

# Copyright in the Online Era

*Monetization and copyright utilization in the digital music market.*

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*This Master's Thesis is carried out as a part of the education at the University of Agder and is therefore approved as a part of this education. However, this does not imply that the University answers for the methods that are used or the conclusions that are drawn.*

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Painting by:  
Bjørg Gammersvik

"Something in the Air"

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## Abstract

The background for this thesis was to look at the unresolved issues regarding monetization and licensing of music in the online area. After studying the music industry for several years I was of the impression that there existed a dichotomy between a “global” unregulated Internet and national markets and law.

I used two different methodological approaches; explanatory method to build the understanding and overview needed to build the theoretical background for the thesis and generative research in the form of in-depth qualitative interviews to answer the main questions.

I found there to be two significant solution propositions to the licensing issue on the online market in Europe; multi-territorial cross borders licensing solutions under the auspices of the European Union, with support from many of the big new intermediaries in the music industry, and national solutions with international registers. I found these different approaches or solutions to benefit different stakeholders in the online market, but my main target was to find, and recommend the solution I found most beneficial for the online market as a whole. I also made many interesting observations regards to the international copyright landscape and Internet infrastructure, on how politics, economic forces, lobbying and cultural differences all effect how they are built and are being used in our everyday life.

My conclusion will also show why the monetization and copyright utilization in the online music market does not benefit from the fact that a handful of very powerful companies have monopoly on the information flow without any forms of regulation or transparency.

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## Introduction

This gridlock situation in development of new legal markets was something I found very interesting, and something I wanted to learn more about. My personal motivation was also to understand how the framework of international copyright was built, and throughout this thesis I found copyright related questions to be of vital importance to answer the thesis question. There was also an aim to understand the different stakeholders' position, to spotlight the most important challenges and to encourage further discussion. To narrow the broad nature of this thesis, I chose to focus on the European market. This approach led to this main question:

❖ ***“What developments in monetization and copyright utilization would benefit the online music market and what impact would they have on the stakeholders?”***

To answer this question I chose a methodology, from which I could build a solid background. In the main theoretical chapters, chapter 1-3, I have used explanatory method to outline how the international landscape is built, how the technological developments in the music industry have been the recent years and recent developments regarding international copyright in the digital age. With this theoretical background in place, I could outline the most important questions to be used in my in-depth interviews; the answers I received from these interviews were divided up in different groups, sorted as observations and discussed in a manner from which I could draw my conclusion.

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## Abbreviations

<i>AES</i>	Advances Encryption Standard
<i>Bis</i>	Example: Article 6bis of the Berne Convention. The <i>bis</i> articles are amendments added later on and placed next to an existing article because their content is related to the content of that existing article.
<i>BTAP</i>	The Beijing Treaty On Audio-visual Performances
<i>BIRPI</i>	United International Bureaux for the Protection of Intellectual Property.
<i>CISAC</i>	The International Confederation of Authors and Composers Societies.
<i>CMOs</i>	Collective Management Organisations
<i>DRM</i>	Digital Restrictions Management
<i>DSP</i>	Digital Service Provider
<i>GATT</i>	General Agreement on Tariffs and Trade
<i>GRD</i>	Global Repertoire Database
<i>HADOPI</i>	Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet
<i>ICANN</i>	<i>The Internet Corporation for Assigned Names and Numbers</i>
<i>ICT</i>	UN specialized agency for information and communication technologies
<i>IMR</i>	International Music Registry
<i>ITU</i>	International Telecommunication Union
<i>IFPI</i>	International Federation of the Phonographic Industry
<i>ISP</i>	Internet Service Provider
<i>ISRC</i>	International Standard Recording Code
<i>ISWC</i>	International Standard Musical Work Code
<i>IXP</i>	Internet Exchange Point
<i>MANETs</i>	Mobile Ad-Hoc Networks



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<i>MTA</i>	Multilateral Trade Agreements
<i>MSP</i>	Music Service Provider
<i>OFT</i>	The UK Office of Fair Trade
<i>PPL</i>	Phonographic Performance Ltd
<i>RIAA</i>	The Recording Industry Association of America
<i>SDMI</i>	Secure Digital Music Initiative
<i>SCMS</i>	Serial Copy Management System
<i>TCP</i>	Transport Control Protocol
<i>TFEU</i>	The Treaty on the Functioning of the European Union
<i>TRIPS</i>	Trade-related aspects of intellectual property rights
<i>UCC</i>	Universal Copyright Convention
<i>WCIT</i>	The World Conference on International Telecommunications
<i>WMG</i>	Warner Music Group
<i>WIPO</i>	World Intellectual Property Rights Organisation

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# 1. Understanding International Copyright Law.

## 1.1 Introduction

There is no international copyright law that automatically gives protection for rights holders throughout the world. The degree of copyright and the protection an individual work receives depends on national laws in the country of origin of that particular work. But there are international copyright instruments that regulate the minimum protection of works in most countries throughout the world, depending on which Unions, treaties or conventions they have adhered. Most countries do offer protection to foreign works under certain conditions.

In this chapter we will go through the most significant international agreements put in a historical perspective, give examples of the most important articles, with a focus on music related issues, to describe and give an understandable view of international copyright law.

## 1.2 The Berne Convention

The establishment of a Union for the protection of the rights of authors in their literary and artistic works was the first big step towards monetizing the music industry as well as protecting the authors, and is the backbone for even creating an industry which its existence relies on exploiting works of authors.

### 1.2.1 History & Background

Historically French legislators have to be given a great deal of credit for an International Union being realized. “The Universalist Movement”, which was assembled at an international congress of authors and artists in Brussels in 1858, consisted of people from literary societies, universities as well as artists, authors, journalists, librarians and lawyers. This movement later formed into an association, called the Association Littéraire et Artistique Internationale.

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The association where the first to put the idea of an international copyright union on the agenda, and the formal outlining of the final convention started on September 1883 in Berne, Switzerland. The final draft was produced and signed by ten countries in 1886; Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia and Switzerland. It came into force on December 5, 1887. Two other countries, Japan and The United States sent representatives to the final conference. Japan adhered to the Convention 12 years later, the United States 103 years later. <sup>1</sup>

### 1.2.2 Structure & Content put in a historical context

To understand the Berne Convention in a comprehensive matter, I found it useful to outline the historical development. In this chapter I will outline the most significant changes and additions in the convention text, from it was first introduced in 1886, to the current text of 1971.

#### **Berne Convention, 1886**

“The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.” <sup>2</sup>

The expression “literary and artistic works” contains a lot of different productions in the literary, scientific and artistic domains, whatever may be the mode or form of its expression, but most significantly for this thesis it includes musical compositions with or without words. <sup>3</sup>

As a main principle the Berne Convention of 1886 adopted a national treatment, meaning that it leaves terms and exceptions of protection up to the national reciprocity of each of the individual members of the Union. With a minimum term prescribed in the Act of ten years for translation rights. <sup>4</sup> The act therefore leaves a lot of the conditions and formalities up to the law in the country of origin of the work. At

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<sup>1</sup> The historical background is drawn from LADAS 1938, 71-83; RICKETSON 1987, 41-80; GOLDSTEIN & HUGENHOLTZ 2010, 33-35.

<sup>2</sup> Berne Convention, 1886 Art. I

<sup>3</sup> Berne Convention, 1886 Art. II

<sup>4</sup> Berne Convention, 1886 Art V

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the time national laws generally protected the right of translation, public performance and the reproduction right. And the Berne Act expressly guaranteed two of these three rights. The reproduction right is not mentioned in the 1886 version. One explanation could be that the reproduction rights were so variously defined under the different national laws.

The Union was structured so that the treaty could be revised over time to meet changing conditions, but the member countries didn't have to adhere to the new act as a condition to retain a place at the conference table for future revisions. And any country could join the Union at any given time by adhering to the most recent act of the Convention. <sup>5</sup>

One important factor of the original Act is the expressly exclusion for news papers or periodical "articles of political discussion" or "news of the day" <sup>6</sup>

This is of course due to the principle of a "free press"; giving protection to newspapers would make it impossible to remain a fairly independent press, and nourish political discussions.

### ***Berne Convention, 1908 Berlin Text***

In 1908 the Act was revised, and one of the important additions was the establishment of a minimum term of protection measured by fifty years after the author's death. <sup>7</sup> But what may be even more important was the establishment of Article. 13, which is one of the most important basic legislations for the international music industry:

"The authors of musical works shall have the exclusive right of authorizing (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments." <sup>8</sup>

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<sup>5</sup> GOLDSTEIN & HUGENHOLTZ 2010, 35

<sup>6</sup> Berne Convention 1886, Art. IV

<sup>7</sup> Berne Convention, 1908 Berlin Text, Art. 7

<sup>8</sup> Berne Convention, 1908 Berlin Text, Art. 13

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It also introduced the principle that a work's protection in any country of the Union is independent of its protection in its country of origin.<sup>9</sup> Basically this means that a work produced in one of the Union countries has a basic protection throughout the Union, but this protection is independent and separated from the protection a work receives in the country of origin.

### ***Berne Convention, 1928 Rome Text***

The 1928 Rome Act added the moral rights of attribution and integrity to the conventions minimum rights, securing the authors right to be credited. As described in Art. 6 bis, as moral rights.<sup>10</sup> Meaning that a work produced in any of the Union countries had a minimum right of being credited throughout the Union, even if the work was licensed out to a third party.

Also the right to broadcast copyrighted works to the public radio was introduced, which could be subjected to a statutory licence under national legislation.

“(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion.

(2) The national legislations of the countries of the Union may regulate the conditions under which the right mentioned in the preceding paragraph shall be exercised, but the effect of those conditions will be strictly limited to the countries which have put them in force.”<sup>11</sup>

The importance of this legislation is not to be under-minded, and is the main principle how and reason why the modern time radio works the way it does. The only restriction the radio has to deal with is that the work(s) they play is published in some way or another, and that they pay statutory licences to the national CMOs<sup>12</sup> who have a responsibility to find the right rights holders.

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<sup>9</sup> As described in GOLDSTEIN & HUGENHOLTZ 2010, 36.

Regarding the Berne Convention, 1908 Berlin Text, Art. 4(2).

<sup>10</sup> Berne Convention, 1928 Rome Text, Art. 6bis.

<sup>11</sup> Berne Convention, 1928 Rome Text, Art. 11bis.

<sup>12</sup> Collective management organization's (Local example: TONO)

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### **Berne Convention, 1948 Brussels Text**

The Berne Convention was still proving able to keep up with the technological developments, and the Brussels Act expanded the broadcast right to include television and clarified rights in cinematographic works.

“(1) Authors of literary and artistic works shall have the exclusive right of authorizing: the radio-diffusion of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;”<sup>13</sup>

But the 1948 Brussels Act also strengthened and/or clarified several of the existing minimum rights, including moral rights, the adaption right, and translation rights. I will not go further in to these particular Articles, but I mention them to show a progression and willingness to further improving the Convention text.

### ***Berne Convention, 1971 Paris Text***

The Paris Act of 1971 is the current text of the Berne Convention, and entered into force on October 10, 1974.<sup>14</sup> One of the most important provisions was the reproduction right as a minimum standard.

“(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”<sup>15</sup>

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<sup>13</sup> Berne Convention, 1948 Brussels Text, Act. 11bis

<sup>14</sup> As mentioned by GOLDSTEIN & HUGENHOLTZ, 2010, 37

<sup>15</sup> Berne Convention, 1971 Paris Text, Art. 9(1)



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## 1.3 The Rome Convention

From the initial start of international copyright treaties, there were focuses on protecting the authors, leading up to World War II there were absolutely no protection for performers, producers or others who perform literary or artistic works. The Rome Convention of 1961 was about to change that.

### 1.3.1 History & Background

The question of international protection for neighbouring rights was brought up a long time before the actual convention took place in Rome 1961, and the Second World War slowed down the process as well. In fact it first formally arose at the 1928 Rome Conference to revise the Berne Convention. Well before the next revision conference, scheduled for Brussels in 1939, drafts were prepared for an annex to the Berne Convention that would deal not only with rights of performers, phonogram producers, and broadcasting organizations, but also with *droit de suite*.<sup>16</sup>

Draft conventions on neighbouring rights were initiated and coordinated by three international organizations, one of them was BIRPI (the predecessor to WIPO), and this work began in 1949. This draft was and various others was produced, discussed and finally reconciled into a single draft during meetings in Rome, Geneva, Monaco and Hague between the years 1951 – 1960.<sup>17</sup> This draft became the basis for deliberations at a diplomatic conference in Rome in 1961. The final text was signed on October 26, 1961, by forty states, not including the United States, and came into force on May 18, 1964.<sup>18</sup>

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<sup>16</sup> The *droit de suite* aims to provide visual artists with a share of revenue from sales of their work *after* initial sale of that work to a dealer or other buyer. Source; <http://www.caslon.com.au/droitprofile.htm>

<sup>17</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 55

<sup>18</sup> WIPO 1981, 8-9

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### 1.3.2 Content

In describing the content of the Rome Convention of 1961, I will focus on the content that directly impacts the music business, protection of performers and protection of producers of phonograms.

#### ***Protection of Performers***

Article 4 of the Rome Convention provides three possible points of attachments for performers, and implements that contracting states shall grant national treatment to performers if any of these following conditions is met:

- (a) The performance takes place in another Contracting state.
- (b) The performance is incorporated in a phonogram which is protected under article 5 of this Convention.
- (c) The performance, not being fixed on a phonogram, is carried by a broadcast which is protected by article 6 of this convention.<sup>19</sup>

If any of these three conditions are met, the performer is entitled to national treatment, as regarded in Art. 2. In the Convention.<sup>20</sup> But also, just as the Berne Convention gives minimum rights to the authors, the Rome Convention guarantees minimum rights against the broadcast or communication to the public or fixation of a performance and, if the performance is fixed<sup>21</sup>, against reproduction of the fixation of the performance.<sup>22</sup>

To elucidate further, if a recording, let's say recorded in Norway by a Norwegian band, made by an Norwegian author and composer, is reproduced in Spain, not only does the author and the composer have minimum rights against such a reproduction, but the band as performers also have minimum rights towards such an infringement.

