Broadband technologies transforming business models and challenging regulatory frameworks – lessons from the music industry

MusicLessons - Deliverable 6

Embedded conflicts in policies, directives and their implementation

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1. Summary and overview of findings

"Europe, by 2010, will be the most competitive knowledge-based economy in the world capable of sustainable economic growth, with more and better jobs and greater social cohesion" (Lisbon agenda)

Overall policy formulation in the EU is naturally the result of deliberations between heads of States, commissioners and the Parliament. Umbrella goals such as those in the Lisbon agenda then become the basis for separate areas of policy-making in various specialised areas and directorates. As overall policies result in decentralised sub-programmes for implementation, there is always a risk for the emergence of embedded conflicts.

1.1 The notion of balance

Consider, for example, the statement in many directives and papers from the Commission during the 1990s concerning the protection of Intellectual Property Rights. The focus was on a balance between the need for strong protection in a digital environment, and the equally important need not to impede the development of new business models. With the responsibility for IPR protection firmly within the legal directorate, and the emergence of new business models the focus of other directorates (Information Society and to a certain extent, Internal market / Competition and DG Enterprise) then the demand for balance appears to have become eclipsed. The most obvious case of a potential clash of policies concerns the goal of public and private interests supporting the wide deployment of broadband. Broadband traffic is being driven mainly by activities in so-called file sharing or P2P networks. Major content owners desire to outlaw such activities as well as the technology involved, and are basing their strategies on the terms of the EU Copyright Directive of 2001.

1.2 Words and terms that take on a life of their own

Another cause of policy conflicts can be the use of certain terms and concepts, which are seen to be key to achieving overall goals, but either mean different things to different individuals or groups, or embody many different aspects which are rarely defined.

Take the term "convergence", so popular in the late 1990s, and currently enjoying a new lease of life. Three different types of convergence were identified:

- Convergence between different industries (IT, Telecoms and Media)
- Convergence between different parts of the communications infrastructure (wireless, fixed telephone, cable etc) via concepts of "seamless connectivity)
- Convergence between different types of interfaces between distribution channels and users (mobile phone terminals which also provide e-mail, radio/TV etc)

There are certainly more aspects to convergence than these three. The point is that statements from the late 1990s such as "convergence is key to a better life in Europe" or more recently that "convergence is at the heart of the European e2010 agenda", even if they are correct, can

lead to different policy directions regarding implementation, depending on the interpretation of the term.

A similar favourite buzzword is "DRM". Digital Rights Management systems are seen as the key to developing the digital content business in Europe. But DRM exists along a spectrum with two very extreme ends. DRM can be used purely for monitoring, aggregating data on the use of various items, thereby providing data for a fair distribution of revenues between relevant rights holders. Most citizens would regard this are reasonably non-intrusive. But DRM techniques can also be used to heavily control and spy on what individuals do or are not allowed to do, and can therefore be extremely intrusive. Any analysis which does not link this to policies regarding privacy and integrity can also lead to potential conflicts (Blomkvist et al 2005 *"DRM – Intrusion or Solution?"* e-Challenges Conference paper, Ljubljana, Slovenia).

1.3 Competition policy – monopolies, oligopolies and SMEs

Competition policy has mainly focused on breaking down or avoiding monopolies. Other policies, notably from DG Enterprise, have focused on supporting the growth of SMEs and giving them access to previously closed markets. The liberalisation of former monopoly markets usually leads to a process where a high number of initial competitors slowly become an oligopoly with a few firms - the deregulation of radio is a typical example of this. These oligopolies can, in their turn, act once again to raise entry barriers for new SMEs desirous to develop and test new business models. The issue is further complicated by the phenomenon of vertical integration whereby firms in different parts of the same value chain amalgamate or sign exclusive agreements, thus giving them synergy advantages over smaller competitors. The media industry is the best example of this, with record companies, music publishers, broadcasters, internet delivery channels and even mobile phone manufacturers linking up to gain greater control over channels to potential consumers.

Another interesting observation comes from the emerging mobile applications arena. Internal interfaces in mobile phones, in general, are not available to innovators (users or SMEs) to develop and introduce new applications. For a small player in the mobile applications area without a large number of users it is very difficult to influence mobile telephone suppliers to open up these interfaces. This creates a huge barrier for the small player without a large initial user base. The result is that the only way forward is to co-operate with one of the major operators or another large player that is sufficiently influential.

