Artist to
Business to Business
to Consumer
Audio Branding System

www.abcdj.eu

D7.2 Analysis of European IP Laws for Audio Branding Context

Project Reference	688122 — ABC_DJ — H2020-ICT-2015
Deliverable/WP/Tasks	D7.2 /WP7/T7.2
Delivery Date	31/12/2016
Main Author(s)	Lucía Reguera, LMONK, lucia@lovemonk.tv Noemí Planas, LMONK, iralalunaslu@gmail.com
Co-Author(s)	Bruno Muñoz, LMONK, bruno@lovemonk.tv
Quality Assurance	Alessandro Canepa, PIAC, alessandro.canepa@piacenza173.it Martin Herzog, TUB, herzog@tu-berlin.de
Filename	<D7.2_ABC_DJ_Intellectual_Property_Laws.v1.3.pdf>
Publication Level	PU=Public

ABC_DJ - Artist-to-Business-to-Business-to-Consumer Audio Branding System
contact: www.abcdj.eu
email: info@abcdj.eu

Project Information

Full project title	ABC_DJ — Artist-to-Business-to-Business-to-Consumer Audio Branding System
Project Coordinator	Stefan Weinzierl / TU Berlin
Project ID	688122 — ABC DJ — H2020-ICT-2015

Acknowledgements This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 688122.

Table of Contents

History

Version	Name	Date	Remark
V0.1	Muñoz, Planas, Reguera	2016-02-01	Definition of contents
V0.2	Muñoz, Planas, Reguera	2016-06-26	Refinement of contents
V0.3	Muñoz, Planas, Reguera	2016-07-14	Final version of contents
V0.4	Planas, Reguera	2016-10-20	First version of report
V0.5	Muñoz	2016-12-15	Final version of report for proofreading
V0.6	Schönrock	2016-12-26	Proofreading 1 executed
V0.7	Planas	2016-12-30	Compilation of final report
V1.0	Wages	2016-12-31	Final version submitted to EC
V1.1	Wages	2017-02-26	Document title changed from "Analysis of Intellectual Property Laws in Europe" to "Analysis of European IP Laws for Audio Branding Context" for clarification reasons. Minor layout corrections (track changes).
V1.2	Wages	2017-03-20	Name correction as requested by the EC's department in charge of copyright policy and legislation.
V1.3	Planas, Reguera	2017-04-24	Concrete specifications based on recommendations by the EC copyright unit.

Glossary

Acronym/Abbreviation	Full Name/Description
ABC_DJ	Artist-to-Business-to-Business-to-Consumer audio branding system
CC	Creative Commons
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
DAO	Decentralised Autonomous Organisation
DSM	Digital Single Market
IP	Intellectual Property
WIPO	World Intellectual Property Organisation

Executive Summary

This document is the first of two dealing with the legal regulations and the management of the Intellectual Property (IP) rights involved in audio branding processes and is complemented with document D7.1.

After conducting a thorough search of bibliography both online and in specialised libraries, and holding informal meetings with the Commission's department in charge of copyright policy and legislation, and copyright expert Silke von Lewinski, amongst others, we realised that there are no reports or compendia dealing with European IP laws from the point of view of audio branding.

Thus, we had to start from scratch and carry out a documentation work in which we analysed the existing laws, bibliography and research on general copyright law, and apply it to the field of audio branding.

Gathered information and conclusions are transferred into recommendations that have to be taken into account for novel and current audio branding services and business models.

The current document exclusively deals with legislation and case law, and only covers the general overview of collective management. Details on how Collective Management Organizations collect tariffs, identify owners and distribute the revenues originated by the usage of works in audio branding processes work is part of D7.1.

1. Introduction

In order to offer a legal analysis of audio branding, we need to examine several questions: the type of rights generated by the different production processes involved; the holders of according rights; who is in charge of managing them; and, finally, the laws regulating all of the above, both on local and European level, and the practical application thereof.

Given the lack of legal literature on the subject matter at hand, as no study exists analysing audio branding from a legal perspective, we've had to conduct our own investigation, obtaining documentation from several different sources, in order to produce this report. A detailed list of these sources can be found under References.

Before we start explaining the rights generated during the audio branding processes, we would like to summarise what they consist of, and their workflow. Audio branding is the strategic use of sonic elements to develop and manage companies' corporate identity, and increase brands' value. We can discern several categories of audio branding, but the one we will be covering in this report is background music, which refers to the sounds meant to be listened to passively in commercial establishments (in-store music), audio-visual media (synchronisation) as well as electronic media (background music on websites and blogs).

For all those different uses, we are talking about recorded music (as opposed to live music), which can be either created specifically for the client or pre-existing commercial music. In both cases we are referring to what, from a legal point of view, is known as a phonogram or sound recording, meaning the aural fixation (recording) of a musical work or other sounds. The phonogram comprises a part of composition or authorship of the musical work, and a part of interpretation or execution, the respective owners of which will be explained in detail in Chapter 2.

In the case of in-store music, the music provider supplies the sales point with a list of songs (sound recordings or phonograms) to be played through its sound system, either in an analogue format (via a storing device) or in a digital format (through real-time online streaming). With synchronisations, the music supervisor or music searcher supplies the audiovisual producer with a list of songs to be included with an audiovisual work (film, series, advertisement) and subsequently broadcast in cinemas, on television or online. With background music for web pages, the provider or supervisor delivers a list of songs to be played during the user's visit to a website. All these different uses (in-store music, broadcast in films/television/online) generate what is known as rights of communication to the public (performance rights), in their different forms.

For in-store music and background music for websites, a repository or store for the songs needs to be created prior to their transmission. This generates what is known as mechanical rights. In the case of synchronisations, the inclusion of a musical work in an audiovisual one leads to what is known as first fixation right. A detailed description of these rights and their implications will be given as well in Chapter 2.

In general, management of all these rights is carried out jointly rather than individually, through what is known as Collective Management Organisations (CMOs). These organisations collect, on behalf of their members, the rights holders, the fees accumulated from the use of their works. Therefore, the CMOs invoice the different agents involved in background music, provided that its use generates a right. For example, both the background music service provider and the commercial space where the work is transmitted in have to pay the corresponding fees to the CMOs, the former because of the

mechanical rights, and the latter because of the performance right. The collective management of the rights implied in audio branding will be covered in D7.1.

All the aforementioned rights, as well as their holders and the way they are managed, are regulated by Intellectual Property (IP) laws. In Europe, there are as many laws as there are countries, as well as directives that partly harmonise all of them, albeit only partially. There is also a series of international treaties about copyright which the different countries can subscribe to voluntarily. These laws and treaties, and their implementation mechanisms, will be explained in detail in Chapter 3.

There are alternative ways to manage an author's right upon their work. In some cases, the authors decide to renounce the copyright model and choose to use the Creative Commons or Copyleft models instead. In Chapter 3, those models and their legal implications will be explained, as well as their impact on the background music processes.

Whenever there is a copyright infraction or any discrepancy regarding the interpretation of copyright laws, the issue needs to be settled in court. In Chapter 4, we will outline sentences dictated by both the Court of Justice of the European Union (CJEU) and the most relevant courts in the different Member States that refer or are of interest to audio branding. The majority of case law covers the use of background music in semi-private venues, such as consulting rooms. We will also discuss several rulings regarding the use of 'rights-free' works.

The new technologies are already part of the audio branding processes. We increasingly see how traditional analogue systems of musical supply to clients are replaced with streaming. But more new advances can happen. In recent times, there is much talk about the use of blockchain in music usage monitoring and copyright payment. In Chapter 5, we will summarise what this system consists of, and the possible impact on the background music processes. We will also analyse the most recent modifications regarding copyright legislation as proposed by the European Commission under the Digital Single Market initiative, as well as other future trends.

Finally, after analysing all those subjects, we will offer our recommendations and possible improvements regarding the existing copyright laws, and their practical application, so as to improve the management of the audio branding processes in all their dimensions, and make them more efficient.

2. Rights and Management

Nowadays it is very difficult to find a shop, bar, restaurant, shopping centre, or waiting room with no background music. But making that possible involves many different elements, ranging from right holders and different types of rights to contracts, transfers and so forth, having to be aligned and agreed upon, without which we could not enjoy the music that accompanies us during many of our daily activities.

The aim of this chapter is to take a closer look at those elements in order to get a clear idea of the legal aspects that have to be taken into account when planning an audio branding strategy.