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<sup>19</sup> Rome Convention Art. 4.

<sup>20</sup> See. Rome Convention Art. 2.

<sup>21</sup> Broadly meaning recorded in any way.

<sup>22</sup> Rome Convention Art. 7

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The minimum rights being 70 years after the author's death for the composition and lyrics, and 20 years after the recording for the performers.<sup>23</sup>

Another interesting article to assess is article 19, which deals with audio-visual productions, performers rights in films.

“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, article 7 shall have no further application.”<sup>24</sup>

This is an interesting Article that we will get back to when addressing the Beijing Treaty On Audio-visual Performances (BTAP) later in this chapter.

### ***Protection of Producers of Phonograms***

The word “producer” is defined as the manufacturer of the phonogram<sup>25</sup>, meaning whoever got the right to reproduce the CD etc. Often the “producer” is a record company, or whoever pays for the recording, with the contractual right to do so.<sup>26</sup> In music business terms the word is often used as the person or persons who is being paid by the record company etc. to produce the product in the studio, but the legal term as it is mentioned in the Rome Convention Text use this word differently.

That being mentioned, the protection of producers is pretty similar to the protection of the performers. As with the case for the protection of performers, at least one of these points has to be present for the producer to be entitled to national treatment in the protecting country, and the minimum term of protection of twenty years from the date of fixation;

(a) The producer of the phonogram is a national of another Contracting State (criterion of nationality);

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<sup>23</sup> As described in the Rome Convention Art. 14

<sup>24</sup> Rome Convention Art. 19

<sup>25</sup> Phonogram being a definition of a product in any form, CD, LP, MP3 file etc.

<sup>26</sup> Owner of the “Master Tape” being “The Original”.

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(b) The first fixation of the sound was made in another Contracting State (criterion of fixation);

(c) The phonogram was first published in another Contracting State (criterion of publication).<sup>27</sup>

#### 1.4 The Back Door to Berne

To include a “fun fact” that may or may not explain the United States unwillingness to sign the Berne convention sooner we can look at a point called “simultaneous publication”. Works being published in the United States could enjoy full protection under the Bern Convention by publishing the work simultaneously in one of the member states and in the United States, meaning that they did not have to be a part of the Union and follow their legislations in the home territory, but could enjoy protection in many other territories around the world under the Bern Convention at the same time. This even had its own term by American publishers, who called it “the back door to Berne”.<sup>28</sup> This provoked many of the Union members, and is now permitted by Art. 6. In the Berne Convention 1971 Paris Text.

But in the Rome Convention, as explained in Art. 5(2) “If a phonogram was first published in a non–contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State”<sup>29</sup> this “back door to Berne” or in this case “the back door to Rome” is fully open. The United States finally joined the Berne Convention in 1989, but never adhered to the Rome Convention.

It should be noted that this gap in international neighbouring rights has now been filled as the US has ratified the WIPO performances and Phonograms Treaty, a treaty that we will examine closer later in this chapter.<sup>30</sup>

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<sup>27</sup> Rome Convention Art. 5(1)

<sup>28</sup> The term mentioned by GOLDSTEIN & HUGENHOLTZ, 2010, 38

<sup>29</sup> Berne Convention Art. 5(2)

<sup>30</sup> WIPO, 2007, 132

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## 1.5 The Universal Copyright Convention

The central object of the Universal Copyright Convention was to secure multilateral copyright relations. Many countries outside the Union found the Berne Convention's stringent minimum standards incompatible with their domestic law, but it was still important to have a relation between these countries and the countries that were members of the Union.<sup>31</sup>

### 1.5.1 History & Background

At the beginning of the 19<sup>th</sup> century there were a lot of countries that could or would not adopt and adhere to the Berne Convention, but there was several regional copyright treaties, as in the American territories. Beginning in 1902, a series of Pan-American Conventions, modelled by the Berne Convention were held. Most importantly was the third Pan-American Convention held in Buenos Aires in 1910, which included the United States and Brazil.<sup>32</sup>

The list of countries that did not adapt to the Berne Convention additionally included the Soviet Union, and several Asian and African nations. The introduction of the Universal Copyright Convention can be traced back to the 1928 Rome Convention, where there was a strong wish to create a bridge between the Berne Convention and the 1910 Buenos Aires agreement. One of the main reasons was of course to include the United States in an international agreement, this was especially important for the music industry as the United States historically has been the biggest music market in the world. Several international meetings were held between 1947 and culminating in a 1952 diplomatic conference in Geneva, produced the Universal Copyright Convention, signed by 36 states.

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<sup>31</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 43

<sup>32</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 69

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### 1.5.2 Content

“Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.”<sup>33</sup>

Many rules of the U.C.C.<sup>34</sup> establishing points are similar to those of the Berne Convention, but unlike the Berne Convention the U.C.C. does permit member states to impose formalities such as notice, registration, and deposit as a condition to protection. Meaning that the principal as seen in the Berne Convention in regards to rights automatically is more regulated in the U.C.C. The most significant requirement for works first published outside the national territory of one of the U.C.C. member nations, is the copyright notice. To further explain the differences between the Berne Convention and the U.C.C. on this point; for any outside parties to get any copyright protection in any of the U.C.C. member nations, they have to claim their copyright. If a work then is found “qualified”, the contracting states must treat the work no less favourably than they treat the works of their own nationals, and grant them four exclusive rights: reproduction, public performance, broadcast and translation.<sup>35</sup>

### 1.6 The TRIPs Agreement

The World Trade Organization (WTO) governs the TRIPs agreement. This is the first international convention that contains rules for the enforcement of IP rights.<sup>36</sup>

#### 1.6.1 History & Background

In 1979 the European Community and the United States tried to obtain an “Agreement on Measures to Discourage the Importation of Counterfeit Goods.” Mainly copyright related trespasses made by Asian nations. These efforts by economically developed countries to increase the minimum standards of the Berne Convention and other intellectual property treaties after years of frustration over weak enforcement

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<sup>33</sup> Universal Copyright Convention, Rome 1952 Geneva Text Art. 2(1)

<sup>34</sup> Universal Copyright Convention

<sup>35</sup> Universal Copyright Convention, 1971 Paris Text Art. 4bis

<sup>36</sup> WIPO, 2007, 132

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measures led to an ultimately unsuccessful initiative. The conference took place in Tokyo, and is historically named the GATT Tokyo Round of 1979.

The question of counterfeit goods kept on, and in 1986 representatives from over 70 nations formally launched the Uruguay Round of GATT.<sup>37</sup> The negotiations went on for several years, and in 1991 the Draft for the final TRIPs agreement was presented, finally The Agreement on Trade-Related Aspects of Intellectual Property Rights was signed in Marrakesh, Morocco on April 15, 1994.<sup>38</sup>

The TRIPs Agreement was not negotiated as a stand-alone treaty, but is one of the MTAs<sup>39</sup>, and did not enter into legal force on its own, when the agreement finally entered into force in 1995, it was a part of a composite set of trade agreements that are binding on countries that choose to join the WTO as members. Therefore it is not only important regarding establishment of international intellectual property law, but it is also an important element of international trade law.<sup>40</sup>

### 1.6.2 Content

This is a complex and complicated trade agreement, but I want to highlight a couple of important factors that can be regarded relevant to the music industry.

One of the absolute obvious ones is that the moral rights obligations of the Berne Convention are excluded, after strenuous objections from the United States. Another important point is that the agreement specified measures for interdicting infringing goods at national borders, at it made time limited transition periods for including the TRIPs standards in their intellectual property right laws for less developed countries when joining the WTO, from four to ten years depending on the development in the respective nation.

The lack of an effective mechanism to enforce the compliance with the Berne Conventions minimum standards were also an important issue for the TRIPs member

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<sup>37</sup> HARTRIDGE & SUBRAMANIAN, 1989, 893-897

<sup>38</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 74

<sup>39</sup> Multilateral Trade Agreements

<sup>40</sup> TAUBMAN, WAGER & WATAL, 2012, 20

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nations, and the TRIPs agreement describes a comprehensive system to solve disputes between the member nations, Being the first effective dispute resolution in copyright and other international intellectual property relations. <sup>41</sup>

Back to what is relevant to the music industry, one thing are left to be told, maybe being the most important; “In the case of performers, phonogram producers, and broadcasting organizations, “this obligation only applies in respect of the rights provided under this agreement.” <sup>42</sup> For example, since the TRIPs agreement does not give phonogram producers a right against the broadcast of their phonograms, WTO members that grant such a right to phonogram producers are not obligated to extend this protection to nationals of other WTO members. This exception does not, however, constitute an exempting from national treatment for rights that local law may characterize as “copyright” but are in substance “neighbouring” or “related” rights.” <sup>43</sup>

## **1.7 The WIPO Copyright Treaty & the WIPO Performances and Phonograms Treaty**

With the new reality of the TRIPs agreement, questions raised by digital uses of copyrighted works and questions left open since the last revision of the Berne Convention in 1971, WIPO and the global intellectual property right society felt the need to implement new international guidelines on certain Copyright and Neighbouring rights questions. <sup>44</sup>

### **1.7.1 History & Background**

In 1989 the WIPO Governing Bodies decided to prepare a possible protocol to the Berne Convention to deal with the natural changes of the IP environment. The protection of computer programs as literary works within the terms of the Berne

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<sup>41</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 75

<sup>42</sup> TRIPs Agreement Art. 3(1)

<sup>43</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 76

<sup>44</sup> GOLDTSTEIN & HUGENHOLTZ, 2010, 45



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Convention, as well as all the reasons mentioned in the section above, being some of the major issues.

“On December 20, 1996, following three weeks of meeting, representatives of approximately 120 countries participating in a Diplomatic Conference on Certain Copyright and Neighbouring Rights questions adopted the WIPO Copyright Treaty, together with the WIPO Performances and Phonograms Treaty.”<sup>45</sup>

### 1.7.2 Content

The WIPO Copyright Treaty is closely connected to the 1971 Paris Act of the Berne Convention, and obligates contracting parties to apply Articles 2 through 6 of the 1971 Berne Paris Act. This of course includes Art. 5(3) as one of the important statements:

“Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.”<sup>46</sup>

The WIPO Performances and Phonograms Treaty draws several of its operative concepts from the Rome Conventions, just as the WIPO Copyright Treaty draws on important elements of the Berne Convention. Both borrow substantially from the terms of the TRIPs agreement.<sup>47</sup> The WIPO Performances and Phonograms Treaty is simply a constrained version of the Rome Convention, but demands the most important articles for the music industry: Economic rights to fixed performances, broadcasting rights for unfixed performances to the public, reproduction rights, distribution rights and rental rights are all included, as well as the moral rights, being the first international agreement including these.

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<sup>45</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 45

<sup>46</sup> Berne Convention, Paris Text 1971, Art. 5(3)

<sup>47</sup> GOLDSTEIN & HUGENHOLTZ, 2010, 60

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## 1.8 The Beijing Treaty on Audio-visual Performances (BTAP)

The BTAP is first and foremost a treaty that will strengthen the economic rights, moral rights and prevent lack of attribution or distortion of performances for actors and other performers (such as musicians), providing a clearer legal framework for their protection and will potentially enable performers to share proceeds with producers for revenues generated internationally by audio-visual productions.<sup>48</sup>

### 1.8.1 History & Background

The BTAP is the newest addition to the international copyright framework, successfully concluded on June 26, 2012. Most other Conventions, Treaties and Agreements made the last 40-50 years, almost always builds on the Berne or/and the Rome Convention, the BTAP is no exception. The BTAP builds on the Rome Convention, but strengthen performers' rights in many ways, and fills several gaps, while the Rome Convention provided protection for audio performers, in only gave limited rights to audio-visual performers. The WIPO Performances and Phonograms Treaty modernized international standards, but audio-visual performers continued to be largely unprotected by international standards, the purposes for the BTAP were to strengthen these standards.<sup>49</sup>

### 1.8.2 Content

“Performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.<sup>50</sup>

The BTAP is for the performers, and as an international agreement for the first time provide performers with protection in the digital environment. The definition of what an audio-visual fixation is, are also very clearly explained.

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<sup>48</sup> WIPO, 2012, Art. 13

<sup>49</sup> WIPO, 2012, Art. 13

<sup>50</sup> BTAP, 2012, Art. 2(a)

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“Audio-visual fixation” means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device”<sup>51</sup>

It’s also important to add that the BTAP includes the minimum terms of protection from the end of the year in which the performance was fixed until a period of 50 years. This is a great leap from the Rome Conventions Art. 19, that defines the performers’ rights in films such as:

“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.”<sup>52</sup>

## **1.9 Law Traditions**

In many ways you can say that the global legal system is split in two groups, the English Common Law and the French Civil Law. Most countries around the world today follow one of these two major legal traditions.

### **1.9.1 Common Law Traditions**

During the middle ages the common law tradition emerged in England and was applied within the British colonies across continents. Common law is largely based on precedent, which means that instances or juridical decisions are used as examples when dealing with subsequent similar instances or similar cases. This again meaning that there is no comprehensive compilation of legal rules and status, and the legal system relies on previous cases to determine procedures and to decide the outcome of cases.<sup>53</sup>

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<sup>51</sup> BTAP, 2012, Art. 2(b)

<sup>52</sup> Rome Convention, Art. 19

<sup>53</sup> The Robbins Collection, 2010

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### 1.9.2 Civil Law Traditions

In contrast to the common law traditions, Civil law has comprehensive legal codes that specify all matter capable of being brought to court, procedures and appropriate punishment for each offence. These legal codes are continuously updated, and distinguish between different categories of law; Substantive law, procedural law and penal law. These laws respectively decide how the case is juridical practiced. Substantive law decides which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act and penal law decides the appropriate penalty when the substantive and particular laws are considered and decided.<sup>54</sup>

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<sup>54</sup> The Robbins Collection, 2010

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## 2. Describing the technology.

