



Online music rights' withdrawal and collective management: potential changes in music licensing



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Music rights' withdrawals: EU & US perspectives

- **Withdrawals:**
 - Licensing and administration of certain rights entailed in copyright separately while keeping other rights in the collective management organisation (CMO)
- EU and US: Radically different copyright management and licensing regimes BUT have been influencing each other
- Changes in the European multi-territorial online music licensing have brought it closer to American licensing – especially different licensing regimes for mechanical and public performance rights on multi-territorial level
- US: recent discussion about a possible modification of Consent Decrees shows that some stakeholders would prefer „*European approach to withdrawals*“

The GEMA II case (1971 & 1972)

- The possibility to withdraw rights has been established by the EU Commission GEMA I and GEMA II cases
- Not allowing partial withdrawal of rights was an abuse of dominant position (indispensability test)
- Members of GEMA can mandate GEMA with administration and licensing of rights for chosen categories of rights (based on forms of utilisation) and for chosen territory
- However, withdrawals of separate works of a rightholder is not possible – either all works or no works but based on different form of utilisation -> **economically divisible forms of exploitation of copyright**
- Categories of rights have to be defined by a CMO -> **Public performance right & reproduction rights** defined as separate rights -> GEMA categories became examples for other CMOs

Online era – *Daft Punk case (2002)*

- **Daft Punk members** wished to manage their rights for **online exploitation** individually
- French CMO SACEM refused membership if authors did not mandate CMO with administration of all rights

SACEM's view: protection from unreasonable demands of the record industry and cherry-picking of the most valuable rights

EU Commission:

- Technical progress enables authors to manage certain types of rights *individually*
- Individual management reinforces moral right
- The fact that only a few CMOs imposed limits of this kind was a proof that such measures were not indispensable
- Suggestion:
 - Change of rules on withdrawing rights before digital technologies & GEMA categories should be revisited (because authors would need to withdraw only part of utilisation rights)

Online era – *Recommendation 2005*

- Narrow focus on online rights – right to withdraw online rights

Withdraw online rights -> mandate *a CMO (!)* of their choice

Individual rights' management -> only a brief reference

Art. 5: multi-territorial management of online rights can be transferred to another *collective rights manager*

- Emphasis that “withdrawn online rights are also withdrawn from RRAs“

- this was missing in *GEMA II*

- RHs are allowed to further split their **online rights** -> determine online rights, withdraw **any of** online rights



Recommendation 2005 - consequences



SOLAR
music



AMRA



aresa

- New licensing entities for Anglo-American mechanical rights
- Withdrawals rather rare -> mostly major publishers
- Establishment of mechanical licensing entities -> no withdrawal *per se*
- For major publishers – “best of both worlds“



CRM Directive 2005



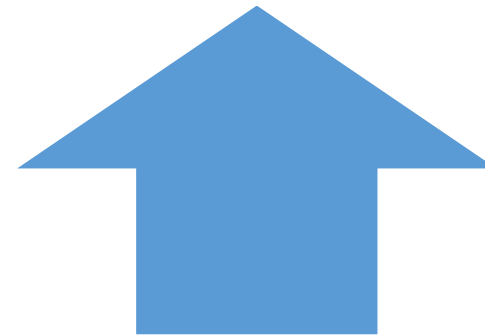
broad right of withdrawal making Rec 2005 binding

Art 5(2) all categories of rights (not only online rights), emphasis on individual lic + IMEs



Re-aggregation measures:

- Only voluntary
- Passport entity
- Tag on + must carry



ARMONIA ONLINE

mint

SOUNDRREEF ROYALTIES MADE EASY
ICE



Categories of rights in the CRM Dir

Categories of rights

- Categories of rights based on exploitation (usage) + CttP + reproduction
- Cat. of rights determined on a national level -> CMO GA or statute
- ? Can these rights be re-assigned to existing CMOs , if they do not define such a category of rights -> Art. 46 “a mandate to administer rights is limited to categories of rights a mandated CMO represents itself” + Art. 30 (MT online music)



Principles connected with withdrawals in EU law

High level of protection

- Principle reoccurring in EU copyright law – e. g. also in the InfoSoc Dir
- CRM Dir. Recitals 1 and 27-> finds its strongest expression in the rightholders' freedom to manage rights individually

Rightholders' freedom of choice <-> ability of a CMO to manage rights effectively

- Categories of rights have to be determined based on this principle
- RHs' freedom of choice prevailing – burdensome for users -> prohibitive transaction costs

Defragmentation on EU national level

Germany

- *My Video* decision
 - Music user obtained a licence only from GEMA (but not CELAS (ex SOLAR))
 - Usability of a licence