2.1 Right Holders

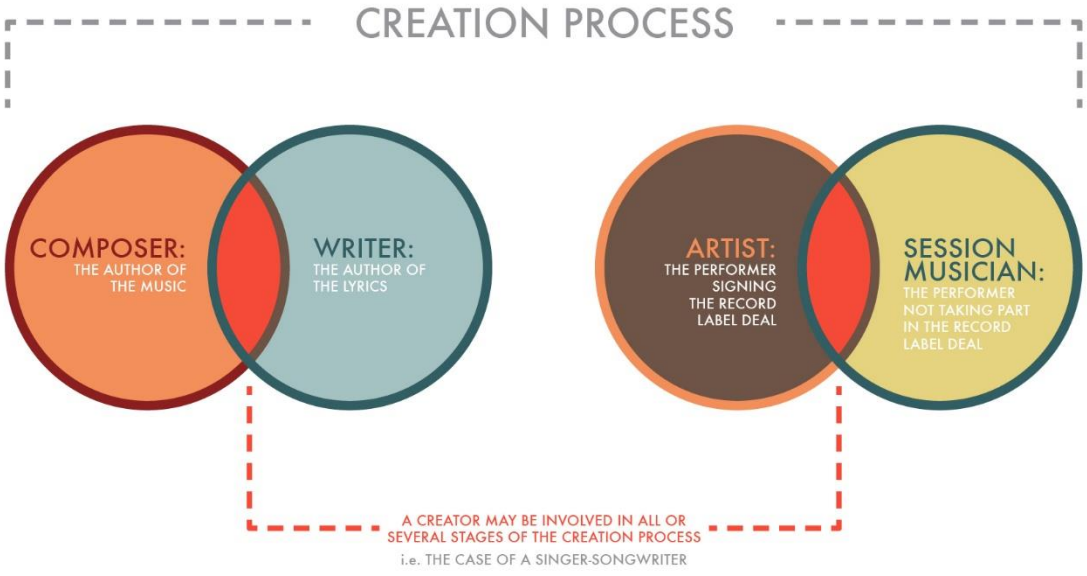
When we talk about IP right holders, we find a very wide range of figures related to different kinds of works. For example, when we think of a book, a photograph or a film, the writer, the photographer, the director, actors, the scriptwriter et cetera immediately come to mind. Given the nature of the task at hand, we will focus on the music field exclusively.

As we already explained in the Introduction, the audio branding processes use recorded songs that, in legal terms, are called phonograms or sound recordings: any exclusively aural fixation of the execution of a musical work or other sounds.

In order for a phonogram to exist, three requirements need to be met:

- There has to be a previous musical work, or, alternatively, sounds.
- There has to be a performance of the musical work or sounds by someone.
- There has to be an exclusively aural fixation or recording of that performance.

The ownership of any of these parts belongs to three fundamental figures: the author and, if applicable, their publisher; the artist or performer/interpreter; and the phonogram producer.



2.1.1 Authors (and Publishers)

The author is the person who creates the musical work, in such a way that without them, the work would not exist. In music, there are two types of authors: the composer or creator of the sounds, and the lyricist or song text writer, in the case that they are non-instrumental. In all European and international legislation, both are equally recognised and protected under the same definition of authorship, and both have the same rights.

The authors can be a single or several persons, i.e. a song can be composed, and its lyrics can be written by one or several different persons who share ownership of the work in the percentages corresponding to the contribution of each individual to the work. IP laws usually do not reflect the minimum and maximum share each individual can hold, but that is usually agreed upon in the rules of registration of the works, for example with the collecting societies.

The author can manage the rights granted to them by the law (which we will explain later in this document) themselves, but that would imply an amount of time and resources the author might not have at their disposal. There is one figure especially important to the author, as it can improve commercial exploitation of their work and warrant the correct administration and protection thereof worldwide: the music publisher. The music publisher's job is to promote, manage, distribute, protect and commercially exploit the musical work created by the author.

In order for the publisher to carry out these tasks, a signed contract with the author in which the latter grants the former the exploitation rights, is essential. In some European legislations, such as in Spain and France, the conditions such a contract has to meet are regulated, like, for example, the maximum percentage of rights the author can grant the publisher (generally 50%).

2.1.2 Performers

If there is an author and a work created by the author, there needs to be someone to execute said work: the artist or performer.

At the 1961 Rome Convention, the performing artist was defined in article 3 as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works”.

The artist and the author are often the same person. However, there are significant differences between the two figures. The author is the copyright holder, but the artist belongs to another group of right holders within the realm of copyright. The rights they hold are known as neighbouring or related rights, and their extension and authority are not as broad as those of copyright.

The artist is the holder of the so-called paternity right, i.e. the right to claim to be identified as the performer of their performances, and the right of integrity, i.e. the right to object to any distortion, mutilation or other modification of their performances, as established in article 5 of the WIPO Performances and Phonograms Treaty (WPPT).

The artist usually signs a contract with the phonogram producer, a record contract, in which the former grants the latter the right to exploit their work, which in practice means distribution, mechanical and performance rights, in exchange for a compensation. This contract, as well as the publishing contract, will be explained in paragraph 2.2.2.1 of this document.

2.1.3 Phonogram Producer

A phonogram producer is the physical person or legal entity under whose initiative and responsibility the first fixation of the musical work is made. This person could even be the author who created the work, or the artist who performed it. Among the tasks the phonogram producer has to execute, after signing a record contract with the artist, are recording, manufacturing, marketing, and distributing the work.

The phonogram producer will be the one entitled to grant licenses for the use of the sound recordings to a background or in-store music provider, both on behalf of himself and of the artist, either directly or via CMOs.

2.2 Types of Rights

2.2.1 Moral Rights

Moral rights acknowledge the condition of author or artist and the right to control the integrity of their work. In essence they are rights that allow their holder to take certain measures in order to preserve the personal bond they have with the work.

While the phonogram producer also belongs to the group of neighbouring right holders, there is a big difference between an artist and a producer, as the latter cannot claim any moral rights.

It is important to take these rights into account. In the case that an author does not wish to link their music to a brand, because they feel goes against their beliefs, ethics and so on, and even though they have transferred the exploitation rights to a publisher, thus authorising its use, the author's decision and will have to be respected at all times.

2.2.2 Patrimonial Rights

This second group of rights allow the right holder to receive a compensation for the use or exploitation of their work or performance.

2.2.2.1 Exclusive Rights

Exclusive rights grant the holder thereof control over their work, allowing them to authorise or prohibit exploitation acts by the user, and obtaining a retribution for the use of the work or performance.

In most EU countries, the author of a work can prohibit or authorise the following:

- Reproduction of the work (making copies);
- Distribution of said copies;
- Public performance (music being played on a sound system in bars, clubs, restaurants, venues, shops, etc.);
- Broadcast through radio or public communication through other media (distribution of a signal via wired or wireless media that can be received by individuals who have the necessary equipment to decode the signal);
- Translation of the work to other languages;
- Adaptation of the work.

Although European and international regulation of this type of rights does exist, each national legislation can establish their own peculiarities, such as limitations to the rights, which, along with other special characteristics, will be explained in point 3.3 of this document.

Regarding artists and producers, several treaties and directives that will be presented in Chapter 3 grant them certain rights, which can be summarised as follows:

- Right of reproduction. The right to authorise direct or indirect reproduction of the sound recording through any procedure or in any form.
- Right of distribution. The right to authorise the public distribution of the original piece or copies of the sound recording through sale or other property transferences.
- Right of rental. The right to authorise commercial rental to the public of the originals or copies of the sound recording, subjected to national legislation of the contracting parties.
- Right of making available to the public. The right to authorise public communication, by wire or wireless means, of any performance or execution recorded on a sound recording, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

The owners of exclusive rights can transfer them to third parties, as is the case with music publishers, who, via a publishing contract with the author of the work, acquire the original rights from the author in exchange for financial compensation. Idem for artists and producers with the record contract.

Regarding the duration of the rights, in the case of copyright it is 70 years starting from the author's demise. In the case of artists and phonogram producers, the duration is 70 years from the recording date or from the first legal publication, if it takes place within the 70 years after the recording. However, it must be taken into account that some legislations, such as in Spain, established a duration of 80 years, a term that will stay in force for the works that fall under the old legislation. Therefore, before assuming that a work has fallen into the public domain, the year of the author's demise and the publication date should be

verified, and the different legislations checked for the duration in each territory, in case it varies.

It is important and, to say the least, interesting for ABC_DJ to mention a category within the reproduction right: synchronisation of a musical work in another work.

The idea of synchronising is to bring together in one expressive resource, normally an audiovisual work, sound recordings with, usually moving, images. Therefore, in its fixation, both recordings have to interpenetrate a take on a meaning, harmonise, collaborate.

The musical work to be synchronised can be an existing piece or one created bespoken to be incorporated in another audiovisual work or recording, giving way to a new work.

With the synchronisation, a use of the work is carried out, which comes with a remuneration or payment that will be done just once – in this case the payment would be for the inclusion or first fixation of the work in a new audiovisual piece, whether that be a commercial, a film, a documentary or a play. However, afterwards, the work will be publicly communicated, which gives way to successive payments, depending on the duration of the piece, the number of times the communication takes place, in which countries, etc.

2.2.2.2 Remuneration Rights

Remuneration rights, unlike exclusive rights, do not allow the holder to authorise or forbid the user to carry out the acts of exploitation they desire, but they do force the user to pay a certain amount as compensation for the use.