### 2.1 Introduction

New businesses, new opportunities and shifting power in the global markets are often driven by new technology, new technology which are being widely accepted by the mass public markets, and even more so when they become a part of our everyday life.

The music industry is no exception; in fact, how we consume music is one of the most important factors for those who are researching, developing and investing in new technology, such as cell phones, laptops etc. Whoever controls how we consume music, controls which devices we need to consume them on. Whoever controls the devices and services controls the what, and whoever controls how we consume, controls which devices we consume it on and controls what we “chose” to consume, is left with a service, device or both, that basically sells itself. The big problem appears when music industry outsiders take control over one, or more of these how’s, what’s and which.

In this chapter I will put mass music consumption in a historical perspective, from the physical products to the streaming era, which we find ourselves in today. I will also outline how the different modern music consumption technologies actually work, what the Internet really is, and what the international discussions’ regarding its future evolves around.

### 2.2 Historical mass music consumption technology

In this paragraph I will, in a very brief manner, outline the technological development in music formats, from the LP and up to the Internet era. I will not spend much time outlining the technicalities for the physical products, as this is not what is relevant to this thesis. What is relevant is to outline the development.

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### 2.2.1 The Replacement Syndrome

In the late seventies and the early eighties the record industry experienced a decline in sales of LPs and Cassettes, the decline period hit some of the biggest markets fast, and hard. The UK market was one of the markets that were hit the hardest, with a 26,4% decline in recorded music sales in the period 1977-1980.<sup>55</sup>

The decline on recorded music sales were blamed on the second oil crisis that triggered a worldwide recession and on private copying of music onto audiocassettes.

But the music industry did not have to wait long for a new technological breakthrough to boost new life in to recorded music. In 1982 the compact disc (CD) were commercially launched, and recorded music saw an upward trend in sales beginning in 1984, due to the wide acceptance of the CD as the new format.

The CD created a new music market, not only for new music, but a brand new market segment, which consumers replaced existing musical works that they already owned on vinyl or cassettes, with CDs. In 1986 over 100m CDs were sold worldwide, and by 1991 the 1b mark were reached. But the music cassette were still the biggest format in sales, and between 1991 and 1998 the recorded music industry had two formats selling over a billion copies each every year. The cassette started to decline rapidly from 1998, but the CD were doing better than ever, hitting its peak in the year 2000 with 2,45b copies sold worldwide.<sup>56</sup>

The CD sales fell for the first time in 2001, and the industry were forced to try another replacement solution. The years surrounding the millennium, and especially the first years in the new millennium, the industry introduced various new formats, hoping that the music consumer would replace their music catalogue once more, most notable being the digital audible tape (DAT) and the Minidisc. However the strategy met with little success in the commercial market. The physical product of the CD was proven impossible to replace.

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<sup>55</sup> Gronow, 1983, 66-69

<sup>56</sup> IFPI (1973 - 2008)

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### 2.2.2 Digitalization of music

#### **MP3**

The music industry is used to competing against each other, especially when it comes to music formats, but has always found a way to agree on the best commercial format over time. In the case of MP3s, the movement started not with the industry itself but with a huge audience of music fans on the Internet, who wanted to compress files small enough so it could be used on mp3 players, and to share with friends.

#### ***What an MP3 file is***

CDs store digital information, uncompressed and in a high-resolution format. The average song on a CD is roughly around 32MB, a size that isn't easily manoeuvrable online. The MP3 format is a compression system for music, which makes it possible to compress a 32MB file down to 3MB without significantly hurting the quality of the song.<sup>57</sup> The way it does this is by eliminate parts of the song and certain sounds that the human ear cannot hear. This is the concept of auditory masking, this type of masking occurs when the frequency of a sound is at a level beyond the range of human hearing. When a digital audio is compressed to a MP3 file, the inaudible areas of data is removed, therefore saves spaces and create smaller files.<sup>58</sup>

#### ***Napster***

File sharing was not even a word in the public consciousness until May of 1999, when a software program named Napster was released. Napster provided a simple to use interface where consumers could share and download digital copies of songs. At its peak, more than 500,000 unique IP addresses were connected at any given time, and it had a reported user base of over 20m unique user accounts worldwide, and 60m visitors per month.<sup>59</sup>

Many different, seemingly similar services to Napster started to appear in the early 2000s, but Napster is unique being the first, and it proceeded to redefine the Internet,

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<sup>57</sup> [http://www.digital-audio.net/technical\\_enc.shtml](http://www.digital-audio.net/technical_enc.shtml)

<sup>58</sup> <http://www-cs-faculty.stanford.edu/~eroberts/courses/soco/projects/data-compression/lossy/mp3/concept.htm>

<sup>59</sup> Blackburn, 2004

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the music industry and the way “The lost generation”<sup>60</sup> thought about intellectual property.

### ***What it was and how it worked***

The key elements for why and how the Napster network worked was having an easily manoeuvrable and specialized search engine that were dedicated to finding MP3 files only and the ability to trade MP3 files without having to use a server for storage, cause all the users databases stored the files for them. Napster was simply the search engine that connected the different users to each other. So called peer-to-peer (p2p) sharing.

In the end, Napster’s Achilles’ heel was the central database for song titles, when the courts shut the software down; the absence of a central database killed the entire original Napster network.<sup>61</sup>

### ***The next generation of P2P networks***

The most prominent P2P network that took the throne after Napster’s forced withdrawal was the Gnutella network. While Napster only used one-client software (The Napster software), Gnutella has dozens of clients available: BearShare, LimeWire and Morpheus being some of the most prominent.

Gnutella is a decentralized peer-to-peer system, consisting of hosts connecting to each other; this connection of individual hosts forms a network of computers exchanging traffic. When searching in a Gnutella networked client you are not searching in one database, but thousands of databases, linked together by the network. Once you receive a hit that satisfies your request, the network knows where to find the file you want. The important point being that the file is then downloaded to your computer out-of-network. The network automatically makes a connection between whoever has the file you want, and whoever wants to download it, instead of wasting the Gnutella networks capacity, and making the network a legal grey zone.<sup>62</sup>

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<sup>60</sup> A term used to describe teens in the early 2000s that got used to a free-of-charge mentality on the Internet.

<sup>61</sup> Andersen & Frenz, 2007

<sup>62</sup> Berkes, 2003



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## ***ITunes***

When Apple launched the iPod in 2001 it was the start of a revolution in music retailing and consumption. The decline in physical CD and single sales were just starting to happen, new illegal download sites popped up almost by the day and the music industry didn't have any good ways to sell their music legally online. Apple saw the possibilities, and took major advantage. iTunes seemed to be the last hope for the major record companies.

The iTunes store was first launched in 2003, a virtual store where you could buy singles or entire albums on-demand with reasonable pricing. Apple being in a perfect negotiation position made deals with all the major record labels to make their music available on the iTunes, not having any other good alternatives, the five major labels licenced out 200.000 tracks to be available on iTunes when it was initially launched. In 2010 over 10 billion songs had been downloaded in the iTunes store.<sup>63</sup>

## ***ITunes technicalities***

The ***iTMS protocol***<sup>64</sup> is what technically runs iTunes, how it communicates, authenticates and codes. iTunes communicates with the Apple main server almost exclusively through HTTP<sup>65</sup>, which is the foundation of data communication on the World Wide Web, used for distribution, collaboration and information exchange. When browsing the iTunes store, and even when playing previews of songs, this is done with no direct connection to the Internet, but through web proxy. But iTunes requires you to have an Internet connection to use the store to authenticate you as the right user on the right device, so it will not work unless you are logged in, which you need an Internet connection to do. Again, this is about total control. iTunes uses the advanced encryption standard known as AES to encrypt all the XML files that displays the store layout.<sup>66</sup>

***FairPlay*** is an authorization process, which is encrypted to the iTunes client to get the information it needs to make a unique ID for the computer you are using iTunes

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<sup>63</sup> [Mp3.about.com/od/history/p/iTunes\\_History.html](http://Mp3.about.com/od/history/p/iTunes_History.html)

<sup>64</sup> Short for: iTunes Music Store protocol

<sup>65</sup> Hypertext transfer protocol

<sup>66</sup> Rohrer, 2004

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on. When creating an apple id account for iTunes on a new computer (or Mac) the iTunes server attaches a hash to the user's account and sends back an account decryption key, the key is stored in the iTunes info file, encrypted again, and saved, making it impossible to move the file on to another computer, again making it very difficult to use the iTunes on several devices at the same time. There are ways to "lure" the system by making backups of the decryption key and reauthorize your computer, replacing files etc. but for the "normal" consumer, iTunes and all apple devices you link with it, takes a great deal of control over what you can and cant do with your device. This was the time before streaming on mobile devices was an option. This kind of restricted use of copyright protected material is known as **DRM**.

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### 2.2.3 Short history lesson in digital copyright restrictions

We have to jump back to the eighties, long before Apple had anything to do with the music industry, to get to the beginning of this phenomenon of DRM. When CDs started to develop as the main source of music consumption in the mid eighties, the music industry quickly learned that CDs easily could be copied using DAT-recorders, to prevent this from influencing the sales income, and from people making illegal copies of CDs to friends, or to sell them on the black markets, the RIAA <sup>68</sup> insisted that CDs and recorders would have a built in restriction of copying, known as SCSM<sup>69</sup>. With this restriction built in, the CD could be copied for home use, but the copy could not be copied. <sup>70</sup>

The SCSM initiative seemed to slow down the "pirate development", even though the system easily could be fooled by using devices that removed the time code on the discs, but at least, most people still had to buy CDs, cause in most cases this was the most convenient thing to do for the consumer. The real problems started in the late nineties, with MP3 files and pirate networks such as Napster, which removed the

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<sup>67</sup> Short for: Digital Restrictions Management

<sup>68</sup> Short for: The Recording Industry Association of America

<sup>69</sup> Short for: Serial Copy Management System

<sup>70</sup> Bahlman & Martz, 2011

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need for the physical CD, and to make things worse for the music industry, were often more convenient for the consumer.

To respond to this new threat the music industry gathered Internet service providers, electronics retailers and technology companies (more than 130 companies in total), and created a forum called SDMI.<sup>71</sup> The plan was to secure the files legally downloaded on the internet with digital watermarking, making it possible to prevent copying of files and enable the SDMI to track single digital files. Unfortunately for SDMI the technology was easily hacked by professionals, and the system never worked the way it was intended. The SDMI project was suspended in 2001.<sup>72</sup>

When the iTunes opened for business in 2001, downloads were burdened with a number of DRM restrictions, the Apple FairPlay being one of the strictest DRM systems ever implemented on commercial music, as described earlier in this chapter. The restrictions made life very difficult for the consumer, but with the commercial success that was the iPod, people coped with the iTunes, establishing it as the dominant online music store with a global market share for downloads of over 75%.<sup>73</sup> In 2007 Apple (With EMI being the first major label to embrace the opportunity) finally opened up for DRM-free sales of music on iTunes, after a series of lawsuits and lawsuit attempts from OFT<sup>74</sup> and The French consumers association. Ultimately, Apple could no longer justify the FairPlay DRM system.

But even with over 10b songs sold in the iTunes store by 2010, and finally providing the costumer with a product similar to the product they could download for free the last decade, the iTunes store were never the solution or salvation for the music industry.

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<sup>71</sup> Short for: Secure Digital Music Initiative

<sup>72</sup> Scheirer, 1999

<sup>73</sup> Hardy, 2012

<sup>74</sup> The UK Office of Fair Trading

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## ***Streaming***

Streaming as we know it today has a number of different forms and purposes, from the traditional radio or TV streaming services, on-demand services that provides the users with TV series, films, music or any other media content from a library of files to services that provides both. We will look at some different kinds of streaming technologies.

### ***a) P2P streaming***

P2P streaming is the most prevalent method for watching live events, like sports or news events. In general it is not used for streaming music, but the technology is still relevant enough to take a quick look at it.

In live P2P streaming there are always a source, or a content provider. The content provider streams a live event to peers. A peer is essentially a member, receiver and sender in a network of other peers, the word “peer” meaning “equals”.<sup>75</sup>

The content provider sends out small units of video data to their viewers (peers), who act as relays. The peer then uploads that chunk of small video units to other peers, so that all the peers receive enough video units (or chunks) for playback in real time.<sup>76</sup> But P2P streaming can also be an on-demand service, as we will get back to when addressing the technology behind the most successful on-demand music streaming service today, Spotify.

### ***b) Media streaming in MANETs***

In MANETs<sup>77</sup> devices interconnect to form a network without the need for any infrastructure like the Internet. The end user streams the media content in a media application, or a media player in some form, and is most widespread in on-demand streaming. In this case we also have a source, but the source already have the content in a centralized server or media library prior to the consumer starts the streaming. The source and the consumer are connected by nodes, or connection points, the

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<sup>75</sup> Dictionary reference

<sup>76</sup> Nguyen, 2011

<sup>77</sup> Short for: Mobile Ad-Hoc Networks

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source working as a distribution point and the consumer being the communication endpoint.<sup>78</sup>

***c) Music streaming as we know it today, a short look at the technicalities of Spotify***

Spotify is a peer-assisted on-demand music streaming service, meaning that it is not web based. Earlier in this chapter I have addressed how the illegal Bit Torrent networks like Gnutella works, Spotify works surprisingly similar. The Spotify p2p network help you locate peers who have the song you want to listen to, which you have found in the Spotify application. Spotify uses TCP<sup>79</sup>, which is a connected-oriented transport layer protocol which provides a data transmission between end points in a network in a reliable way. TCP can fail due to timeout between the peers, but the centralized server has the ability to re-send lost packets at a very fast tempo.