1.4 The elusive notion of Cultural Diversity

Finally, Cultural Diversity is a concept that has received great attention of late, being on the lips of any respectable European politician or civil servant. But cultural diversity can mean different things to different people. For some it is seen merely as an issue of strengthening cultural heritage, via documentation, accessibility etc. For others it can be related to the unleashing of new innovative potential in Europe via the interaction of those with different cultural backgrounds. The cultural diversity issue cannot be separated from related technological and economic issues – a fact that becomes clear when observing the

development of the media sector. Cultural workers in the music sector represent a significant source of technological innovations for creating, producing, storing and distributing new cultural products. By interacting across borders, their diverse cultural backgrounds can allow for the emergence of new solutions, styles, genres, hybrids etc. A policy which focuses solely on the "cultural (heritage)" aspects, as opposed to promoting an overall view that links cultural with technological and economic aspects can also lead to policy breakdown. One can speculate how available a specific DRM protected music file will be after say 20 years considering that technological development is very rapid, and the keys to the DRM system may be forgotten or hidden somewhere.

Policies related to maintaining, enhancing and unleashing the innovative potential of cultural diversity will be key to achieving overall goals of the Information Society such as:

- An open and competitive market for Information Society and media services and products
- High degree of innovation and research investment
- Inclusion, better public services, quality of life, promotion of jobs in a way compatible with sustainable development.

Cultural Diversity plays an important role in enhancing self-esteem, in allowing different approaches and traditions to meet when solving old and new problems, in short in attaining the goal of inclusion via active participation of as many citizens as possible. But if cultural diversity initiatives are divided into different policy streams which are not subject to overall integration, then the result can be, at best, neutral, and at worst, confusing and negative.

These and other issues are covered in this report that starts with a short historical overview of policy foci as the notion of the Information Society has developed.

2. Information society policies over the past decade

2.1 From balanced visions of opportunities to a patchwork quilt of opposing forces

Media and communication policies always reflect a mixture of economic, technological and cultural impulses and visions, and are frequently coloured by the lobbying activities of parties with resources and clear impressions of their vested interests. The same can be said of policies that have emerged from in the wake of the birth of the concept of the Information Society. The vision is a society where digital technologies are seen as the key to new and more effective ways for citizens, businesses and governments to share and store services and products, and partake actively in everyday life. The implementation involves a patchwork quilt of different types of legislation and initiatives; often these take the form of policies that seem to move in mutually incompatible directions

The different factors noted above (economic, technological and cultural) rarely result in a homogenous view of progress, but in opposing forces which need to be carefully balanced. Regulation versus free market development, and cultural diversity versus cultural uniformity are two opposites.

This is not a new phenomenon resulting from the specifics of the Information Society. In the 19070s, UNESCO eagerly promoted the concept of a "free flow of information". A critic of this stance maintained that "there are no real policy recommendations, just a belief that more and more media are a good thing (Tunstall1977: page 211 in "*The Media Are American"* London. Constable). We can see similar elements in current Information Society policies involving slogans such as "broadband for all".

Moving to the 1980s, satellites made their entrance and once again a new technology became the focus of both visions and concerns. The Council of Europe began to concern itself with the notion of European identity (the term "cultural diversity" had not yet entered the debating arena). A Council for Cultural Cooperation created in 1987 had the brief to study the "trend towards uniformity and the blurring of European identities" (Council Of Europe Report 1990 "*The role of communications technologies in the safeguarding and enhancing of European unity and cultural diversity*", COM (90) 1a, Strasbourg, 7 August 1990).

The European Commission began to take a greater interest in media and communication policies in the 1980s. This interest tended to view media and cultural products as any other goods, i.e. they should be traded in a market with a minimum of regulatory restraints. A result of this was that the concept of "public service" media became heavily criticised, even if a goal shared by all was to increase the quality and availability if European audio-visual products across the Union. Soon, quantitative studies of the effects of satellite transmissions across borders showed that public service broadcasters provided a far greater access to European programmes than their new commercial competitors – this is still the case (se Music Lessons deliverable 2, June 2005)

For the Commission, providing a free flow of media and information products across European borders using satellites was the best guarantee for achieving a goal of at least 50% European programming in every TV channel. It can be argued that the desire to minimise regulation, which also spread to areas involving technological standards has had long-term effects on the range of choice of information available to Europeans in both mainstream media (Radio and Television) as well as in the new digital networks.