There has been a gradual development through several international and European legal texts until its realisation in the different national laws, since the 1961 Rome Convention, established that a single equitable remuneration should be paid for transmitting phonograms through radio broadcast or any other form of public communication.

For a better understanding of this right, we have to interpret it as a compensation for the use of the sound recording. This way, every venue or store has to pay a remuneration to artists and phonogram producers every time a song is played in their establishment.

In most countries, this remuneration is determined by mutual agreement between collecting societies and users. Some countries, such as France, Poland and the United Kingdom, establish an administrative organ if an agreement cannot be reached. In Croatia and Germany, it is the collecting societies who decide on the fees, and users have the possibility to challenge them. France has included a direct reference to the revenues deriving from the exploitation in its legislation for the determination of the equitable remuneration. Belgium has detailed fees through its royal decrees. In the legislations of Belgium, Hungary, Greece, France, the Netherlands, Portugal and Slovenia it is stipulated that both artists and phonogram producers are allowed to receive an equally divided remuneration.

As we see, in spite of the fact that these rights is included in national legislations, there are numerous differences between them, partly because not all countries have fully implemented Directive 2006/115, and because the Directive itself establishes a leeway for the different countries, such as with the concept of “equitable”. However, the CJEU has given different criteria to different countries to determine this remuneration: there has to be a balance between the interests of artists and phonogram producers in receiving the remuneration for a sound recording in particular, and the interests of the third parties who communicate the sound recording; the commercial use given to the sound recording has to be taken into account.

In document 7.1 we take a closer look at the fees of the different European collecting societies; who collects what, when and how; the distribution of the fees, etc., answering many possible questions raised upon reading this report.

2.3 Individual vs. Collective Management

There are certain kinds of use, mainly those linked to remuneration rights, that right holders thereof find very difficult, if not impossible, to manage individually.

It is impossible for right holders to contact and monitor every TV channel and radio station, or visit each and every establishment where their sound recording is or will be played in order to negotiate the necessary authorisations and the remuneration they should perceive.

That is where the CMOs come in, which perform the task of exercising copyrights and neighbouring rights in the name of the right holders, representing them and protecting their interests.

All copyright and neighbouring right holders in every field of IP can be members of a collecting society: authors, publishers, composers, writers, musicians, performing artists, and phonogram producers.

When a right holder becomes a member of a collecting society, they should provide information about their personal data and their protected work or performance. That way, the information becomes part of the collecting society's national or local repertoire (special mention should be made of the international repertoire, which is managed by CMOs all over the world). That way, these entities have all the data necessary to locate the use of the works and performances and can estimate the retributions or remunerations that should be paid to the right holders.

In the field of music, the rights managed by collecting societies are the following:

- The right of public performance, i.e. the music performed in bars, restaurants, clubs and other establishments and public spaces.
- The right of broadcast, meaning live and recorded performances broadcast on radio and television.
- The right of mechanical reproduction of the music works, i.e. the reproduction of the work in any recorded form.
- The right of performing artists and phonogram producers to receive remuneration for the broadcast or public communication of sound recordings.

We can generally discern at least one collecting society in charge of managing copyrights in each country, another one for the management of artists' rights, one for phonogram producers and, in some countries, entities that cover mechanical reproduction rights exclusively.

The CMOs mainly grant licenses (meaning both licenses for exclusive rights and contracts that establish the rights to remuneration), negotiate fees with users, collect those fees, and distribute the money collected among the right holders.

With regards to the granting of licenses, the collecting societies use so-called blanket licenses in order to allow the use of music from their entire catalogue, thus avoiding the cumbersome situation of having to use individual licenses.

There are also “coalitions” between different CMOs that offer centralised services with the objective to faster provide authorisations. This kind of coalitions are called one-stop shops. In practice, there is still a lot of work to be done.

A controversial issue is the fact that in some legislations, such as in Spain, collective management of remuneration rights is mandatory, meaning that the CMOs are entitled to collect the fees that correspond to all of the right holders, whether they are members of those societies or not.

It is important to stress that the fees of those remunerations are agreed upon by the collective societies and the users, under the condition that they have to be in accordance with the principle of equity. This issue has raised some serious problems that have been taken into court, in order for the judges to decide whether the collective societies' fees were equitable. In section 4 we comment on some of the most important CJEU rulings regarding this matter.

Document 7.1 discusses in detail the practical consequences of this obligatory nature, and tries to clear up what happens with the collected fees corresponding to the non-members of the collecting societies, what the fees are in each country, how they are calculated, etc.

2.4 Creative Commons and Copyleft

The past few decades have seen the appearance of the works of the Free Software Foundation (FSF) and Richard Stallman, creator in 1985 of the General Public License (GPL), meant to distribute computer software programs “permission-free” under one sole condition: there shall be no obstacles in the circulation of the modified programs in virtue of a GPL.

Inspired by the aforementioned works, the Creative Commons organisation emerges in 2001, founded by Lawrence Lessig in California. CC offers a total of six different licenses to right holders, which they can use to give permission to the general public to use and share the creative work of the author under the terms and conditions they choose themselves.

The author who decides to use any of the standardised CC licenses should be well informed and take full responsibility, as the organism is not offering any kind of legal advice to the author, nor is it responsible for the application of the license.

Regarding the licenses' form, each one is described in three different formats.

First of all, there's the “legal code”, which is the actual license, with various preambles and articles. Since this is a purely legal document using a type of language the average user is not accustomed to reading, it could lead to erroneous interpretations and applications.

That is why CC decided to design a set of simple, easy-to-read and easy-to-understand licenses with symbols and straightforward definitions. This second form of license, although it is not a license in itself but rather a practical reference to understand the “legal code”, is called “Commons deed”.

License	Description
 Attribution (by)	All CC licenses require that others who use your work in any way must give you credit the way you request, but not in a way that suggests you endorse them or their use. If they want to use your work without giving you credit or for endorsement purposes, they must get your permission first.
 ShareAlike (sa)	You let others copy, distribute, display, perform, and modify your work, as long as they distribute any modified work on the same terms. If they want to distribute modified works under other terms, they must get your permission first.
 NonCommercial (nc)	You let others copy, distribute, display, perform, and (unless you have chosen NoDerivatives) modify and use your work for any purpose other than commercially unless they get your permission first.
 NoDerivatives (nd)	You let others copy, distribute, display and perform only original copies of your work. If they want to modify your work, they must get your permission first.

*Source: https://creativecommons.org

The third form or format is called “Digital code”. It is a description of the license that can be read by computer programs such as search engines. That way, Creative Commons developed a metadata system, CCREL ("CreativeCommons Rights Expression Language"), through which it is possible to annotate works with a license facilitating its functionality and the possibility to do a search per license type.

The general conditions of the transfer through these licenses are their perpetuity, non-exclusivity, cost-free status, and validity for everybody.

The idea is to expand the possibilities between “all use prohibited” and “all use permitted”, introducing the intermediate possibilities that can emerge. For example, an author can create a work and wish to have it distributed as much as possible. They can expressly permit the work to be copied and redistributed by anyone, but maintaining their authorship at all times. Or, they can allow for the work to be copied, but not redistributed.

The main questions an author has to ask themselves when choosing a CC license are if they want to permit a commercial use of their work, or if they want to allow derived works to be created from it.

Creative Commons licenses do not seek to eliminate copyright, rather they depend on it. While they are often categorised as part of the Copyleft movement, CC is actually closer to copyright, as the licenses are nothing more than a way for authors to control their own work, deciding to what extent that work will be protected.

Another myth is that authors using CC licenses are not or do not wish to get paid for their work – the licenses simply provide more possibilities for creators to decide how and as what they want to be remunerated. Simply put, if we understand copyright as “all rights reserved”, Creative Commons would be “some rights reserved”.

While it is true that these licenses have many advantages, such as their user-friendliness, the author having complete control over their work, and their easy-to-understand graphic version that makes internalisation easy, in practice a few incompatibility issues and other problems arise.

In fact, on many occasions their legal validity has been challenged, even though the law has endorsed it, as there could be legal insecurity due to the multiple versions ad countries – controlling them is quite difficult, as they contain undetermined elements.

Another problem with this kind of licenses has to do with their possible modifications. In the clause "Termination", the following is stipulated:

"Licensor reserves the right to release the Work under different license terms or to stop distributing the Work at any time; provided, however that any such election will not serve to withdraw this License (or any other license that has been, or is required to be, granted under the terms of this License), and this License will continue in full force and effect"

Therefore, a modification of a license or a withdrawal of a work does not affect the conditions and uses stipulated in the initial license.

Yet another problem in terms of management, which has already been treated in court, is their incompatibility with collective management of remuneration rights by collecting societies. Bear in mind that these remuneration rights grant their holders the right to perceive a compensation for the use of their work or performance in certain cases established by law. What happens in many cases is that copyrights and neighbouring rights are confused, as well as exclusive rights and remuneration rights, and CC licenses and Copyleft, which has already led to numerous litigations.