France

- SACEM Statutes, Art. 34
 - Withdrawal limited to one or more usage categories specified in the list
- Art. 34, section 9:
“mechanical reproduction *and* public performance right for multi-territory exploitation of works within the framework of interactive services“



US perspective on withdrawals

Pandora v BMI:

“US Copyright Law does not allow for splitting of public performance right” + refusal to deal

Pandora v ASCAP:

„Discrimination of licensees“ – any music user requiring a public performance right should be able to obtain it from ASCAP, classes of potential licensees

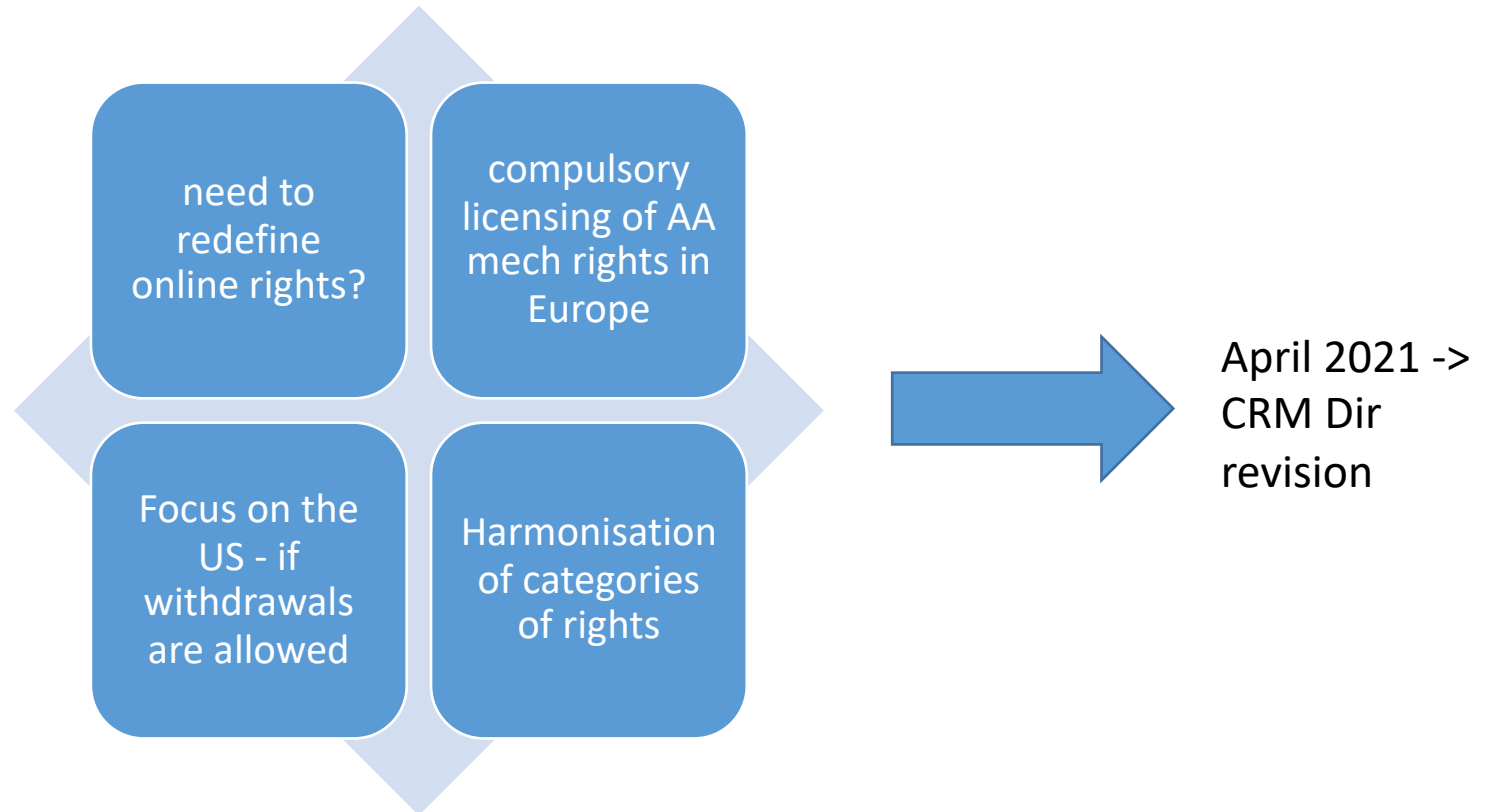
Statement on Closing of Consent Decree Review:

„partial withdrawal not allowed – modification of Consent Decrees would be required“

US PROs -> only public performance rights (administration of mech forbidden by ASCAP CD), however, aggregation of mech & perf allowed for SESAC and GMR



Future relevance of withdrawals





Thank you!



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