<sup>80</sup>

The system is extremely well manoeuvred, only using the centralized Spotify server when it is necessary. The user simply chooses the track he or she wants to listen to, if you have listened to it before, large parts of the song is already downloaded on your device, and the client starts looking for the track in peer-to-peer networks close to your device. The rest of the track is streamed from a combination of multiple sources; cache (memory) on your device, multiple peers and the Spotify servers. If it is a popular track, the likeliness of you simply using peers close to your device is probable. If the track is less popular, the Spotify client requests the first 15 seconds of the track directly from the Spotify servers while searching for the track on the peer-to-peer network, making the track available for the end user instantly. When the track has 30 seconds left, the Spotify client starts searching the p2p network for the next track on your playlist or queue, when the track has 10 seconds to go, if it hasn't found the next track on the network yet, the client starts pre-fetching it from the Spotify servers. And the cycle continues.

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<sup>78</sup> Dybsjord, 2010

<sup>79</sup> Short for: Transport Control Protocol

<sup>80</sup> Dybsjord, 2010

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On a general basis only 8.8% of the music playback from Spotify comes directly from the Spotify servers, the remaining playbacks comes from the peer-to-peer network (35.8%) and your local cache (55.4%). Basically, the typical stream from Spotify is a mix of your local cache (or memory) and peer-to-peer networks close to you.<sup>81</sup>

## 2.3 The physicality's of Internet

The Internet as we know it as consumers today is a thing floating in the air that we can connect us to using the right devices. This is far from the truth, as the Internet really is a highly physical product, myths that the Internet is “uncontrollable” and that no one “owns” the Internet are also phenomenon's that we will examine closer in the following paragraphs.

### 2.3.1 Underwater cables

Without being too technical, what provide us with Internet are giant networks and servers connected with other networks and servers. These giant networks link together trough sea cables, which connect Internet hubs all around the world. At the present time 232 sea cables are in-service<sup>82</sup>, with a length of 500.000 miles<sup>83</sup> all together, the longest cable stretch from South Africa to France.

### 2.3.2 Owners of the Internet

There exists a myth that “on one” owns the Internet, and that there are some sort of a collective ownership of the Internet divided on the world's population. Those who provide it, and those who make a living maintaining it, usually big international companies, own the Internet. But it is true that no single country, one single company or organization owns the Internet as a whole. But there are just a handful of companies that owns the backbone (the biggest routers and the undersea cables) of

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<sup>81</sup> Kreitz & Niemelä, 2010

<sup>82</sup> Blum, 2012

<sup>83</sup> 800.000 KM

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the Internet, and the local ISPs<sup>84</sup> like the Norwegian telecom company Telenor, are ultimately a customer of one of these companies. Some of the biggest are: Verizon, AT & T, IBM and UUNET. The Internet does not become wireless until the final transaction between the local ISP and the individual consumer.

To make sure that the whole thing is linked together, there are Internet Exchange points (IXPs) that allows for data exchanges between the big companies that provide parts of the backbone infrastructure. The data exchange, infrastructure and protocols are decided by several organizations, like ICANN<sup>85</sup>, which manages the Internet's Domain Name System. ICANN is responsible for making sure that domain name links to the correct IP address.<sup>86</sup>

## 2.4 ITU

The International Telecommunication Union (ITU) is the United Nations specialized agency for information and communication technologies (ICTs).

The ITU has three main areas of activity; Radio communications, standardization and development. The ITU also settles disputes, ensemble conferences and makes decisions, resolutions and recommendations based on the meetings between the union countries.<sup>87</sup>

### 2.4.1 The World conference on international telecommunications (WCIT)

The International Telecommunication Regulation treaty had not been updated since 1988, long before the Internet had its economic and mainstream impact. Back in those days telecommunication was the big issue, the conference name itself; "The World Administrative Telegraph and Telephone Conference", gives us a good understanding of the issues and challenges at the time, and how out of date the treaty

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<sup>84</sup> Internet Service Providers\*

<sup>85</sup> The Internet Corporation for Assigned Names and Numbers

<sup>86</sup> Blum, 2012

<sup>87</sup> [www.itu.int/en/about](http://www.itu.int/en/about)

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was in the digital era.<sup>88</sup> Between 3-14<sup>th</sup> of December 2012 the world conference were held again, this time named The World Conference on International Telecommunications or WCIT, after years of discussion and debate regarding “freedom” vs. “regulation” regarding the infrastructure and regulation of the Internet.

The ITU and most of their non-western member countries are fighting a hard battle for increasingly harsher regulations online, to be able to put the Internet in a stronger economic headlock, governing the Internet in the same way as telephony networks and roaming for mobile phones. On the other side, many of the western countries (lead by the US and the UK) want to keep the regulations at a minimal. In fact they want to keep the 1998 ITR Treaty when it comes to matters regarding the Internet, not mentioned at all. The argument being that the Internet has flourished as a result of borderless technology and collaborative efforts.

The new treaty was finally signed by most of the member countries, but the UK, the US and 53 other member countries like Sweden and Poland refused to sign. The implementation of resolution plen/3<sup>89</sup> being the reason:

*“All governments should have an equal role and responsibility for international Internet governance and for ensuring the stability, security and continuity of the existing Internet and its future development and of the future internet, and that the need for development of public policy by governments in consultation with all stakeholders is also recognized.”<sup>90</sup>*

As accepted in the final document of the official treaty;

*“These Regulations, of which Appendices 1 and 2 form integral parts, shall enter into force on 1 January 2015, and shall be applied as of that date, consistent with all the provisions of Article 54 of the Constitution.”<sup>91</sup>*

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<sup>88</sup> ITR, 1988

<sup>89</sup> WCIT Final Acts, Appendix 2 res plen/3.

<sup>90</sup> WCIT Final Acts, Appendix 2 res plen/3 E.

<sup>91</sup> WCIT Final Acts, Art. 10.1 (61)



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## 3. International copyright in the digital age – Recent developments

### 3.1 Introduction

Technological advancements are happening fast, as the internet has revealed possibilities beyond what anyone, not only the law and policymakers, could imagine. The possibilities to spread files faster, better and smarter opened up for online copyright infringement, as a result, there have been questions about the lack of development in international copyright law, and the extent to which it has fallen behind the pace of technological advancements.

The fact that copyright has been used to prevent misuse of intellectual property due to new technologies is not a new phenomenon, nor is it a new phenomenon that new technology makes old laws less relevant, and that copyright has to renew itself whenever the use of intellectual property changes.

In this chapter we will revisit the world of international copyright, outline the struggle for relevant laws in the digital age, take a look at recent developments in the field and raise relevant questions regarding the future.

### 3.2 Relevant lawsuits, court decisions, law propositions & Music business initiatives.

To build a picture of how international copyright law keep up with the technological advancements and innovations, it is relevant to look at different lawsuits and court decisions in recent years. This is especially crucial in countries that use common law systems, such as England, their former colonies and (most of) the American countries. This is much due to the principle of precedent that we touched in the first chapter.<sup>92</sup> But this also gives us an indication of the direction international copyright takes on a global basis.

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<sup>92</sup> 1.9.1

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It is also important to look at legal development, new law propositions and international directives, as well as initiatives from the music industry itself.

In this chapter we will look at some of the most important and most recent developments and happenings.

### 3.2.1 China – Baidu lawsuit

From 2006-2010 the digital sales in China grew 55%, being one of the first major markets where digital sales bypassed physical sales. One of those who benefited a great deal from this digitalization was a company called Baidu, an online company, which offered Chinese unauthorised free music via, download links in its search engine. The three mayors (Sony BMG, UMG and WMG) sued Baidu in 2010 for copyright infringement, and the case was heard in the Chinese people's court. However, the company was found not guilty of copyright infringement, the court ruling that providing search results and direct links, does not directly break copyright law. The case against the search giant fell because IFPI failed to identify the actual sites hosting the illegal music downloads.<sup>93</sup>

### 3.2.2 Sweden – The Pirate Bay trial and verdict

In 2010 The Pirate Bay founders were found guilty of severe assistant of copyright infringement in a Swedish court. In addition to having to pay 46m SEK (6.5m \$) in damages to Swedish copyright holders, they were also sentenced to one year in prison. Later, the compensation to the copyright holders was increased to 76m SEK (11m \$), but the prison sentences were reduced.

The official legal foundation was the infringement of the Swedish copyright law 1, 2, 46, 53 & 57 §§.<sup>94</sup> § 53 c- 53 f was adopted from the EU enforcement directive of 2004.

<sup>95</sup> §53 c 4 states that a commercial electronic communication service that infringes

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<sup>93</sup> Hardy, 2012

<sup>94</sup> Official pirate bay court ruling.

<sup>95</sup> 2004/48/EF

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copyright protected material or opens up for the use or sharing of copyright protected material can be punished.<sup>96</sup>

The court can also grant that the identities behind IP addresses that infringe copyright material can be exposed by court rulings.

### 3.2.3 France – HADOPI<sup>97</sup>

In 2007 the French government agreed to establish an independent enforcement body known as HADOPI, after pressure from French music and film copyright owners. HADOPI's purpose is to protect copyright protected material online and limit the use of illegal p2p sharing or piracy. The HADOPI initiative was also created as an information service to increase the awareness of online copyright infringement, promote legal streaming and downloading services. This is “part one” of the HADOPI initiative. Part two is a bit more aggressive.<sup>98</sup>

HADOPI created a three-strike warning system against individuals that used illegal file sharing; this includes large-scale identification and surveillance, and can suspend or terminate a user's Internet connection if the copyright infringement continues after two letters of warnings. If the user still continues to infringe copyright, the French court can sentence a user with up to three years in prison. In return, the French music copyright holders agreed to make their entire repertoire available for sale online without DRM restrictions.<sup>99</sup> The HADOPI initiative was harshly criticised, but it finally passed in the French parliament in 2009. In 2010 the first warning email were sent out to 650.000 French Internet users, by 2012 it led to cases against 165 French Internet users.<sup>100</sup> Amongst others, Ireland adopted the law. But later Ireland's high court ruled that the three-strike system was not compatible with Ireland's copyright law.

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<sup>96</sup> The Swedish Copyright law §53 C 4.

<sup>97</sup> Haute Autorité pour la Diffusion des (Euvres et la Protection des Droits sur Internet)

<sup>98</sup> Prop. 65 L, 2013. (Proposition background)

<sup>99</sup> Hardy 2012.

<sup>100</sup> The Norwegian Ministry of Culture, Prop. 65 L, 2013

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### 3.2.4 The UK – DEA

In 2010 the Digital Economy Act 2010 (DEA) was passed in the UK parliament. The legislation legally binds the Internet service providers to send out information notices to IP addresses that infringe copyright online when notified by the copyright holder. Information regarding names behind the IP address in question can also be revealed to the copyright holder, but only on a basis of a court ruling. The DEA has led to a number of different law propositions for changes in the UK copyright act.<sup>101</sup>

### 3.2.5 The U.S – The Choruss initiative

The Choruss initiative started up as an experiment with new business models for the music industry. Instead of using millions of dollars/euro's/pounds trying to stop p2p networks, why not try to use the opportunity to make new revenue streams from the new technology. WMG funded the project, where students at a few chosen colleges around the US paid a compulsory licence payment that were included in their tuition fee. With that licence they could download DRM-free material from p2p networks as they preferred, while the college authorities could monitor which tracks that were being downloaded, making it possible for Choruss to distribute the income to the rights holders.

The big problem Choruss faced was getting the right information, and in the end this is what brought the project down as well. They found that they could only find correct information about half of the rights holders, finding themselves with a great sum of money that basically were “unpayable royalties”. But the project itself revealed the need for a Global Repertoire Database or international registry, should this business model work as intended.<sup>102</sup>

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<sup>101</sup> <http://www.legislation.gov.uk/ukpga/2010/24/crossheading/online-infringement-of-copyright>

<sup>102</sup> Hardy 2012

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### 3.2.6 Norway – Prop. 65 L

The eight of February 2013 the Norwegian ministry of culture issued their official recommendation and proposition to review the Norwegian copyright act, with the intention of making it easier for the copyright holders to prosecute copyright infringers online. According to Norwegian copyright law and the Berne convention the copyright holder has all the rights to make his or her works available to the public. This right is technology natural, so when p2p network sites or any other sites or software applications make these works available to the public online without the copyright holders approval, this violates the Norwegian copyright act § 2.<sup>103</sup>

The recommendation is in many ways based on the actions of other European countries, but will not suggest termination or temporary eviction from the Internet for its users, like the French HADOPI initiative. What it will do is making it possible for copyright holders to get access to information about individuals, not only their IP addresses, but the person registered as the owner of the IP address. This can only be given to the violated party if the court finds evidence for severe copyright infringement.

The recommendation will also make it possible for copyright holders to make claims against Internet service providers that will be regarded as the technical provider of the illegal content. The Norwegian Ministry of Culture uses EUs directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society as an example and guidance in their recommendation. Article 8.3 is mentioned in regards to the Internet service providers' responsibility, and the rights holders' possibilities to hold them responsible:<sup>104</sup>

“Member States shall ensure that rights holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or a related right”.<sup>105</sup>

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<sup>103</sup> For further information on the different paragraphs: [http://lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19610512-002.html&emne=%C5NDSVERKLOV\\*&](http://lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19610512-002.html&emne=%C5NDSVERKLOV*&)

<sup>104</sup> The Norwegian Ministry of Culture, Prop. 65 L, 2013

<sup>105</sup> EU Directive 2001/29/EC Art. 8.3

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### 3.2.7 The European Union – Directives & preliminary decisions

The EU court has at two occasions stated their view on disclosure of identities behind IP addresses. The first case (case C-275/06) concluded:

“This Directive 2002/58/EC does not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings.”<sup>106</sup>

In other words, EU does not require the Internet service providers to disclose identity information, but it does not prohibit it either.