There are background music providers licensed exclusively under CC licenses who claim not having to pay anything to any collecting society. This is false, as CC licenses apply only to authors, not to performers or phonogram producers, which means that remuneration rights corresponding to the latter two groups of right holders do have to be paid to the respective collecting societies.

3. Legislation

Copyright legislation is one of the most complex fields in law, often based on outdated decrees applied by judges who are not specialised in the field, giving way to unexpected results or unintended consequences. This complexity increases in the realm of the European Union, since there are as many jurisdictions as there are Member States.

In this chapter, we summarise, as an indication, the most relevant international legislation in Intellectual Property (IP), related to audio branding in particular. We will also give a quick overview of local legislations, focussing on those that are relevant exceptions to the common rule.

3.1 International Treaties

An international treaty is an agreement between at least two subjects of International Law and is governed by International Law, which can consist of one or several related legal instruments. Such agreements are most commonly made between nations, although in some cases they are made between nations and international organisations, such as WIPO (World Intellectual Property Organisation), UNESCO (United Nations Educational, Scientific and Cultural Organization) and ILO (International Labour Organisation). Treaties establish generally applicable rules that are legally superior to the signing countries internal laws.

Below we name the six most important treaties in force related to IP, all of which are administered by WIPO. As of today, all of them are signed by the 28 members of the European Union, except for the Rome Convention (not signed by Malta) and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, also known as the Phonograms Convention (not signed by Belgium, Ireland, Malta, Poland and Portugal).

Treaty	Summary	Countries
Berne Convention (1886) Berne Convention for the Protection of Literary and Artistic Works	Applicability Country of origin Copyright term Fair use	All
Rome Convention (1961) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations	Performers Producers of phonograms Broadcasting organizations Limitations and exceptions Duration	All except Malta
Phonograms Convention (1971) Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms	Making of duplicates Importation Distribution	All except Belgium, Ireland, Malta, Poland and Portugal

TRIPS (1994) Agreement on Trade-Related Aspects of Intellectual Property Rights	Computer programs Databases Rental right Performers and producers	All
WCT (1996) WIPO Copyright Treaty	Computer programs Databases Authors (Right of distribution, Right of rental, Right of communication to the public) Limitations and exceptions Duration	All
WPPT (1996) WIPO Performances and Phonograms Treaty	Performers and producers (Right of reproduction, Right of distribution, Right of rental, Right of making available) Live performances Moral rights Limitations and exceptions	All

3.2 Directives

The next level of legal instruments the European institutions have at their disposal to apply EU policy are the directives. A Directive is a flexible tool used mainly to harmonise national legislations. In order for it to be effective, it should be transposed to each country's internal law in the time stipulated in the Directive.

Directives are only binding on Member States regarding the results to be achieved, but they are free to choose the form and methods to apply them. That is to say, that the transposition does not have to be done literally. This is why, in spite of the intention to harmonise, there still are divergences in each country's own laws and in the interpretation thereof.

There are numerous directives in the field of IP. Below we will summarise the ones that have the biggest impact on the ABC_DJ project.

Directive	Entry into force
Database Directive Directive No. 96/9/EC of the European Parliament and of the Council, of 11 March 1996 on the legal protection of databases	January 1, 1998
E-Commerce Directive Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market	July 17, 2000
Copyright / InfoSoc Directive	June 22, 2001

Directive No. 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	
Enforcement Directive Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights	May 20, 2004
Rental Directive Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property	January 16, 2007
Computer Programs Directive Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs	May 25, 2009
Term Directive Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights	October 31, 2011
Orphan Works Directive Directive No. 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works	October 26, 2012
Collective Rights Management Directive Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market	March 20, 2014

Database Directive

This Directive introduces the definition of databases (among which are the compilation of musical works) and confers legal protection on them, whether they be analog or digital. It creates a new, exclusive and distinctive right for the producers of such databases, valid for 15 years, to protect their investment of time, money and effort, regardless of the question whether the database is in itself innovative (“non-original” databases). The Directive also harmonises the copyright laws applicable to the structure and disposition of the “original” databases' content. The rights that are introduced here are independent from any copyright over the content of the database itself, and can be controlled by different individuals.

This Directive affects the ABC_DJ project in that a database is generated that includes the selection and storage of musical works in a systematic fashion.

E-Commerce Directive

The Electronic Commerce Directive sets up an Internal Market framework for electronic commerce, in order to provide legal certainty for business and consumers alike. It establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers. In this regard, the Directive frees them from liability for "mere conduit”, or passive transmission; "caching", or temporary storage necessary for said transmission; and hosting of information for third parties. It also establishes the principle that digital service providers are only subject to the

regulations of the EU country where their registered office is, and not of the country where their servers, email addresses or mailboxes are located.

This Directive, while not directly related to IP, is relevant to an audio branding service provider that provides hosting and online transmission of musical works.

Copyright / InfoSoc Directive

This Directive adapts copyright and neighbouring right legislation, in order to reflect technological developments, and to incorporate the main international obligations deriving from copyright and neighbouring right treaties adopted within the WIPO framework in December 1996 (the WCT and WPPT) in Community legislation, as well as to harmonise certain aspects, such as exceptions and limitations to copyright.

The Directive defines the exclusive rights granted to authors and holders of the neighbouring rights we explained in Chapter 2: the right of reproduction, the right of communication to the public and the making available right, and that of authors to allow or prohibit any type of public distribution through sale or other means (the exhaustion doctrine). It also lists the exceptions Member States are allowed to apply to copyright and neighbouring rights, of which only one is obligatory: transitional or accessory copying as part of a network of legal content transmissions. Whether the other limitations are applied to national legislations is at the discretion of each territory.

Lastly, this Directive prohibits bypassing of any anti-copy protection system, as well as the distribution of tools and technology that enable said bypassing.

This Directive is one of the most important ones for audio branding service providers and clients, as it is the one that defines the applicable rights in the music field in the whole of Europe, their exceptions, and who the right holders are**.**

Enforcement Directive

The Directive requires all Member States to apply effective, dissuasive and proportionate measures and penalties against those engaged in counterfeiting and piracy.

While it is not directly related to the ABC_DJ project's modus operandi, this Directive could be relevant in case of wrongful use by an audio branding service client.

Rental Directive

This Directive harmonises the legal situation relating to rental and lending rights as well as certain neighbouring rights. It establishes the minimum rights Member States have to grant performing artists and phonogram producers (neighbouring rights), based on the regulations of the Rome Convention, such as the exclusive right to authorise radio distribution and public communication of their performances, which furthermore comes with the right to remuneration.

In spite of its name, the rental part is the least relevant to the ABC_DJ project. The part about the right to remuneration for public communication, on the other hand, is of enormous importance, seeing as it implies that clients of background music services have to pay to the artists and labels when they publicly communicate songs, either directly, or through a CMO.

Computer Programs Directive

The objective of this Directive is to harmonise Member States' legislations in relation to the protection of computer software programs, in order to create a legal environment that warrants a certain level of protection against unauthorised reproduction. It offers

computer programs protection that is similar to that of artistic works, and grants their creators rights over their programs and designs.

If any computer programs are developed as part of of the ABC_DJ project, this Directive has to be taken into account.

Term Directive

This Directive extends the term of protection for performing artists and phonogram producers from 50 to 70 years after publication or public communication of the recording, bringing it more in line with the protection for authors (70 years after their demise), and also determines the calculation of the protection term from musical compositions with lyrics in the case that the lyric writer and the songwriter are different individuals. It also contains measures to help performers, such as the "use it or lose it" clause, which allows artists to get their rights back if the producer does not market the recording during the extended period, and an additional remuneration from the phonogram producer to the artist, managed through the corresponding CMO, during the 20-year extension period.

For the ABC_DJ project, its relevance lies in the power to determine if the works it uses are protected or if they have come into the public domain.

Orphan Works Directive

This Directive sets out common rules on the digitisation and online display of so-called orphan works, which are works that are still protected by copyright but whose authors or other right holders are not known or cannot be located or contacted to obtain copyright permissions.

Its application concerns only public institutions like museums, libraries, education centres and archives.

Collective Rights Management Directive

The objective of this Directive is to make sure the right holders have a voice in the management of their rights and to guarantee a better functioning of the CMOs, as well as improving their transparency and supervision. The new rules also facilitate the concession of multi-territorial licenses of musical works for their online use.

The Directive also introduces a new definition that allows private commercial operators such as trading companies to become copyright managers as an "independent management entity", which could be of enormous relevance to the ABC_DJ project, as we will explain in Chapter 6.

3.3 National Law

3.3.1 General Overview

Each of the 28 countries of the European Union has its own Intellectual Property law, different from the others. Below we will list the current laws in each territory, with a reference to the year of its most recent version.

