarantee, through the provision of a legal presumption, that the blanket license granted to online music providers guarantees providers that the CRO has the right to administer the right

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520. *Id.*

521. See Guibault, *supra* note 116, at 3 (noting how a tariff based on the destination principle would be most desirable and suggesting that a tariff based on the destination principle be an aggregate of the tariffs of the member CROs calculated, taking into account either the advertising revenue or the intensity of use in each country when applying a percentage of each respective country's national tariff to the aggregate tariff).

522. Initial EBU Comments on Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Aug. 19, 2005, 19.8.2005/MB/HR, at 2, available at, [http://www.ebu.ch/CMSImages/en/leg\\_pp\\_crossborder\\_collectivemanagment\\_190805\\_tcm6-40156.pdf](http://www.ebu.ch/CMSImages/en/leg_pp_crossborder_collectivemanagment_190805_tcm6-40156.pdf).

in every work covered by the license.<sup>523</sup> The EBU also wants express legislation that the multiterritorial license would cover not only the initial transmission, but also every other relevant act that takes place within the area of the license in order to complete the intended effects of the intended act.<sup>524</sup> In calculating royalties for a multiterritorial license, the EBU would like to see that the entire audience of the online services are taken into account.<sup>525</sup>

The E.U. Commission's Monitoring Report on the Recommendation showed that the Recommendation spurred attempts at multiterritorial and global licensing by CROs, publishers, and record companies.<sup>526</sup> The E.U. Commission will follow further developments and will repeat the monitoring if needed.<sup>527</sup> If CROs in the E.U. do not continue their attempts to develop a multiterritorial licensing regime, they will soon be forced to change their practices as the European Commission is in the process of monitoring attempts at multiterritorial licensing to determine whether it is necessary to propose a directive to legislate multiterritorial licensing of online music.

Historically, CROs provided services to individual rights holders, such as songwriters and publishers, that the individual rights holders could not perform on their own.<sup>528</sup> It was not feasible for numerous songwriters and publishers to license performance rights, for example, to numerous users.<sup>529</sup> CROs have allowed for the efficient licensing of rights, collection and distribution of royalties, and enforcement of rights for individual rights holders of copyrights.<sup>530</sup> In effect, these organizations have facilitated the market between creators of works and the users of works.<sup>531</sup> However, the viability of these organizations has been called into question recently with the Internet and the myriad of new uses and platforms for music distribution that the Internet, and digital technology in general, provide.<sup>532</sup> As technology allows for increased worldwide access to musical works, CROs must provide online music providers with what they desire, which is increased efficiency<sup>533</sup> and consumers with what they desire – variety and low cost, while providing rights holders appropriate and efficient compensation. To do this, CROs must implement new tracking technology to increase their efficiency in

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523. *Id.*

524. *Id.*

525. *Id.*

526. Lüder Email, *supra* note 495.

527. *Id.*

528. COLLECTIVE MANAGEMENT, *supra* note 88, at 35.

529. *Id.*

530. *Id.* at 17.

531. *Id.* at 18.

532. *Id.* at 17.

533. *Id.*

tracking works and in collecting and distributing royalties to rights holders. Most importantly, however, CROs must work together with rights holders to offer multiterritorial and global licenses for online music providers. In essence, CROs and other organizations must adapt to best realize their role – the facilitator of the market between authors and rights holders of music and users and providers of music.<sup>534</sup> As long as territorial licensing is the method used to license online music, CROs will never realize this role.

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534. COLLECTIVE MANAGEMENT, *supra* note 88, at 18.