The other relevant case (case C-461/10) has its origin from Sweden and the Pirate Bay lawsuit. The main topic was if the EU directive (2006/24/EF)<sup>107</sup> with regard to the processing of personal data and on the free movement of such data is mismatched with the new Swedish copyright law. The court ruled as followed:

“Based on Article 8 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights which, in order to identify an internet subscriber or user, permits an internet service provider in civil proceedings to be ordered to give a copyright holder or its representative information on the subscriber to whom the internet service provider provided an IP address which was allegedly used in an infringement, since that legislation does not fall within the material scope of Directive 2006/24”<sup>108</sup>

In other words, the EU found that they could not make a ruling in the case cause it is not under the material scope of the directive. Meaning that the EU stands on their earlier statement that the European member countries courts can disclose identity information if the person data laws are considered.

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<sup>106</sup> Case summary: [http://ec.europa.eu/dgs/legal\\_service/arrets/06c275\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/06c275_en.pdf)

<sup>107</sup> Full directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF>

<sup>108</sup> Court ruling summary: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0461:EN:HTML>

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### 3.2.8 WIPO – IMR

There are a number of different rights management information systems, developed and used in different sectors of the music industry. We have the ISWC, CIS-Net, IPN, ISRC and PPL, being some of the larger ones, including millions of tracks each. The problem for a global music industry, is that these system in little or no degree exchange information with each other, there is no way to search on all the databases at the same time, one track can exist on several of them at the same time and they can even exist with different copyright holders registered. The vision for the IMR is creating a framework that integrates the information, the systems used by the different sectors in the music industry and functioning as a coordinated registry between them. <sup>109</sup>

The World Intellectual Property Organization (WIPO) is the United Nations agency dedicated to the use of intellectual property, such as patents, copyright, trademarks and design. It was established in 1967, and has 185 member states.

WIPOs role in the IMR is to open up for discussion between the different sectors of the industry help bringing the policymakers to debate and action. WIPOs role in a future IMR could be dealing with legal disputes regarding accuracy in data registration trough a dispute resolution service that can be developed on the background on a functional IMR. <sup>110</sup>

### 3.3 Orphan works

One of the big challenges that the music industry and international copyright faces is the exploitation of works whose authors or right holders cannot be located, such works are known as orphan works. The problem is amongst others, a result of the Internet revolution where “everything” is available; in many cases music that we never knew existed or could never locate before. Revenues from such works often end up in so-called “unpayable royalties” pots or funds.

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<sup>109</sup> WIPO, 2012

<sup>110</sup> WIPO, 2010

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### 3.3.1 Recent developments in the US Copyright law regarding orphan works

As in other territories, the copyright communities in the United States have concerns surrounding the ownership status of orphan works, and how they create gridlocks in the digital marketplace.

#### ***Orphan works act of 2008***

In 2008 the orphan works act was presented. The bill was created on the background that orphan works could not enjoy the same copyright protection as registered works; “To provide a limitation on judicial remedies in copyright infringement cases involving orphan works.”<sup>111</sup>

The bill relief the users of orphan works of a lot of the risks that were involved in using orphan works prior to the bill, both monetary relief and injunctive relief. If the right holder of an orphan work should appear after the exploitation has taken place, the exploiter’s exposure to monetary relief is limited to “reasonable compensation”, or “the amount a willing buyer or seller would have agreed to with respect to the infringing use immediately before the infringement began.”<sup>112</sup>

In the end, the bill was not passed, much due to the political nature of the US Congress, even though the Senate passed the bill.

### 3.3.2 Recent developments in the EU regarding orphan works

#### ***Directive 2012/28/EU on certain permitted uses of orphan works***

On the 25 of October 2012 the European Parliament published Directive 2012/28/EU that permit certain uses of orphan works. Article 2 (1) in the Directive is useful to clarify what the legal term “orphan work” means:

“A work or a phonogram shall be considered an orphan work if none of the rights holders in that work or phonogram is identified or, even if one or more of them is

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<sup>111</sup> H.R. 5889 (100th): Orphan Works Act of 2008

<sup>112</sup> H.R. 5889 (100th): Orphan Works Act of 2008 § 514. (4 C - 1 A)



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identifies, none is located despite a diligent search for the rights holders having been carried out and recorded in accordance with Article 3.”<sup>113</sup>

Article 3 is basically a checklist that the exploiting party has to fulfil to be able to plead “diligent search” accordingly to the directive. If the checklist is fulfilled by the EU Directives standards<sup>114</sup>, Article 6 opens up for permitted uses of orphan works in the following way:

“1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

“38a) By making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) By acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.”<sup>115</sup>

### **3.4 Multi-territorial licensing in EU**

#### **3.4.1 Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)**

Directive 2001/29/EC can be seen as EUs reaction to the WIPO treaties of 1996, which I described in chapter one. With this directive the EU was pretty clear to outline what were their main objectives:

“Technological development has multiplied and diversified the vectors for creating, production and exploitation. While no new concepts for the protection of intellectual

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<sup>113</sup> EU Directive 2012/28/EU Art. 2 (1)

<sup>114</sup> See: EU Directive 2012/28/EU Art. 3

<sup>115</sup> EU Directive 2012/28/EU Art. 6 (1 a-b)

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property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.”<sup>116</sup>

With this directive the objective was to adapt legislation on copyright to reflect technological developments and to transpose the obligations arising from the WIPO treaties.

### 3.4.2 Cross border licensing

In 2005 the EU commission stated a recommendation on collective cross-border management of copyright and related rights for legitimate online music services.<sup>117</sup> The recommendation was based on replies received from collecting societies, publishers, users and member states, and one of the most significant sentences in the recommendation was:

“Pursuant to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (3) and Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (4), a licence is required for each of the rights in the online exploitation of musical works.”<sup>118</sup>

In other words, with this recommendation the EU suggest that by fragmenting intellectual property rights for online usage, it will make it easier for the commercial users to licence music multi-territorial. The 2005 recommendation can also be seen as a respond to the Santiago Agreement, an agreement between sixteen European collective societies that authorised collecting societies to grant non-exclusive licences for online public performances of musical works on a worldwide basis to content providers. The Santiago Agreement aimed to promote the use of "one-stop shop"

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<sup>116</sup> EU directive 2001/29/EC, 5

<sup>117</sup> 2005/737/EC

<sup>118</sup> EU Recommendation 2005/737/EC (6)

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copyright licenses, but in 2004 the EU commission notified the parties that entered the agreement that it was in violation with the European Union Competition law, and the agreement was shut down.<sup>119</sup>

The dispute between the EU commission and the author's societies resulted in a decision from the EU Commission in 2008 (case: COMP/C2/38.698). It has been called the "CISAC Case<sup>120</sup>". CISAC<sup>121</sup> were not directly involved in the case, but the model was built on a model developed by CISAC. The decision argued that 24 European authors' societies had violated EU competition rules when they coordinated the territorial scope of their representation agreements.<sup>122</sup>

With this decision in mind, CISAC and the 24 European authors' societies filed an appeal to the General Court of the European Union. The final judgement were issued on April 12<sup>th</sup> 2013 by the General Court, from which it firmly rejects the EU Commission's 2008 decision, therefore accepting CISAC's and the European authors societies appeals. The most interesting arguments that the General Court agreed upon is:

"The arrival of new technologies cannot automatically turn existing structures for collective management into anti-competitive behaviour."

"Importantly, the Court believed there are legitimate reasons why a society would not want to organise competition over its own rights in a given territory. It recognised that competition between two societies in a single territory could remove incentives to monitor and enforce rights; this is because none of the competing societies would be guaranteed to be the one that licenses these rights. In doing so, the Court opened the door for the development of new multi-territory licensing models."<sup>123</sup>

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<sup>119</sup> Groenenboom, 2005

<sup>120</sup> For full case decision: [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/38698/38698\\_4567\\_1.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf)

<sup>121</sup> The International Confederation of Authors and Composers Societies

<sup>122</sup> The "CISAC Case" Briefing Paper.

[http://www.cisac.org/CisacPortal/miscDocs/CISAC\\_Case\\_Briefing%20paper\\_EN.pdf](http://www.cisac.org/CisacPortal/miscDocs/CISAC_Case_Briefing%20paper_EN.pdf)

<sup>123</sup> Analyzing Court Ruling. Gadi Oron, 2013. <http://www.cisac.org/CisacPortal/consultArticle.do?id=1676>

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### 3.4.3 EU commission strategy, Single market for intellectual property rights.

The 24<sup>th</sup> of May 2011 a strategy report from the EU Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions were published. The strategy report points out that the European online market is still fragmented by multiple barriers, even though the Internet is borderless. Europe remains a fragmented by national markets and laws, and in many cases Europeans are unable to buy copyright protected material across a digital single market. As seen with a number of problems with iTunes, Spotify amongst others, across markets. The strategy report raises the question if the current copyright rules set the right incentives and enable right holders, users of rights and consumers to take full advantage of the opportunities that modern technology provide.<sup>124</sup>

### 3.4.4 Proposed directive on collective management of copyright and related rights.

With the 2011 strategy report being the background, the 11<sup>th</sup> of July 2012 the EU Commission published a proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the international market.<sup>125</sup> The proposed directive is a part of a larger plan in reorganizing the internal trade in the EU, and is based on articles in the TFEU (The Treaty on the Functioning of the European Union)<sup>126</sup>.

The EU Commission is proposing the following assessments:

“A governance and transparency framework would codify the existing principles and provide a more elaborate framework of rules on governance and transparency, increasing the possibilities of control over collecting societies.”<sup>127</sup>

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<sup>124</sup> EU Commission IPR strategy COM(2011) For full report:

[http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)

<sup>125</sup> EU Commission proposal 2012/0180 (COD)

<sup>126</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

<sup>127</sup> EU Commission proposal 2012/0180 (COD) impact assessment A4

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“The European Licensing Passport would foster the voluntary repertoire aggregation for online uses of musical works at EU level and the licensing of rights through multi-territorial licensing infrastructures. It would lay down common rules for all collective licensors throughout the EU and would create competitive pressure on societies to develop more efficient licensing practices.”<sup>128</sup>

The proposal is in other words a set of rules, which shall apply to all types of collecting societies in the EU, Organisational, financial management, non-discrimination and reporting rules.

“As regards governance and transparency, a significant share of royalty collections in collecting societies derives from the non-domestic repertoire. The problem of members that do not have oversight of their society’s activities is more pronounced with respect to foreign right holders. As they are not members of the relevant collecting societies, they have little insight into, and even less influence on, the decision-making process of societies acting on behalf of their own society. Protecting the interests of EU right holders requires all royalty flows, and in particular cross border flows, to be transparent and accounted for. It is unlikely that in the future Member States would ensure the transparency needed for right holders to exercise their rights cross-border. EU intervention is the only way of ensuring the exercise of rights and, in particular, the collection and distribution of royalties in a consistent manner across the EU.

Multi-territorial licensing for online uses of musical works is, by definition, of a cross-border nature. Rules intended to ensure the smooth functioning of multi-territorial licensing are accordingly better set up at EU level since Member States would not be in a position to draw up rules, which would coherently address the cross-border activities of collecting societies.”<sup>129</sup>

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<sup>128</sup> EU Commission proposal 2012/0180 (COD) impact assessment B2

<sup>129</sup> EU Commission proposal 2012/0180 (COD) 3.2

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## 4. Methodology

### 4.1 Methodological approach for this thesis

In the previous chapters I have chosen an explanatory method to examine the reasons for and associations between what exists. This is to aid the understanding of the generative research, which will be used to answer the thesis questions.

“Generative research is concerned with producing new ideas either as a contribution to the development of social theory or to the refinement or stimulus of policy solutions.”<sup>130</sup>

I have chosen to use the generative research method because it has the potential to identify strategies to overcome newly defined phenomena or problems.<sup>131</sup>

In this thesis I have chosen to use qualitative in-depth interviews as my generative research method to answer the central thesis questions. To be able to answer in a fulfilling conclusion, I have chosen a guided interview approach to the in-depth interviews, interviewing a chosen few individuals with different backgrounds and interests in the area. The aim was to give me the broad picture and wide understanding of the field.

This type of research is often referred to as “applied research”<sup>132</sup>, when the researcher is concerned with using the knowledge acquired through research methods such as in-depth interviews, to contribute directly to the understanding or resolution of a contemporary issue.

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<sup>130</sup> Richie and Lewis, 2003: 30

<sup>131</sup> Richie and Lewis, 2003: 30-31

<sup>132</sup> Richie and Lewis, 2003: 24-25

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## 4.2 Methods in qualitative in-depth interviews

Qualitative research is a broad term that includes a wide range of different techniques and philosophies. The qualitative research approach allows the researcher to examine people's experiences in detail, using methods such as in-depth interviews.<sup>133</sup> When using in-depth interviews, the researcher welcomes the interviewee's personal point of view or situation, and tries to elicit information in order to achieve a holistic understanding of that point of view. Qualitative in-depth interviews are often referred to as "unstructured interviewing".<sup>134</sup>

According to Patton, 1987, there are three basic approaches to qualitative interviewing:

### (1) The informal conversational interview

This type of interview resembles a chat, during which the informants may sometimes forget that they are being interviewed. Most of the questions asked will flow from the immediate context. Informal conversational interviews are useful for exploring interesting topic/s for investigation and are typical of 'on-going' participant observation fieldwork.

### (2) The standardised open-ended interview

Researchers using this approach prepare a set of open-ended questions, which are carefully worded and arranged for the purpose of minimising variation in the questions posed to the interviewees. In view of this, this method is often preferred for collecting interviewing data when two or more researchers are involved in the data collecting process.

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<sup>133</sup> Hennink, Hutter & Bailey, 2011

<sup>134</sup> Berry, 1999

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(3) The general interview guide approach (commonly called guided interview)

When employing this approach for interviewing, a basic checklist is prepared to make sure that all relevant topics are covered. The interviewer is still free to explore, probe and ask questions deemed interesting to the researcher.<sup>135</sup>

The general interview guide approach to in-depth interviewing is often described as a form of “conversation with a purpose”<sup>136</sup>. The interview will generally be based on a few topics and issues that will be covered in the interview, but the interview is sufficiently flexible to permit topics to be covered in the order most suited to the interviewee. Also it allows questions based on responses to relevant issues to be raised spontaneously, allowing responses to the key issues to be fully probed and explored.<sup>137</sup> I found the guided interview to be the most methodically right way for me to approach the interview process.