Country	IP Law	Version
AUSTRIA	Federal Law on Copyright in Literary and Artistic Works and Related Rights (Copyright Act) (as amended up to Federal Law Gazette (BGBl) I No. 99/2015)	2015
BELGIUM	Law of April 19, 2014, inserting Book XI 'Intellectual Property' to the Code of Economic Law, and specific provisions to the Book XI in Books I, XV and XVII of the Code	2014
BULGARIA	Law on Copyright and Neighbouring Rights (as amended in 2011)	2011
CROATIA	Copyright and Related Rights Act and Acts on Amendments to the Copyright and Related Rights Act (OG Nos. 167/2003, 79/2007, 80/2011, 141/2013 & 127/2014)	2014
CYPRUS	Copyright and Related Rights (Amendment) Act 2007	2007
CZECH REPUBLIC	Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.)	2006
DENMARK	The Consolidated Act on Copyright (Consolidate Act No. 1144 of October 23, 2014)	2014
ESTONIA	Copyright Act (as amended up to Act RT I, 29.10.2014, 4)	2014
FINLAND	Copyright Act (Act No. 404 of July 8, 1961, as amended up to April 30, 2010)	2010
FRANCE	Intellectual Property Code (consolidated version of February 23, 2015)	2015
GERMANY	Act on Copyright and Related Rights (Copyright Act, as amended up to Act of April 4, 2016)	2016
GREECE	Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4281/2014)	2014
HUNGARY	Act No. LXXVI of 1999 on Copyright (consolidated text as of January 1, 2007)	2007
IRELAND	Copyright and Related Rights Act, 2000 (No. 28 of 2000)	2000
SPAIN	Law No. 21/2014 of November 4, 2014, amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and Law No. 1/2000 of January 7, 2000, on Civil Procedure	2015
ITALY	Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighbouring Rights (as amended up to Decree-law No. 64 of April 30, 2010)	2010
LATVIA	Copyright Law (as amended up to December 31, 2014)	2014
LITHUANIA	Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999 (as amended on October 7, 2014 – by Law No. XII-1183)	2014

LUXEMBOURG	Law of April 18, 2004, amending 1) Law of April 18, 2001 on Copyright, Neighbouring Rights and the Databases, and 2) Law of July 20, 1992, amending the Patent System	2004
MALTA	Copyright Act of 2000 (Chapter 415) as amended up to Act No. VIII of 2011	2011
NETHERLANDS	Act of September 23, 1912, containing New Regulation for Copyright (Copyright Act 1912, as amended up to July 1, 2015)	2015
POLAND	Act No. 83 of February 4, 1994, on Copyright and Neighbouring Rights (as amended up to May 20, 2016)	2016
PORTUGAL	Code of Copyright and Related Rights (as last amended by Law No. 16/2008 of April 1, 2008)	2008
ROMANIA	Law No. 8 of March 14, 1996 on Copyright and Neighbouring Rights	2006
SLOVAKIA	Act No. 185/2015 Coll. on Copyright and Related Rights (as amended by Act No. 125/2016 Coll.)	2016
SLOVENIA	Copyright and Related Rights Act of 30 March 1995 as last amended on December 15, 2006	2006
SWEDEN	The Act on Copyright in Literary and Artistic Works (1960:729)	2011
UNITED KINGDOM	Copyright, Designs and Patents Act 1988	2014

As we explained previously, despite the extensive harmonisation of the European IP laws, given the relative liberty Member States enjoy to apply the guidelines established in the directives, there are still some divergences between national legislations.

For example, the legal continental European tradition and Common Law (Anglo-Saxon legislation) have different views on copyright: Great Britain and Ireland apply the “fair use” or “fair dealing” doctrine, which allows limited use of protected works without the author's permission. The rest of the European countries, on the other hand, have in their legislations a specific list of exceptions and limitations to the application of copyright, the determination of which has to come after the Berne three-step test (to allow the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably harm the legitimate interests of the author), generally for the use in broadcasting, investigation, education, etc. For example, until recently the UK did not contemplate the exception of private copying, and when it introduced it, it did so without a corresponding remuneration, unlike most of the other Member States. Portugal is the only territory that has a “fair use” policy for scientific or humanitarian objectives, but only covering out-of-commerce works.

Another of the main differences between the two legal traditions is the concept of authorship. In the UK, authorship of a work can be possessed by a legal person, while in the continental legislations the author can only be a natural person, and the works made by companies (music and audiovisual recordings and so on) come with neighbouring rights that are slightly different from copyright, which, for example, does not contemplate moral rights. Exception to this are, for instance, the Greek and Dutch legislations, where anonymous works published in name of the real author by a company, the latter would be the holder of the copyright.

In the same line, in the UK and Ireland authorship of a musical work created by an employee is automatically assigned to their employer. In most of the EU countries, the author would be the employee. There is a particular case in Finland in which, if after the demise of an author their work is used against cultural interest, the Ministry of Culture can prohibit its use. Although this clause has been used only once in history, in 1962, it is the only case in which a government can exercise copyright.

With regard to the subject that can be protected, some countries consider all sound recordings as "works", as is the case of Denmark and the UK, while the other countries do not, only granting them neighbouring rights. In the case of Denmark, its legislation even protects tones, chords and other sounds (e.g. drum rhythms), and even field recordings and recordings of daily life. Germany protects non-musical sounds only if they are made by a person.

It is not required in any EU country, following the guidelines set out in the Berne Convention, to register a work in order to give evidence to its authorship or to obtain rights protection. In some countries, such as Spain, Italy and Portugal, voluntary public copyright registers exist, both free and paid, and, even though they are not obligatory, the information stored in said registers can be binding in a lawsuit, in absence of further evidence to determine a work's authorship. In some territories, apart from these registers, there is a legal obligation to deposit copies of published works in the national libraries, as is the case with Spain and Portugal, among others.

In some countries copyrights are non-transferable, as is the case with the Czech Republic, where the author of a work is the only one who can bring a lawsuit against infractions, while in most countries the transfer of patrimonial rights to third parties via a written contract is permitted. What should and should not be in such a contract varies from territory to territory, although generally the license term and the agreed-upon remuneration for each exploitation form must be specified. The French and Belgian legislations are the most protective of the author in that respect, as the law is always interpreted in their favour. For example, Belgian law does not allow the inclusion of exploitation forms that are unknown at the time of signing, contrary to other countries. In France, authors have the right of withdrawal, even after the work has been published. In this case, the author must compensate the licensee, and the latter has priority to be able to obtain the rights again, should the author decide to publish the work again.

The above is only valid for transmission contracts between the author of a work and its exploiting parties. However, no European legislation contains any clauses that regulate the contracts between performers and phonogram producers, only certain principles guide this kind of contracts. All legislations, on the other hand, grant rights to performing artists. Many of them even give them moral rights in addition to patrimonial rights.

In spite of these particularities, there are no substantial differences in national legislations that could affect an audio branding service operating on a European level, seeing as the rights and the right holders are the same in all of the EU territory. In any case, the differences lie in their practical application, i.e. their management. Some legislations made collective management of some rights mandatory. For example, in Spain, remuneration rights of performing artists and phonogram producers for public communication and private copying must be managed through CMOs. In the Czech Republic, the right to retransmission is the only right to be managed collectively. In Czech legislation, there is another exception: there is no equitable remuneration right for public communication or broadcasting for artists and phonogram producers, but in practice the CMO Intergram administers the exclusive right to public communication for artists.

Document 7.1 explains how the licensing of works and the collective management of copyrights and neighbouring rights work, as well as the implications thereof for the ABC_DJ project.

3.3.2 European Non-EU Members

An audio branding service provider who wants to operate in Europe should also consider the countries that are not part of the EU at present, such as Switzerland, Norway, Iceland, the micro states, and some of the Balkan states (Albania, Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro, Serbia, Turkey). The first two are the most relevant, given their importance and music consumption.

Norway is not a member of the EU, but it is part of the European Economic Area (EEA) and the European Free Trade Association (EFTA), and therefore takes part in several of the EU programs, institutions and activities, and adopts about 20% of its legal acts. In the field of Intellectual Property the country has adopted some directives, such as the one about Copyright, and is a co-signer of the most important international treaties, so its laws in this field are governed by the same rules as the EU.

Switzerland is not a member of the EU nor the EEA, but is part of the EFTA. The country signed several treaties with the EU, so a large part of EU legislation also applies in its territory. Like Norway it co-signed the main international treaties, and its IP laws are similar to the other European countries.

3.3.3 Enforcement

As we already mentioned, there is no international copyright law; there are just national laws that apply within each country's borders. However, over the course of the 19th century the first international tools appeared with the aim to protect authors' works outside of the country where they were created.

In each specific case the competent jurisdiction and applicable law is determined. Example of this are the 1980 Rome Convention, the Brussels Convention the Lugano Convention, however they do not cover questions about jurisdiction and applicable law for lawsuits related to copyright. This is because of the intangible nature of copyright and the possibility to use the work at any time and place. This issue has been resolved over the course of time via the Berne Convention and the general rules about jurisdiction and applicable law. Nevertheless, with the rise of internet these problems have been growing due to, among other factors, the speed with which works are distributed online. This leaves us with a legislation that cannot with complete efficiency resolve the applicable law and relevant jurisdiction in the protection of copyrights on internet. Still, over time the CJEU has established the standard in these cases through its interpretations.

Let us first analyse which would be the applicable law in a hypothetical case of private international law.

The Berne Convention establishes the principle of national treatment and sets a conflict-of-law rule for the determination of the applicable law. Thus, in accordance with its article 5.1, each state has to warrant the same rights to foreign authors as they do to national authors.

Article 5.2 contemplates the application of the law of the Member State where protection is claimed. Over the years, the conclusion was reached that this conflict-of-law rule does not go hand in hand with *lex loci*, i.e. independent of the chosen court of justice, the applicable law can be from a foreign country. Therefore, one can claim protection for the Netherlands, in accordance with Dutch law, residing in the United States, but in practice

the jurisdiction and the applicable law usually coincide, due to the costs of translation, lawyer fees and other costs this would carry.

There is a Council Regulation that deals with jurisdiction in Civil and Commercial matters. But since it does not treat copyright in particular, we must turn to its rule of general and special jurisdiction.

The general rule grants competence to the home country or country of residence of the defendant. However, the parties can choose a different court of justice, explicitly or implicitly, if the defendant appears in the court of justice chosen by the plaintiff. And in the case, that there are related lawsuits in different courts of justice, i.e. which are about the same question, a sole court of justice can be chosen.

There are special jurisdiction rules for contracts and offences. It is up to the plaintiff to choose between general and special jurisdiction. With respect to contracts, competence lies with the courts of the country where the main obligation has been or has to be complied with. In the case of offences, it's the courts where the damage has been or will be done.

As a consequence of this special jurisdiction rule, if the offence takes place on the internet, the following courts of justice could be competent:

1. The country where the server is located;
2. The country of residence of the individual transmitting the illegal content;
3. Each and every one of the countries from where people have access to and download the work in question, i.e. all receiving countries of the work;
4. The country of residence of the author/right holder/plaintiff where the damage was caused.

The question rises if these courts of justice have jurisdiction to know all the offences committed in different countries. The answer would be that only the court of justice of the country of residence of the defendant is competent to know the case in its totality – the rest of the courts would only know about the damages caused in their territories.

It is clearly difficult for a right holder to protect their rights in international lawsuits. There are several projects to resolve these questions, parting from an international perspective. This is the only possible way to resolve conflicts arising from unauthorised use of copyright-protected material.

4. Case Law

In any field or issue related to Law, bearing in mind legislation is as important as the application and interpretation thereof by the courts.

In this chapter, we try to take a closer look at the CJEU's jurisprudence and that of some national courts about certain rights, concepts and issues that have generated a variety and variation of opinions over the years. Particularly in the last decade, with the rise of online businesses, and the emergence of Creative Commons licenses. But one topic that has caused controversy and a wide range of opinions and jurisprudence is the concept of public communication and what is understood as such.

We will now point out some rulings about the aforementioned subjects.

4.1 CJEU Judgements

Società Consortile Fonografici (SCF) vs. Marco Del Corso (15 March 2012)

In this lawsuit, the question was raised if the music playing in a dental practice waiting room constituted or not an act of public communication.

The court found that the patients of a dental practice represent a limited number of individuals, seeing as the total amount of people simultaneously present in the waiting room is very small. The court also affirmed that the individuals attending a dental practice do not do so seeking to hear music and that, if they do hear music, it is by chance, without them choosing to.

In conclusion, it is understood that these are in fact scenarios with very little financial transcendence due to the insignificant size of the group of individuals the possible communication would be meant for, and the random capture of listeners.

With this sentence, the CJEU establishes certain criteria when it comes to analyse if an act constitutes public communication:

- A broadcast to a number of people too small or insignificant, taken into account cumulatively, i.e. considering the individuals that have access to the same work simultaneously and successively, cannot be considered communication to the public.
- If the receiver of the communication is an audience caught by chance, there is no communication to the public.

The PPL vs. Ireland and Attorney General Case (15 March 2012)

The Phonographic Performance Limited (the Irish performance rights organisation) asked for a ruling to clarify whether Ireland was in violation of European law when it established a law that exempted hotels from paying remuneration for their broadcasts.

The court considered that the broadcasting of works is a supplementary service that has an impact on the hotel's category, and as a consequence on the room price. Hence there is a profit-making nature. Therefore the court reaches the conclusion that communication to the public exists.

Reha Training vs. GEMA (31 May 2016)

Lawsuit in Germany between the CMO GEMA and rehabilitation centre Reha Training, which offers post-surgery treatment to accident victims. Reha Training have television sets in their waiting rooms and exercise room, on which patients have access to the

transmissions broadcast on these devices. GEMA sued the rehabilitation centre arguing that they were communicating works from its repertoire without permission and, after claiming the proper amounts of money, did not receive any answer from the centre.

The German court remitted the question to the CJEU, with the purpose of clarifying if that act of distribution constitutes a communication to the public. In this case, the CJEU affirmed that the distribution of television broadcasts installed by the rehabilitation centre in their buildings is indeed an act of public communication.

At present, the German court has to resolve the main lawsuit.

SENA vs. NOS (6 February 2003)

Lawsuit between Dutch neighbouring rights organisation SENA and the Dutch Broadcast Foundation (NOS) about the determination of the equitable remuneration paid to performing artists and phonogram producers for the distribution of sound recordings by radio and television stations.

The court points out that equitable remuneration is an instrument to achieve a balance between the performing artists' and phonogram producers' interests on the one hand, and the interests of the user broadcasting the sound recording. That is to say that, when applying this concept of equitable remuneration, Member States have to achieve that the compensation for the distribution of a sound recording be equitable, corresponding to the signing parties of the agreement about the scope of said compensation and, in their absence, to the State.

As possible criteria to come to that equity, the court names: the amount of hours the sound recordings are transmitted; the fees established by contract with regard to performance and broadcasting rights; the fees of public radio broadcasting organisms in the neighbouring territories of the Member State in question; the audience ratings; and the amounts paid by commercial radio stations.

The SENA doctrine was later confirmed by the Lagardère ruling, where the court established the equity of the value set to the use of the work as a parameter of control.

OSA vs. Léčebné lázně Mariánské Lázně (27 February 2014)

In its ruling the CJEU responded to a prejudicial issue raised by a Czech court in the framework of a lawsuit between the Czech collective rights society OSA and a thermal spa. In this procedure, OSA claimed a financial compensation for the distribution of works from its repertoire by the spa via the TV and radio devices installed in its rooms for its patients' use.

Apart from confirming that these distributions are acts of public communication, the CJEU analysed if a Member State can allow a monopoly position in the copyrights collection market, preventing a user from that State from accessing the services offered by collecting societies from other Member States. It also resolved the question of the impossibility to invoke a Directive in a lawsuit between private persons, but that question is not relevant for the matter at hand.

Regarding the second question, the CJEU decided that the dispositions of EU law regarding the free providing of services did “not [preclude] national legislation […], which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society and thereby prevents users of such works […] from benefiting from the services provided by another collecting society established in another Member State”. However, it makes an important point as, according to guidelines of the Treaty on the Functioning of

the European Union (TFEU), in particular article 102 thereof, must be interpreted in the sense that "the fact that this first CMO imposes fees that are notably higher than those applied in other Member States and charges excessive prices with no reasonable relation to the market value of the service provided constitute evidence of abuse of a dominant position."

4.2 National Case Law

Spain

One of the first rulings that include Creative Commons licenses in Spain was by a Commercial court on 17 February 2006, dismissing a claim by the Spanish Society of Authors and Publishers (SGAE) against the proprietor of Disco Bar Metropol in the city of Badajoz. SGAE based its claim on the presumption that most of the music played is managed by the organisation, and that if music is being played, it is presumably works managed by SGAE.

The court ruled that with these licenses "the author holds some moral and financial rights over their creation, and as such they can manage them as they see fit, allowing free use or allowing it partially." The court believes that the defendant creates and accesses numerous musical works not managed by SGAE, and that the use of said works is permitted by the authors by means of CC licenses.

With this ruling it is proven that SGAE does not manage all music and that there are musical works managed by other means, such as CC licenses.

Belgium

Ruling in Belgium regarding Creative Commons licenses in 2010. In a promotional video, the organisers of a festival used a work subject to a CC license for PR purposes. Upon hearing the advertisement, the plaintiffs contacted the festival organisers in order to try to come to an agreement, which did not happen.

The defendants wanted to pay a compensation in accordance to the fees established by Belgian collecting society Sabam, approximately 1,500€. However, the plaintiffs asked for a much higher figure, 10,380€, for the breach of the CC license and the copyright infringement.

The court established that there had to be either a compensation for the uses, or a compensation for each violation of the conditions stipulated in the license. The court finally opted for the latter.