### 4.3 Presentation of the interview objects

When choosing interview objects I found it crucial to have people with a broad understanding of international copyright and music industry knowledge. I found that a specialization in the European market and knowledge of how the EU works was of significant relevance, and was one of the characteristics I looked for. The choice of interview objects is also influenced by the need for different approaches and opinions, not only to give the research a greater validity, but also to give me personally a broader understanding of the topic seen from different angles.

For those reasons I chose the following people:

***Helge Sønneland.***

Helge Sønneland has until recently been the leader of the European Free Trade Associations (EFTA) workgroup for immaterial rights, copyright, trademark, patent and design, a position he held for 20 years. From 2007 he was the senior adviser in the Norwegian EU-delegation in Brussels with assignments

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<sup>135</sup> Patton, 1987

<sup>136</sup> Webb and Webb, 1932: 130

<sup>137</sup> Richie and Lewis, 2003: 140-142



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regarding copyright, media and culture. Ha has also worked as the Deputy Director General at the Norwegian Ministry of Culture, Department of Copyright and Media. Today he works as an adviser for the University of Oslo's faculty of law.

***Inger Elise Mey.***

Ingrid Elise Mey is the Director of Online Media & International Licensing at TONO – Norwegian Performing Rights Society. She is also Chairman of the Board at NOTAM – Norwegian Center for Technology in Music and the arts.

***Irina Eidsvold Tøien***

Irina Eidsvold Tøien is currently working on her PhD at the University of Oslo, specializing in performing arts at the law faculty. She has earlier worked as a lawyer and as Head of legal affairs at TONO.

***Bengt Hermansen***

Bengt Hermansen work as the Deputy Director General at the Norwegian Ministry of Culture, Department of Copyright and Media.

#### **4.4 The interview process**

I chose a methodology that opened up for a flexible conversation within the subject with my interview objects. The interviews lasted between 1 – 2 hours, and I personalized the questions for each interviewee. The most important questions for my thesis were asked to all of them, but I also had more detailed questions within their specialized area of expertise, with room for discussion at the end of each interview.

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#### 4.4.1 Questions

##### a) Main questions

How is the international copyright landscape built, and how should copyright keep up with the constant technological developments and emerging borderless business models?

Which direction is Europe taking regarding copyright protection and copyright utilization online?

Are we moving towards multi-territorial licensing solutions or are we moving towards national solutions with international registers in the European market, which approach would benefit the online market, and how will that affect our regional market and copyright holders?

##### b) Other relevant questions asked

The WIPO treaties from 1996 can be considered as a renewal of the Bern and Rome convention, why make new conventions that to a great extent build upon old conventions instead of updating the old ones?

To what extent should international convention and national legislation documents implement technology definitions?

Why does the EU seek to regulate the national CMOs by proposing strict regulations and transparency through a multi-territorial licensing platform?

What benefits can multi-territorial licensing provide for music, and the music industry online?

If the EU achieves multi-territorial licensing in the inner market, how will that affect other national CMOs in Europe?

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Do you think that the proposed transparency and regulations of European CMOs can weaken their ability to compete with international CMOs outside of Europe?

The EU commission, and many online companies like Google, Apple and Amazon, are pushing towards multi-territorial solutions. Some finds national solutions with international registries to be a better strategy. Which solution do you think would be easiest to implement in the current international copyright law?

#### 4.5 Analysis

For the analysis I have divided the answers I received from my interview objects in six groups:

1. The international copyright landscape.
2. Copyright vs. the constant technological developments and emerging borderless business models.
3. Europe's direction regarding copyright protection and copyright utilization online.
4. Multi-territorial licensing solutions vs. national solutions with international registers in the European market.
5. Beneficial solutions for the online market.
6. Regional market effects.

##### 4.5.1 The international copyright landscape. (1)

This is the topic that were the least focused on during the interview rounds, the reason being that I used explanatory method to create an overview of the international copyright landscape in the first and third chapter. But I asked some questions regarding the topic to support the explanatory method.

Hermansen: *"The Bern convention text builds the foundation for intellectual property rights of authors and composers; in addition we have the WIPO treaties from 1996. WCT is an expansion or supplement of the Bern Convention in that regard."*

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I was especially curious on the reasoning for WIPO to make new treaties, when old fundamentally strong conventions like Berne just as well could be updated, as most of the new relevant important treaties, agreements and conventions are based on either the Berne or the Rome convention texts. My interview objects pointed out that the WIPO treaties from 1996 can be seen as the renewal of Bern and Rome, and that changes in these conventions directly would be much more difficult to conduct.

Hermansen: "It would be far more difficult to open up for changes in the Berne Convention text then to prepare new treaties that works as an extension of the Berne convention."

Sønneland: "I perceive the two WIPO treaties from 1996 as the renewal of the Berne convention. And the most substantial parts of the Berne Convention are included in the TRIPs agreement from 1994."

Hermansen further outlined the process of that choice:

Hermansen: "The assessment that was made early in the 90s was that it was too difficult to raise important questions in the Berne Convention, as an option, the WIPO countries agreed amongst themselves to make new treaties."

#### ***4.5.2 Copyright responses to constant technological developments and emerging borderless business models. (2)***

How should copyright keep up with the constant technological developments and emerging borderless business models?

I used this question at the start of every interview, to get the interviews started. On this question I seek different answers, I wanted to know what my interview objects felt was the most important topics, and I asked further questions based on the interview objects answers to this question, the broad nature that is has.

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Hermansen: *“International copyright has been challenged the last years; there is no doubt about that. The author/composers have to remain in control, that’s the greatest challenge.”*

Bernt Hermansen directed his answer to developments within the EU, being the most significant to the Norwegian market. This is due to the difficulties bringing about changes in the WIPO system. His summary was that there has to be a willingness by the international community to find solutions.

Mey: *“We already possess the tools required to licence to the market, but we need the legitimate backing for the fact that we manage the new ways of communication to the public as well.”*

Ingrid Elise Mey outlined the legal work frames that enable them to work the way they do, but also outline the difficulties in rights fragmentation.

Tøien: *“The framework in international copyright law is there, but we lack a willingness from the public to use the law that exists.”*

Irina Eidsvold Tøien stressed the fact the national and international legal framework couldn’t adjust every time the technology changes, and that the framework as it is today, with the Norwegian copyright act as an example, is very solid. She also pointed to the music industry’s ability to try and move around the legal framework when it comes to new technology, and that the way we look at copyright may have to change to a more economic point of view.

Tøien: *“An economic thinking is crucial, also to legitimate copyright towards the public, so there is a principle of fairness that the public understand.”*

Helge Sønneland also pointed out that the legal framework is pretty solid, but he also pointed out that the current work internationally in the field of copyright is not an effort to strengthen it further. He also mentioned that by trying to control and enforce

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copyright infringement on a large scale and in an excessive manner, one could further damage the reputation of copyright.

Sønneland: *It is important to get the consumers to accept that they have to pay for music online, that illegal downloading is illegal, but if you push for restrictions too harshly it can create negative reactions to copyright. Even if you are legally right, it might not always be in your best interest to be right.*

The issue of balancing the regulation and restriction was a topic in several of the interviews, where to draw the line?

Hermansen: *“WIPO was comparatively early in regards to targeting the digitalization in 1996, and the international regulation of the Internet has come a long way in that regard. But to keep up with the technology you have to be cautious when it comes to regulation as well, so you don’t regulate problems that do not exist in the long-term perspective, or push the regulation too far. An example of going too far is the HADOPI regulation that France implemented which gave a negative effect on copyright.”*

I was also curious in regarding implementation of technological expressions in international treaties/agreements/conventions and national legislation. Should one adapt the laws to the new technology?

Hermansen: *“I do not think that technological definitions necessarily should be included in legislative documents. If you use the Norwegian copyright law as an example, the legislation text is technology neutral, and the laws from 1961 remains in relevance to the Internet. Nordic legislation has benefited from that.”*

Mey: *“We could certainly try to adapt the law to new technology; however neutral relevant legislation is more important in a longer legislative perspective. The underlying relevant copyright action that actually happens is more important than trying to adapt to the various technical terms that might change from year to year.”*

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Tøien: *"It is important that the legislation is so abstract that it is not dependent on technological expressions"*

*"We need a legislation that can react, if revenues are generated based on copyright holders' behalf they have to be compensated for that use. We cannot be dependent on expressions and terms, because the industry moves around those terms."*

Sønneland: *"The expression that was being used in 2001 and 1996 was "on demand", where the user chooses the time and place for access, which is a technological neutral expression. For the author/composer this expression is not a problem, cause a publication to the public is apparent on a "on demand" service, but for the producer and practitioner it can be, especially when it comes to streaming services like Spotify. "*

I encouraged my interview objects to outline some of the most relevant questions to them, regarding the immediate future for international copyright as a whole.

Tøien: *"Internationally the definition of copyright is too broad, copyright and intellectual property is usually seen as the same thing. But there are not the same objectives and reasoning behind patent rights and copyright, and the stakeholder groups are quite different."*

Helge Sønneland elaborated on this topic:

Sønneland: *"I do not expect that a new instrument that gives further protection than the WIPO treaties and the TRIPs agreement will emerge in my lifetime."*

*"The 1996 treaties and the 2001 directive is a bit unclear regarding the limitations of what is allowed. In the demarcation zones, or grey areas several people have asked the question if it could have been clearer."*

*"The first important step is to implement the commitments of the international treaties that already exist. It is still a long way to go before the majority of countries around the*

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*world are a member of, or have ratified the 1996 treaty, without it they have no digital commitments.”*

*“WIPO struggled to make an example with the Beijing treaty, where the first attempt to make an agreement was in 1996, the next attempt was in 2000, that did not succeed either, and 12 more years passes before they come to an agreement. So have they kept up with the technological development? In some sense they have.”*

*“To the extent it is needed to improve the foundation of copyright, it is most obvious for me to point to the EU. The international community’s efforts on copyright are at the present time not to strengthen it.”*

*“What is the biggest topic for the European market is licence clearance for multi-territorial use.”*

#### **4.5.3 Europe’s direction regarding copyright protection and copyright utilization online. (3)**

Hermansen: *“The EU likes to see Europe as one, and they want there to be a free flow within the system.”*

I wanted to focus on the European market; therefore I found it natural to ask my interview objects some questions regarding the European market and recent developments. The EU became an important topic.

Which direction is the EU taking regarding copyright protection and copyright utilization online?

Mey: *“When iTunes was about to launch their service in Europe, they could have requested a licence for the entire European market from one single entry point, but they still had to clear rights in all the countries one at the time. The EU commission was made aware of the differences between the US and the EU countries in this field.”*



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*“We made agreements with other copyright organisations that we called cross-border licensing, they had the name Santiago and Barcelona agreements. The European copyright management organisations were supposed to give each other the mandate to provide cross-border licences in several territories at the same time, a bit like iTunes desired. But the EU found these agreements to be fundamentally contrary to their competition regulations. The consequence was that the collecting societies refrained from using this type of model after 2004”*

Sønneland: *“After the EU commission said that the cooperation between national rights management organisations was illegal, they made a recommendation that break up the existing agreements, creating a mess.”*

Sønneland was referring to “The CISAC case” which I describe in chapter three.

Mey: *“More and more people are starting to tell us that it has become more difficult to clear all rights after the 2008 CISAC decision from EU, when rights has become more and more fragmented. The point from a CISAC view was actually to make it easier to licence, however the EU Commission did not see it that way.”*

*“Broadcasting companies that need to clear rights often need to clear “all” rights and they are often national. They do not benefit from the fragmentation of rights, and the terms for them have become more difficult.”*

*“The EU wanted to open up for “One Stop Shops” usage, but the result was the opposite of what was intended.”*

Sønneland: *“The need for an easy licence clearance for multi-territorial use has increased simultaneously with the need for digital content, but it is difficult to clear rights.”*

*“With a multi-territorial licensing strategy that the EU is proposing, I am afraid that the benefits will be greater for the producers, and Spotify etc. then for the author/composers.”*

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#### 4.5.4 Multi-territorial licensing solutions vs. national solutions with international registers in the European market. (4)

I put a lot of focus on the proposed EU Directive 2012/0180 in the interview process, and wanted to figure out which direction the EU is taking with this proposed directive, which licensing solutions that would be easiest to implement and what concerns there might be.

Hermansen: *“The biggest difficult with a multi-territorial licence strategy is to ensure that the author/composers does not lose, especially in regards to pricing. The price level within the different European countries varies, so how to prevent “shopping” of rights in the least expensive territories is one of the challenges.”*

Mey: *“A compulsory licence could be the result of the next EU Directive. But the Bern convention, and the author/composers single rights ensure them that they do not need to go along with that, you can’t “steal” and re-aggregate their works against their will.”*

I was also interested in the competition situation between the CMOs in the EU, and the CMOs outside the European territory, would a multi-territorial licensing strategy be implemented. I got clear, but contradictive answers.

Hermansen: *“I do not think that the requested transparency and regulation from the EU will weaken our competitiveness towards industry players outside of Europe.”*

Sønneland: *“I think that the requested transparency and regulation from the EU can weaken Norwegian competitiveness. But if the EU commission is willing to implement a pursuant, and such legal opportunities exists, that those who operate within the European market, but are not stationed here, also have to follow the same rules of transparency and regulation.”*

Are we moving towards multi-territorial licensing solutions or are we moving towards national solutions with international registers in the European market?