The Netherlands

Lawsuit in the Netherlands related to the validity of Creative Commons licenses. Photographer Adam Curry published photos he made on www.flickr.com using an Attribution-NonCommercial-ShareAlike Creative Commons license. A Dutch gossip magazine reproduced his photos in an article about Curry's children, without previous permission. The magazine argued that the link to the CC license was not clear, and that it was misled by the claim "This photo is public", without investigating its reach.

The Dutch court's ruling confirmed that the conditions of a CC license automatically apply to the content it licenses, and that users of the content are bound to observe these conditions, even without having explicitly accepted or known the conditions of the license.

5. Future Perspectives

5.1 Digital Single Market

When in 2014 the European Parliament (EP) and European Commission (EC) turns were renewed, new president Jean-Claude Juncker announced that one of his first priorities was the implementation of the Digital Single Market (DSM), of which the purpose is to guarantee the free circulation of goods, persons, services and capital, so that citizens and businesses in the EU can easily and equally access goods and services online whichever their nationality or place of residence, and thus create online opportunities and improve Europe's position as world leader in the digital economy.

The DSM strategy, approved on 6 May 2015, comprised of 16 initiatives, part of a roadmap terminating by the end of 2016, featuring three big blocks of work: to improve consumers' and businesses' access to digital goods and services in the whole of Europe; to create the proper conditions for digital networks and services to thrive; and to maximise the growing potential of the European digital economy. With regard to the subject matter at hand, the most relevant measure on said roadmap is that of producing legislative proposals in order to reform copyright system. Also relevant are the simplification rules for cross-border exchanges and the simplification of the VAT system in order to reduce the administrative workload of the businesses operating in several different territories.

The first batch of measures were published in December 2015, with a regulation proposal to guarantee cross-border portability and that, when a consumer subscribed to online film, music or e-book services travels into another EU country, they can access the content as if they were at home. The second batch was published in September 2016, with proposals for, among others, a new Directive regarding copyright in the DSM.

One of the main objectives of the Directive proposal is to facilitate cross-border access to content, particularly for uses for which the clearance of rights is complex, and to achieve it, measures are stipulated to simplify the procedures for the concession of licenses and settlement of rights. Article 4 introduces an exception to permit digital use of works for educational purposes. Article 7 regulates the digitalisation and supply of out-of-print works by cultural patrimony institutions. Article 10 establishes a negotiation mechanism to facilitate the availability of audiovisual works on video on-demand platforms. Article 11 introduces a new right for newspaper and magazine publishers for the online use of their publications.

Another essential point of the Directive proposal is the fair remuneration of the right holders, and in that sense it sets out measures to improve the position of the right holders to negotiate and be remunerated for the exploitation of their content by online services that store and offer access to large amounts of content uploaded by the users themselves (such as YouTube and SoundCloud, to mention some examples). Article 13 stipulates that these platforms will be required to guarantee the functioning of the agreements reached with the right holders, with measures such as effective content recognition technologies.

Lastly, in order to strengthen the negotiating power of authors and performers and guarantee their fair remuneration, the Directive proposal includes measures to improve transparency and the contractual relations between them and those who they transfer their rights to. Article 14 introduces an obligation of transparency and information reporting of the exploitation of the works by phonogram producers and publishers towards the authors and performers who have transferred their rights to them. Article 15 stipulates that the authors and performers have the right to claim an additional remuneration in the cases where they originally agreed upon compensation was disproportionately low.

The Directive proposal modifies some of the already existing directives, and the Member States have 12 months to transpose it once it has been approved. At the time of this writing the exact date the Directive will enter into force is unknown, seeing as it has to be debated first in Parliament and then ratified by the Member States.

Though none of the proposal's concrete measures directly affects the audio branding processes, and therefore the ABC_DJ project, the basic issues it deals with are relevant. Facilitating cross-border distribution of cultural content; clarifying the responsibilities of the intermediaries who provide them; and improving transparency towards creators, and their remuneration; are all objectives the project should share.

5.2 Blockchain

A blockchain is a distributed database that is an ever-growing list of records, protected against any manipulation or revision. A blockchain consists of a series of blocks that hold batches of valid transactions. Each block includes a cryptographic summary, or hash, of the previous block, connecting both. The blocks, linked like that, then form a chain. The blockchain format was invented for the bitcoin, as a solution to the problem of having a secure and at the same time widely distributed database.

Each time a new block is created it is immediately stored in all hardware containing the database. This update takes place every ten minutes. As this process takes place, the blockchain is encrypted through a set of passwords instantly generated by thousands of these computers. In order to modify a given block, we would need to have open access to thousands of computers that were involved in creating the encryption key back when the block was created. This is where the system´s security lies. A block cannot be hacked, unless one knows and can effectively access thousands of computers all over the world; hence, a centralized attack is not possible.

The design of the blockchain for cryptocurrency served as inspiration for other applications, such as contracts and organisations. A so-called smart contract is a computer protocol executed by all the nodes of a blockchain network in a decentralised way. Consequently, two or more parties could negotiate a remuneration agreement in a protocol of this kind, and said remuneration would go to the corresponding (or third) parties, in accordance with the conditions stipulated in that contract. A Decentralised Autonomous Organisation (DAO) is an organisation that runs through rules encoded as smart contracts.

The use of blockchain-based applications could be a solution to the transparency and fair remuneration of right holders in the music industry. At present a new format is in the making for the distribution of music that would not only hold the audio but also the metadata regarding a song (authors, performers, producers, publishers, etc.). That way it would be much easier to monitor the use of works, without depending on costly and inaccurate audience research systems or the reliability of the usage reports provided by the users themselves. The calculation and distribution of royalties would be considerably simplified as well.

Moreover, these formats could be combined with a blockchain-based digital currency system that would guarantee that all rights for uses in any part of the world be paid to their legitimate owners securely, accurately, transparently and immediately. In digital uses, which are especially atomised, any solution that allows for micro payments would mean a great advance, especially for non-mainstream creators and independent phonogram producers and publishers.

Blockchain has been labelled by some as the “money Internet”, since it would provide users with the ability to carry out currency transactions, whilst bypassing supervision by

financial entities. Moreover, transactions would be dealt with safely and anonymously through the MVB protocol (Minimum Viable Blockchain).

This is the reason why, with banking intermediaries effectively forgone, so would be verification and foreign currency exchange movement procedures that corporations typically take days, weeks or months to complete, as is the case with, e.g., royalty payments. In addition, transactions would be carried out in a public and transparent way. Such an important breakthrough, would certainly translate as a great incentive for artists and authors that would benefit from managing and modifying their contracts and commercial exploitation themselves.

There are numerous companies working on the development of applications, intended for the music industry, based on blockchain. Companies such as www.ujomusic.com or www.revelator.com are researching ways in which to use blockchain to provide services currently rendered by music aggregators. Most of them use as their main reference the API created by www.colu.com.

All these companies are building their platforms on open source software and digital currency.

The legal consequences of this type of technologies are as of yet unknown. The EU has not approved any specific legislation related to cryptocurrency, and the legal situation varies considerably from one country to another. While some of the Member States explicitly allow its use and trade, others prohibit or restrict them, and in many countries there is no definition whatsoever.

It is also true that blockchain is setting high expectations, and thus may face many challenges and restrictions on its path towards effectively adapting to different business models. On one hand, in order to keep up with database maintenance, massive electric power consumption is to be expected. On the other, cryptographic currency is already facing political and legal challenges in many countries.

It also remains to be seen whether blockchain could offer a safe alternative for dealing with copyright conflict resolution, that may eventually render traditional collecting management organizations obsolete.

The repercussions of a smart contract that allows for the electronic coupling of an automated legal consequence to a contract are still being contemplated in our regulations. The legal status of DAOs is not regulated yet either, although the closest one would be a general partnership, and that would imply that partners have unlimited responsibility in the case of possible debts, and that they could be subject to civil actions. In Europe, contracts and companies are regulated by Commercial Law, which we will not analyse in this report due to its complexity, but we put it forward here so that it can be taken into account in case there is a wish to further explore the subject.

5.3 New Models

Until recently, license agreements by platforms like Spotify were personal and did not authorise its commercial use. That is to say that, although in practice commercial establishments are using such services to liven up their venues, this use could be indictable. Since a few months ago, Spotify Business offers background music services for public spaces to businesses for a monthly fee, at present only available in Sweden, Norway and Finland. Based on consumer data from their over 100 million users worldwide, the Swedish company promises their clients a selection of the most popular music in their area. Clients can create and control playlists for each location from one single dashboard, even via phone. The playlists can be sequenced to find the right mood for each moment of the

day, and can be shared with consumers. The service offers three different fees, for small businesses, larger ones, and international brands.

For the rest of the world they are offering Soundtrack Business, which is more similar to the traditional background music services in the sense that they are offering a selection of playlists curated by Spotify. The license covers commercial uses by the clients in their public spaces, with a single monthly fee.