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Hermansen: *“National solutions with international regulations are, with the experience that we have here in Norway, the best way to maintaining a level on the compensation and protection for the author/composers. This is harder to maintain if we are pushed into a larger system, even though it might look as if we are headed that way.”*

Mey: *“Right now, national solutions are still easier to implement, especially when you licence locally or in a region like the Nordics. By re-aggregating the repertoire, it also makes more sense to combine the national solutions, together with international registries, and databases that are up to date. The GRD and the IRM are good initiatives, and as long as we can agree on implementing common standards, the one system does not exclude the other.”*

#### **4.5.5 Beneficial solutions for the online market. (5)**

Which approach would benefit the online market?

Sønneland: *“We are in a situation where the inner market in Europe, does not include all digital industry and digital rights, I think it is wise that the facilitation of opportunities to buy content and to provide the author/composers with the right compensation for the use, has to be included.”*

*“When you don’t succeed in enforcing copyright, it is even more important that you succeed in creating a market that can aggregate revenues.”*

*“I believe that the European countries can penetrate territories outside of Europe more easily, if they have a multi-territorial repertoire to offer.”*

Mey: *“I think what would have worked best for the European market would be multi-territorial solutions, but then you would need to re-aggregate and gather the entire repertoire back into a blanket-type licensing model. The major publishers and record companies are not so interested in that, since they have indeed benefited from the 2008 CISAC decision. .”*

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#### 4.5.6 Regional market effects. (6)

How will the developments in the EU affect our regional market and copyright holders?

Tøien: *“In Norway we have fulfilled the requirements for insight and regulation a long time ago, so this is aimed at other copyright organisations in other countries in the EU. I do not think that multi-territorial licensing in the EU will have a big negative effect in Norway.”*

Hermansen: *““In Norway – and the other Nordic countries – we have had a system with extended collective licenses for years, but EU has not fully accepted this as an easy way to clear rights within the Union.”*

Tøien: *“The Norwegian compulsory licensing model jumps over distribution segment, the big publishers are left out, and that’s why I think they do not want this model, even though it works when providing the right compensation to the author/composer.”*

Mey: *“The major publishers in Europe are not too happy with the notion of our Nordic extended collective licensing model, nor a pure compulsory licensing model.”*

Sønneland: *“The general directive and the provisions as stated in the new directive proposition, have the consequence that the Norwegian compulsory licence agreement cannot continue.”*

The Nordic/Baltic cooperation was also brought up as a concern.

Sønneland: *“What is yet to discover is if the Nordic/Baltic cooperation can continue just in our region. They are also saying through this proposed directive that there are only those agencies that can secure immediate repertoire insight, quick settlements and have large data capacities that can continue. I do not expect that to be a problem for TONO, but the Nordic/Baltic cooperation is a prerequisite.”*

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## 5. Observations and discussion

### 5.1 Observations

I will continue to use the six groups as described in 4.5 as a way to structure the analysis process:

1. A very important note and an important observation was the process the international societies goes through, often with WIPO as an arena, when creating the international framework for copyright. I definitely did not believe these processes to be easy, but the time scale for which these processes go from ideas, or raised questions, to an actual agreement was surprisingly long. In that regard it made sense that forces within WIPO chose to make new treaties, with the basis of the Rome and Berne Conventions, instead of implementing new paragraphs on the old, solid, conventions.

One of the questions that occurred to me after addressing the international copyright landscape in chapter one was, why haven't the Berne convention met the technological challenges that we face today, being the foundation of international copyright law? What I found is that the Berne Convention still does its job in an honourable way, and it has been updated, but the way of updating the Berne Convention is by making new treaties that works as extensions of the Convention text.

2. What surprised me was how positive my interview objects viewed the current international framework for copyright, and that the challenge in many ways does not reside there. An important observation was that the framework that exists is actually very strong; the question of how to use that framework to regulate usage of and to enforce those legal rights is a more relevant one.

I also approached the matter of including technological expressions, or to legally define certain technological instruments. An important observation

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was that my interview objects without exceptions, argued for technology neutral abstract legislations, independent from technological expressions.

All my interview objects raised the importance of the WIPO treaties (1996) as an important way to keep up with the technological developments in international copyright, but the most interesting observation was that the majority of countries around the world haven't ratified that treaty, including Norway. Helge Sønneland elaborated on this topic, and it was an important observation that Norway, even without ratifying the WIPO treaties, still implemented it in our current copyright law through an EU Directive, but countries outside of Europe that hasn't ratified the WIPO treaties does not have any digital commitments at all. It was a real wake up call, that the majority of countries around the world, in 2013, the digital age, do not have any digital commitments on the field of copyright, I view this observation as one of the major findings.

3. That the EU struggle to build solid foundations for a free flow of services and goods within the internal market was no surprise, as I view this as one of the fundamental points of the EU as an organisation, but it was an important observation for me that the matter of copyright is extremely territorial inside the EU. Even more so than I expected.

The matter of EU and cross border licensing became essential regarding which direction the European market is taking regarding copyright protection and copyright utilization online, and there are a number of observations I found interesting. One of them was that this is not a new subject, and that the European CMOs tried, with a great deal of progression to make a cross border licensing agreement possible some few years back, but was stopped by the EU. An important observation is that the EU wish there to be a cross border licensing model in the EU, as they claim in the directive proposal that came in 2012, but they still stopped the industry initial initiative in 2004. Another

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observation is that the need for easy licence clearance for multi-territorial use is increasing, and has been for a number of years.

4. The 2012/0180 EU Directive became the biggest and most important topic in this group, and there were several important observations regarding the proposed directive that I found very interesting. All my interview objects knew the proposed directive very well, and they could tell me several interesting things that were less obvious to spot when reading and analysing it on my own. The objective can be interpreted as a way to regulate and control the CMOs in a much larger scale and controlled manner than before. I found the reason for this to be that many countries, mainly in the eastern and southern parts of Europe, had CMOs that were notorious for being either corrupt or unfair to their copyright holders. But they also wish to control, to a much higher degree than today, CMOs that already has been proven to work in a legal and often successful manner. In some cases on a micromanagement level.

What I wanted to know, was the direction the EU was implying with the proposed directive, and I got many good answers regarding this, but I was also made very aware that the proposed directive, is still a proposed directive, therefore it is impossible to say for sure how the final directive will look like, and the wording in the proposed directive is of such a manner, that it is easy to interpret it as an “overview of the challenges” and “need for changes”, asking more questions than they answer. What Bernt Hermansen could say, and that I note as an important observation, is that even though it is hard to say at this point, it does seem that we are heading towards multi-territorial licensing, directed by the EU in some way or another as opposed to the alternative, as he clearly stated as the best alternative, national solutions with international registers.

I also question the competition between the CMOs in the EU, and the CMOs outside of the European territory, would a multi-territorial licensing strategy be implemented. The observation that was a bit surprising was that the two

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very clear answers I received were contradictory, Bernt Hermansen stated that he does not think it will weaken our competitiveness; Helge Sønneland stated that he thought it could. But it is important to note that this being a proposed solution from the EU, it is still unclear how the actual conditions on a final directive would look like, if the final directive implement legal conditions, that CMOs outside the European market, but who operates within the European market also have to follow EUs rules of transparency and regulation, the competition situation will not be effected by such an implementation.

5. I used this question to elaborate on question four (4), and there were some interesting observations. One thing that was brought up was that the inner market of the European Union does not include all digital industry or digital rights. This is something that has been made clear earlier in the thesis, but I think Helge Sønnelands comment about the importance of creating markets that can aggregate revenues<sup>138</sup> was a particularly strong one, and it opened up for a new way of approaching the master thesis question. I regard that comment as an important observation.

Another important observation, and a new approach to the multi-territorial point of view, is what this can mean for European music export. If the European market had a multi-territorial repertoire to offer, there is a chance that the European countries would have an easier job penetrating the markets outside of our union. This has to be regarded as a possible positive result of a multi-territorial approach. An important observation was, as Ingrid Elise Mey elaborated on, that a multi-territorial approach would possibly be the best thing for the European market, but the job of re-aggregating and collecting the repertoire is very difficult. And Without the content holders' cooperation, it is impossible, because you can't force re-aggregation, the Berne Convention stands in the way of that. Another observation is that the situation for the big content holders today, the big publishers, is a pretty good one. They are

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<sup>138</sup> page 57



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currently in a position of power, since they have benefited greatly from EUs fragmentation strategy.

6. The Norwegian compulsory licensing model was one of the topics that were raised in some way or another by all my interview objects. And there were several important observations regarding this topic. I felt that my interview objects either directly or indirectly supported and defended the Norwegian compulsory licence model, music is being used, and authors/composers are getting paid. But for the global music industry, the compulsory licensing model is hard to control, and it skips several important distribution segments where people not are being paid. Another important observation was that, not only are the big publishers in Europe terrified of the Scandinavian model, the consequence of a new EU Directive can mean the end of it. But this has to be regarded as a possibility, and not a hard fact.

## 5.2 Discussion

I will discuss the theory I have found and the important observations the interviews revealed to discuss my thesis question:

- ❖ ***“What developments in monetization and copyright utilization would benefit the online music market and what impact would they have on the stakeholders?”***

I will also discuss the six groups I have used in the methodological chapter, but in the discussion I will merge these six groups in to three main questions (a, b and c) relevant to build the background of discussing and finally answering the thesis question.

- a) **How is the international copyright landscape built, and how should copyright keep up with the constant technological developments and emerging borderless business models?**

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**b) Which direction is Europe taking regarding copyright protection and copyright utilization online?**

**c) Are we moving towards multi-territorial licensing solutions or are we moving towards national solutions with international registers, in the European market, which approach would benefit the online market, and how will that affect our regional market?**

I will discuss on these questions first on the basis of my observations (chapter 4.6), to build the background for the discussion surrounding the main master thesis question.

***a) How is the international copyright landscape built, and how should copyright keep up with the constant technological developments and emerging borderless business models?***

The international copyright landscape is built up by national legislations, with international treaties, conventions and agreements that ensure minimum standards for those national legislations. They also ensure that works can enjoy cross-border protection. These international treaties, conventions and agreements are absolutely vital to a global music industry. In addition there are territorial agreements and guidelines, like EU directives within the European market that also affect the international copyright landscape. The whole global picture can be confusing to say the least, and it seems to me that the perception and protection of musical works is stronger in the European countries, and to some extent in the North-American territory, then in other territories around the world. I found there to be two major concerns regarding international copyright treaties, conventions and agreements:

1. The WIPO treaties from 1996 are the renewal of the Berne Convention, and it draws up digital commitments. Most countries around the world have not adhered to these treaties, and without them they have no internationally digital commitments on the field of musical works.

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2. The legal framework for international copyright is strong. I have established this through outlining all the different international treaties, conventions and agreements. But how strong are they really, if they are not universally adopted, adhered to and properly implemented?

So how should international copyright keep up with the constant technological developments and emerging borderless business models? Working on this thesis, it has become clear to me that the work with international treaties, conventions and agreements are processes that works so slowly that there is no point for them to try keeping up with the new technological developments at any given time. The most important thing for the international copyright society is to build and maintain the foundational guidelines for protection, having technology neutral legislations that are independent from new technological expressions, which deal with the relevant underlying copyright action that actually happens.

***b) Which direction is Europe taking regarding copyright protection and copyright utilization online?***

During the time period that I have been working with this thesis I have been made very aware of the importance and strong presence of the European Union's involvement in copyright protection, regulation, utilization and market structuring inside the internal market. I feel that I have understood the EUs vision; they like to see Europe as one, and that the EU is one big territory with an easy flow of services and goods across the borders, a vision that reflects many different businesses throughout Europe. But it seems to me that they have struggled with the sector of music and other copyright related materials. It is a great deal of complexity to this industry and there are a lot of different players involved in the process from author/composer to consumer.

I think the launch of the iTunes Store in 2004 can be seen as a landmark to the cross-border licensing struggle within the EU system. The EU were made very aware trough intense lobbying, of the big differences between the European and the American

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market regarding online licences for musical works, a difference that does not sit well with a union which its main purpose is to gather the European market. As I described in chapter three, the EU recognized the need to adapt and supplement the current law on copyright and related rights to respond to new forms of exploitation back in 2001, but with the “new forms of exploitation” getting more and more a reality, the EU Commission made some questionable decisions. First they attacked the cooperation between many European collecting societies, the so-called Santiago Agreement, that aimed to promote “one stop shop” copyright licensing in Europe. Then they issued a recommendation that fragmented the different rights in the online exploitation of musical works. It can certainly be discussed whether the EU contradicts itself by making this recommendation, since they in 2001 stated that it is a problem that the technological development diversified the vectors for creating, production and exploitation, then they chose to make a recommendation that states that “a licence is required for each of the rights in the online exploitation of musical works”<sup>139</sup>, it would seem to me that this diversifies the creation, production and especially the exploitation even further. One can discuss if the EU feels the need for control, and that they have tried different methods to have that control. First by stopping the industry CMOs initiative, then by giving the publishers increased bargaining power by dividing up the rights, and now by putting the cross border licensing model back on the table within their own terms.

But there has been recent developments regarding the dispute between the EU Commission and CISAC (Including 24 European authors’ societies). The EU Commissions decision from 2008, which states that the way that the European authors societies work together on a cross-border manner is in violation with the EU competition law, were finally rejected by the European General Court. This is certainly a big victory for the collection societies, but also for collective management across the European nations as a whole. I also think that this decision can be seen as a step towards the development of new multi-territorial licensing models, and perhaps not in the regulative manner that the EU intends with their proposed directive from July 2012. It is hard to speculate further, being as recent as it is, but I certainly think

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<sup>139</sup> Eu Recommendation 2005/737/EC (6)

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that the need for easy clearance for multi-territorial use is increasing, and a call for a solution is necessary.

***c) Are we moving towards multi-territorial licensing solutions or are we moving towards national solutions with international registers, in the European market, which approach would benefit the online market, and how will that affect our regional market?***

This is a difficult discussion in the writing moment, mainly because there are many developments going on at the same time. The EU has their clear strategy, and their strategy report from 2011 resulted in a proposed directive in 2012. I found the proposed directive to be quite interesting, and in many ways the EU makes some important and rightfully harsh assessments. I think the need for more transparency and governance over the collecting societies that are proven to work in a dishonest and insufficient manner is an assessment that the EU got absolutely right. But I am not sure it is necessary or even serves a purpose to control collecting societies on a micromanagement level, especially not collecting societies that already have met the EU's requirements for transparency and fair principles. Then we have the European licensing passport model that was introduced in 2010, and made clear in the 2012 proposed directive. Can it be argued that this is just a different approach to the Santiago agreement, from which the EU has much larger control? Let's take a closer look at one of the statements that the EU makes in the proposed directive: "It is unlikely that in the future Member States would ensure the transparency needed for the right holders to exercise their rights cross-border."<sup>140</sup> It can absolutely be discussed if this statement can be regarded as a lack of trust in the national CMOs, and especially in cross border agreements made between them. But I still think that cross border licensing agreements in the European market can be a possible outcome of the recent developments, either organized by the EU, CISAC or the industry itself. It has to be said that with the historical tension between many of the most important players in the industry, the last alternative seems unlikely.

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<sup>140</sup> EU Commission proposal 2012/0180 (COD) 3.2

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The alternative is to combine national solutions with international registers and databases that are up to date. This approach would mean that cross-border agreements could be implemented, but that all the different national CMOs could choose how those agreements would affect their territory. There seems to me that it would only create unnecessary problems by having the EU as some sort of “clearance central”, but it is crucial that they help build the framework and guidelines to make this alternative a real option. With international registers, you could also solve many of the user’s problems regarding clearing rights, and finding the correct rights holders. There already is an agreed upon arena to solve disputes etc. WIPO with their experience has already been established as the best alternative.

As a third and unlikely alternative, but as I would also like to mention, is to re-aggregate and gather the entire European repertoire into a blanket-type licensing model. I say unlikely because it can be argued that the music industry does not approve that kind of model at all, and they can easily prevent compulsory licensing by pointing to the Berne Convention’s single rights.

I think the need for creating a framework for which an online market can aggregate revenues in a cross border manner is vital for the European market, either this solution being a cross border licensing model created by the EU, national solutions with cross border agreements or a compulsory licence across Europe. The option most harmful to the market is to do nothing at all.

For the Norwegian market I think it is crucial that the extended collective license agreement model can continue. It is a model that has proven to work with a great deal of success in our regional market. There have been discussions surrounding it in the Norwegian market as well, but I think that the pros more than enough weigh up for the cons. There are absolutely interesting times regarding the field of copyright and copyright utilization online, this is not unique to the Norwegian market of course, but Norway is an exciting example. Direct effects on the Norwegian markets can be that the compulsory model as we know it today can disappear, as a result of a new EU Directive. But I do not think that the EU is going to make that recommendation, as I

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believe that the Norwegian authors' society (TONO) and the political forces of our country would fight that intensely. I think it is more important for them to create a directive that unifies the European market, not creating new unnecessary tensions.

**❖ *“What developments in monetization and copyright utilization would benefit the online music market and what impact would they have on the stakeholders?”***

The online market is here to stay. Of course, there are other revenue generating areas for the music industry in the offline world, but as the main source of consumption being online; the main source of income will also be online in the future. I do not regard this as a conclusion, but as a base from which I will start my discussion.

So who are the stakeholders? To keep it simple, I will divide them in to a set of groups:

1. The consumers and users.
2. The creative community and rights societies (musicians, composers, authors & CMOs)
3. The traditional music intermediaries (record labels, publishers)
4. New intermediaries (MSPs, DSPs, ISPs)

I have discussed three different licensing solutions on the international online music market, with Europe as a reference point. How would the different solutions influence the relevant stakeholders?

1. The consumers and users.

Consumer's will typically chose the most convenient way to consume the product or service they wish to consume, and I think it can be debated if illegal downloading, for quite a few years, was the most convenient way to consume music. I strongly feel, and services like Spotify has largely proven, that the willingness to pay for music online is

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increasing, as long as the service is more convenient than downloading the same material illegally. The consumer does not really care how the different services work, they only care if it works. They want services that are as cheap and convenient as possible, and the typical consumer will only be willing to pay for one service at the time. It can be discussed that the “traditional” music sales on the online market simply did not create enough value for the consumer.

That the copyright gridlock situation has been bad for business is unquestionable, but for the consumers it has also worked as an excuse for illegal downloading. This has not been an ideal situation for the consumer; because the typical consumer does sympathize with the artists and authors, who they do not sympathize with whoever are the intermediaries.

I think that the most convenient solution for the consumers would be any workable cross-border licensing solution that makes as much of the world repertoire as possible available on services that can distribute a “fair” compensation to the authors/composers and artists. Solutions that do not prevent streaming services like Spotify to be even further developed. It can be discussed if a compulsory-licensing agreement, which makes the world repertoire available, could potentially be in the consumer’s best interest.

For the users, the most important thing is easy clearance. The direct result of the 2008 CISAC decision was that the rights for online uses became more fragmented, making it harder for the users to clear all the rights. If one looks at the different EU directives, strategy reports or comments from the EU regarding this topic, the last 10-12 years, the phrase “one stop shop” is used frequently. But by fragmenting rights, you get the opposite effect. It can be discussed that the users would benefit from national solutions with international registers, in a combination with cross border licensing agreements made by the national CMOs. But to make this a plausible solution you need a reliable international register.



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2. The creative community and rights societies (musicians, composers, authors & CMOs)

The creative community makes a living of the economic exploitation of their music, and the CMOs job is to ensure that the exposure results in fair compensation. But which licensing solution provides the best framework for which a fair compensation for the exploitation of works can be ensured? To a great extent my interview objects agreed on that national solutions with international registers would be the easiest strategy to implement, and the best way to maintaining the highest level on the compensation and protection for the author/composers. It can also be discussed that even though a compulsory licensing solution might be in the best interest for the creative community, it might not be in the best interest for the music industry. The reason for this could be that the compulsory licensing model jumps over distribution segments, making publishers less relevant. The EU is also very sceptical to this solution, so I do not expect that the next EU directive will suggest this approach.

But what can be discussed is if advertising from Google and other DPSs<sup>141</sup> should benefit the creative community to a greater degree. Google, Amazon, Apple, Facebook and some others are basically monetizing on the basis of information about consumer behaviour. This allows them to target their advertisement, which basically is what a service like Google and Facebook are selling.

The more realistic outcome is cross border licensing models, an approach that the different national CMOs in Europe have tried to implement before. It could be discussed that with the new final verdict on the CISAC case, this initiative could be re-started. In that case, how would the EU react to this, and how will the recent verdict influence the next EU Directive? Being that these developments are so recent, it is hard to speculate, but it can absolutely be discussed if the national CMOs, with national solutions combined with cross border agreements could be the reality of cross border licensing, at least in the internal European market.

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<sup>141</sup> Digital Service Providers

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### 3. The traditional music intermediaries (record labels, publishers)

It can be argued that the EU, with their recommendation of fragmenting rights, put the traditional music intermediaries back in a position of some power. And it can also be discussed that the increased number of rights attached to a musical composition can result in an increased number of licences needed to “clear” a work for several different commercial uses, therefore resulting in bigger income for the major publishers. If this is the case, the traditional music intermediaries has profited on the unclear situation in the European markets regarding cross border licensing the last 4-5 years. A question that can be raised in that regard, is if the unresolved issue of licensing in the online area is profitable for the traditional music intermediaries in the long perspective? And if any, which licensing solution would benefit them the most?

For the traditional intermediaries is all about regaining control over the market by claiming as many rights as possible. But who really owns which rights? It can be discussed if the performers are the biggest losers in the online marketplace with the grey-zone business models that are being used today, in this case it is easy to take a quick look at the rights that are being exploited in the streaming services, a service where the performers do not receives any performance remuneration. Cause which legal system do we really use online, when the owners of the biggest catalogue are American, and the biggest market (streaming) and DSPs is in Europe? It can be viewed as if the American law, a law that have not adhered to the Rome convention, which is so crucial for performers rights, is the system that are being used in the streaming market. This is very unfortunate for the performers, and very lucrative for the traditional intermediaries. But how long can they hold on to this strategy, which clearly cheats the performers? I am certain that if the situation was the other way around, and the authors/composers were in the losing end of this, it would be a full on copyright war.

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#### 4. New intermediaries (MSPs, DSPs, ISPs)

Then we have the new intermediaries, the Music service providers (MSPs), the Digital service providers (DSPs) and the Internet service providers (ISPs). These are the companies that does not have anything to do with the traditional music industry, but which are the backbone of the digital music industry. In this group we have Apple, Spotify, Aspiro, Telenor, Google and so on. These companies primarily have two things in common, the digital nature of their existence and they're need for content.

There are also a competition situation between the ISPs and TELCOS on roaming tariffs, and the fact that services like Google are setting up their own infrastructure. These are developments that we have not seen the end of.

In this discussion I will primarily turn the focus towards the DSPs and MSPs, as the interest points and core business areas of the ISPs is not the same as for the DSPs and MSPs. We have to outline the big difference between those who provide Internet and those who provide content to the Internet.

It has been debated that the big (often) American companies like Apple and Google together the big (often) American publishers, has been some of the greatest forces behind the EUs strategies in cross border licensing in Europe. It can also be discussed that the EU must feel somewhat embarrassed that the internal market inside the Union is so fragmented on the case of the online music market. One can also speculate that the big music service providers and digital service providers could enjoy a greater freedom and room for greater profits if the national CMOs had less influence in the European market, and with increasingly bigger data capacities needed, the excuse the EU needs to push the Internet service providers to extensively invest more heavily in the internet infrastructure could be fulfilled. Cause that is what this really is about isn't it?

It could also be discussed that this was the EUs goal from the start, with the 2001 harmonization of certain aspects of copyright and related rights in the information

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society directive that the copyright laws were to be adapted to respond to the new economic realities. In other words, adapted to greater fit the needs for the big international Internet companies? Cause the international work on copyright isn't really to strength it these days is it? Well, at least these are questions that can be raised.

It can be discussed if the European Licensing Passport model would be the most beneficial solution for the new intermediaries, and it can seem like this is the direction they want the European market to take. It can also be argued that this is another way of trying to control the strong CMO traditions in this market, by imposing strong regulations on them, so that the foreign companies with no regulation at all can operate as free as possible across borders in the European market.

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## 6. Conclusion

As I have shown with the developments of the Berne Convention over the decades, new platforms for communication always means challenges for copyright and its institutions. But the Berne Convention has re-established itself every time, although with considerable delay. In view of this the online copyright challenges will probably be more strongly linked to the Berne and Rome Convention at some point, but it may take some years.

Monetization and licensing of music in the online area remains an unresolved issue, although we might have seen the first attempts. The difficulty is the dichotomy between a “global” unregulated Internet and national markets and law. These forces are pulling in opposite directions and are fundamentally contradictory. In the field of copyright, the national laws differ from one country to another, although international treaties, conventions or agreements bring some degree of harmonisation. The idea of Internet freedom is very strong and surprisingly rooted in the public opinion, online development is seen as transparent and democratic, as in fact these very ideas seem to be at the heart of the connectedness and participation that bring so much enjoyment to us all. The Internet seems borderless by nature in the public perception and this misconception is very useful for drivers of the online market. It is a paradox that proponents of Internet freedom actually are able to monetize their part of the business through advertising and click based models, as in fact the Internet is very little borderless in its pure physical framework. But how to monetize and bring “control” for the sale of music into this environment structured with licensing solutions that encourage all the different stakeholders?

By carefully mapping out the framework of international copyright, I have found that the rights are theoretically very strong, also in the case of copyright protected material used in the online world. But the enforcement process is of a much greater challenge than it is in the offline world, and also harder to argue for in light of the above. But perhaps by simplifying and re-organizing the licensing situation for online

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uses of copyrighted material, one could solve many of the problems we face with copyright enforcement and prevent large-scale copyright infringement.

I would argue that international registers with national solutions combined with cross border licensing agreements between the local CMOs could be an optimal solution to solve the cross border licensing problems on the online market. Well aware that other solutions could be more beneficial for the different stakeholders as individual interested parties, I have tried to approach this conclusion with a big perspective, concluding on a solution that could be beneficial for the online music market as a whole. The real question is whether an international registry is a realistic option, as it has to include an extremely comprehensive collection of different internationally acknowledged registries that are synchronized and communicate in a successful manner. Small discrepancies in the system or the lack of just a few single works would make the registry irrelevant for the users. This shows how vulnerable this solution could turn out to be. Another precondition is that the music industry as a whole cooperate, this may well turn out to be difficult within an industry where it is no tradition for working together. I have taken these challenges into consideration, and still recommend this solution because I believe the potential positive outcome would be of such significance and could help to solve the monetization and licensing issues we face in the online music market.

Finally, I will conclude by directing the discussion towards fundamental questions that need to be raised, should we be able to create a healthy online market for the music industry in the future. Information and transparency are the key words. The biggest “online companies” like Google, Facebook, Apple and a handful of others, have information as their core business model. With the information about consumers and their behaviour online, they facilitate market strategies for their costumers, one of the big costumers being the music industry itself. The music industry has become dependent on these information-based services, and at the same time the new intermediaries are dependent on the catalogue of music. Whether anything can change this balance of power, remains to be seen.

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The absurdity is that the nature of the online market should be more transparent than the offline market, but the music industry is in fact more disempowered in the online market than what was the case in the offline. The information about usage from third parties has to be purchased and collected outside of the music industry. I do not think the days are numbered for the traditional intermediaries, but they should realize that they have to approach the digital age with a long-term perspective. Solid, fair and sustainable cross-border licensing models that include all repertoires and all rights have to be built and maintained to nourish further economic growth for the online market place. For that to happen it would help if the big online intermediaries were imposed with the same strict rules of transparency that the EU wish to impose on the CMOs. The monetization and copyright utilization in the online music market does not benefit from the fact that a handful of very powerful companies have monopoly on the information flow without any forms of regulation or transparency.

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