Clients located in the EU, in any case, must keep paying the fees of the collecting societies for the public communication of the works transmitted through these services.

The novelty of this model is that, unlike the other background music service providers, Spotify already has the licenses from the right holders from virtually everywhere; a database holding millions of songs, from the greatest hits to the most underground ones; and detailed consumption statistics. Furthermore, as the most used digital music streaming service in Europe, the potential clients likely already know the brand and are even likely to have already used the service for personal use. Should the Spotify Business service be implemented in the rest of Europe, it could become the main competitor in the field of background music for public spaces.

6. Recommendations

Revise the current laws and recent case law

The revision date for the laws included in this report is September 2016. The first recommendation for audio branding service providers looking to establish themselves in the EU would be to examine the Directives published since then to see if there is any new one that affects their project, and if so, consult its transposition deadline. This can be done on the website of the European Commission or the WIPO, both listed in the References.

The most recent approved Directive was the one about Collective Management in 2014, the transposition deadline was in April 2016, and practically all national legislations have incorporated it in their legal framework. The Directive proposal for copyright in the DSM, published in 2016, should be approved in 2017, and the Member States would have one year to transpose it.

It is not normal for countries to establish measures of their own that stray too far from their neighbours' usual rules, as they could even face sanctions if they breach certain regulations stipulated in the Directives. But occasionally there are some that set themselves apart with an unusual proposal. These cases are usually taken to the CJEU by right holders or, more commonly, CMOs, in order to clarify their interpretation. It would be useful to consult the most recent rulings related to IP before starting to provide the service. This can be done on the Curia or vLex websites, which are listed in the References.

Propose a revision of the collective management Directive

Any commercial application ABC_DJ develops to provide clients with musical content should include the licenses of the three right holder groups described in Chapter 2: authors, artists and phonogram producers. As we explained, in most of the cases, rights management occurs through CMOs. Each EU Member State has different organisations for the management of the different types of rights (for example, one for Mechanical Reproduction and another one for Public Communication). In practice, this means that an audio branding service provider will have to sign contracts with dozens of collecting societies throughout Europe.

Deliverable 7.2 analyses the licensing of works and recordings by the collecting societies and individual right holders in detail, and offers recommendations on how to implement cross-border licensing measures in practice. Here we will limit ourselves to recommendations about possible changes in the existing legislation.

In Europe, it is highly complicated to force legislative changes in the field of IP. Any regulation proposal takes years of impact assessment, meetings with stakeholders, reports, public consultations, etc., and has to have a solid legal foundation. There is also not a lot of room to increase the harmonisation of the European laws, because when it comes to the right holders and rights that each of them possesses, the existing Directives are already sufficiently harmonised. Nevertheless, the ABC_DJ consortium could lobby alongside other stakeholders in order to try to introduces some improvements that facilitate the audio branding services' strategy.

The main would be to propose to broaden the application range of Title III of the Collective Management Directive to include the traditional forms of use of the works, in addition to the digital one, and thus make it easier to obtain licenses for the use of music on a pan-European level, in lieu of having to get several licenses in every country.

Propose the creation of one-stop music licensing in the EU

As explained in Deliverable 7.2, many countries already contemplate one-stop collective rights management through a coalition of several CMOs for the collective collection of their fees from the users.

One measure the ABC_DJ consortium could propose to the regulators would be the creation of a pan-European one-stop music licensing organisation, the branches of which could be the collecting societies that already exist in each country. This could be done through an order or regulation by way of legislation, if the CMOs cannot come to private agreements to do so.

Propose a clarification of the situation of music under Creative Commons licenses or Copyleft

Right now, background music providers are divided between those who offer copyrighted material and those who focus on “rights-free” content or content published under Creative Commons licenses. Ideally, the ABC_DJ project should be able to combine the two, and from a legal standpoint, there is no impediment to do so.

As we have seen in the case law summary, the courts generally acknowledge the CC licenses, and the national court rulings are along the same lines. But the ABC_DJ consortium, by means of lobbying with local governments, could come up with a proposal for the EC to clarify the situation of the works covered by these alternative licenses. On one hand, to establish what happens with the protection of the part of the performers and phonogram producers, seeing as these licenses only cover the author's part. On the other, to set a precedent about how to treat the CMOs' collection of the fees from the venues that use this kind of works. As we have seen before, many background music services claim to offer works that do not have to be paid to any collecting society, but this is not true in the territories where remuneration of the artists and phonogram producers is managed collectively by law.

If the consortium contemplates using copyrighted, CC and Copyleft works, in practice this would mean that the audio branding provider must sign different contracts with whomever supplies them with songs. On one hand, blanket licenses with the CMOs for the protected works, and on the other, individual contracts with each and every right holder outside that framework. Using smart contracts based on blockchain technology could facilitate the internal management.

The final client or venue that transmits the songs, should they use a mix of protected and “rights-free” works, should also take this into account when requesting the corresponding licenses from the collecting societies, so that, if there are exemptions from the payment of fees in any territory, this should be taken into account for their calculations.

Regulate the situation of smart contracts and the DAOs

The use of blockchain-based smart contracts to obtain licenses and for posterior payment of fees could be of great use to the consortium. However, these are not yet regulated in the European legislations.

The ABC_DJ consortium could work with other stakeholders to propose legislative measures in order to regulate the situation of blockchain technology in Europe, and particularly to provide smart contracts and the DAOs with harmonised legal security in the whole of Europe.

Avoid breaching the IP laws

The ABC_DJ consortium must guarantee no infractions will be committed against the copyrights on the musical works and sound recordings it works with. In addition to getting the proper licenses from all right holders and/or CMOs, it should include certain mechanisms to avoid fraud. This is especially important in the case of works under CC licenses or Copyleft, which will be licensed directly from the right holder, because as there is no previous filter to verify authorship, which normally is provided by collecting societies, the risk of plagiarism or fraudulent attribution exists, which could lead to lawsuits.

Ideally, any music hosting and providing platform developed by ABC_DJ should have sufficient information about the right holders to not allow for these infractions to happen in the first instance. For lack of a global right holders database for musical works, the consortium could implement measures for registering and association of ownership metadata with the audio fingerprints. Another option is to use already existing technological methods to verify authorship, such as Safe Creative, an online intellectual property register that has been functioning since 2007.

Another possible measure is to establish “notice and stay down” mechanisms, so that, when a right holder detects a copyright infraction by another user, they can inform the provider so that they can resolve the conflict and that user, nor any other, can upload the content ever again claiming authorship.

Become a collecting society

The Collective Management Directive allows for private entities to become collective societies. Document 7.1 explains the process so that the ABC_DJ consortium can create such an entity for licensing, collection of fees, and payment to the right holders.

As an example, background music provider SoundReef is already offering these services to its users, using Safe Creative for the authentication of the works' authorship, and offering a non-exclusive agreement to the right holders for the management and collecting of the rights in the modality of background music only.

7. Conclusions

An audio branding service provider that wants to operate in the territory of the EU is facing having to develop in an environment where laws are constantly changing, and also still very compartmentalised.

We are seeing a very harmonised Intellectual Property legal framework in Europe, albeit in constant development, due to the incursion of internet in our lives, a circumstance that has caused a continuing evolution in the jurisprudential doctrine and in the Directives and national laws. However, the rights and the right holders are the same in virtually all of the countries we researched.

There are particularities in national legislations with regard to the rights' reach, especially concerning the right of remuneration and the mandatory nature of collective management of said right by the CMOs, established in certain legislations, which causes great confusion. Document 7.1 reviews and clarifies these peculiarities.

In short, we find ourselves with a legal framework which, while harmonised, we believe still needs a lot of work. In Document 7.4. we will try to provide a single-license solution that would greatly facilitate the management and practice of these rights.

References

Concise European Copyright Law (2nd ed.) (2006). Wolters Kluwer.

Consulting Editor Ben Allgrove. *International Copyright Law: A Practical Global Guide* (2013). Globe Law and Business.

M Walter, M., Von Lewinski, S. (2010). *European Copyright Law. A Commentary*. Oxford.

Congreso Internacional. *El Derecho de autor ante los desafíos de un mundo cambiante* (2006). Palestra.

Barberán Molina, P. (2010). *Manual práctico de propiedad intelectual.* Práctica Jurídica. Tecnos.

Tapscott D., Tapscott A. (2016). *Blockchain Revolution. How the technology behind bitcoin is changing money, business, and the world.*

Aaron Wright & Primavera De Filippi (2015). *Decentralized blockchain technology and the rise of lex cryptographia.*

Performers' Rights in International and European Legislation: Situation and Elements for Improvement (2014). AEPO-ARTIS

Online sources:

WIPO: http://www.wipo.int/portal/en/index.html

CISAC: http://www.cisac.org

VLEX: http://eur-lex.europa.eu/homepage.html?locale=en

CURIA: http://curia.europa.eu/jcms/jcms/j_6/en/

EC: http://ec.europa.eu/index_en.htm

Creative Commons: https://creativecommons.org