2.2 Technical standards, but not everywhere.

The issue of technical standards is an interesting area of policy, with different approaches in the telecoms and media sectors. Creating and implementing a standard for GSM mobile telephony gave the European Telecommunications industry a major boost and created a system where any phone user could "roam" in any territory, but the home market, with a GSM operator. North Korea is now the only country in the world without GSM. The same did not happen with digital television. Ten years later, on the brink of phasing out analogue terrestrial TV transmissions, Europe is still feeling the effect of this policy.

In the mid-1990's, the EU had a theoretical opportunity to regulate much needed Digital TV (DTV) standards to facilitate the creation of a pan-European digital television market with a multitude of consumer choices in services. That was also the official goal (The Advanced Television Standards Directive, 1995) but no clear guidance on standards was given at the time. The duality of regulation and liberalisation of the markets was evident and the Commission chose in the words of the Bangemann report (1994) a more "technological-neutral" approach avoiding market distortions. The absence of a pan-European digital TV standard explains the maze of different standards in place over Europe, resulting in no pan-European digital receiver but a plethora of set-top boxes offering less and less European programming – exactly the opposite of the goals form the early 1990s.

2.3 The Internet enters the policy arena – public regulation or market forces?

The Bangemann Report "Europe and the Global Information Society" was undoubtedly inspired by the US debate on the Information Super Highway and all that it offered in terms of the efficiency of modern society. This European analysis of the digital world took as a starting assumption the view that there is an inexorable increase in the scope of digitisation. One of the prophetic texts of the era was "Being Digital" (Negroponte, 1996), together with a wide variety of terms emphasising intangibility e.g. "Living on Thin Air" (Leadbeter, 1999), and the "weightless economy" (Quah, 1996). If any product or service could be digitised, then this would happen and the physical equivalents would disappear. A plethora of e-prefixes emerged to cover all these opportunities: e-commerce, e-work, e-democracy, and e-health etc-.

Bangemann and his colleagues expressed much concern over the observation that there were 34 PCs for every 100 US citizens but only 10 on average in the European Union. The answer was to stimulate major investments in digital networks and the investments involved

would be driven primarily by attractive content which consumers would purchase, thus making the networks "tick" and generate traffic revenues.

Video-on-demand was regarded as a likely driver. But this proved to be an incorrect conclusion. Content owners were loath to release their copyrighted materials into a new environment where perfect copies could me made at the click of a mouse, and where their legal protection of their copyright revenues was unclear. With a minimum of regulation there were no mechanisms such as compulsory licences, or must-carry conditions which could ensure attractive content being made available in the new networks of the Information Society (Wallis.R 1998:52 in *"Evolving Media Markets: Effects of Economic and Policy Changes"*, Turku School of Economics, Turku 1998). That other services such as pornography and gambling could play an important roll as a driver, as such things have done historically, was not mentioned in any official documents. However, around 1998/99, MP3 overtook "sex" as the most heavily searched term in the Internet environment; music emerged as one of the main drivers of traffic in new digital networks. It is interesting to observe that the MP3 music format was developed within an ISO standardisation project called DAVIC. DAVIC had several working agreements, but one was fundamental – the standard that came out of the project should have no options!

Bangemann, however, did notice the need to balance regulation and freedom in one specific area, that of Intellectual Property. IPRs should enjoy protection in the Information Society and its networks "on the basis of balanced solutions which do not impede the operation of market forces" (page 17 in the Bangemann report) and noted further that "flexibility and efficiency in obtaining the authorisation for the exploitation of works will be a prerequisite for a dynamic European multimedia industry". It took almost a decade before the world got the first comprehensive "legal" music downloading service, made possible via the approval of the major record companies via their exclusive rights. This was run not by a music company, but by a computer firm, Apple, desiring to use music to market their storage device, the i-Pod.

2.4 The elusive notion of Convergence; a plea for a balanced approach as the different directorates get to work.

Convergence, as already observed, was a major buzzword during the latter half of the 1990s. The Bangemann report saw primarily entertainment content as driving something called convergence. As one speaker at a conference in 1999 put it: convergence is rather like the term culture – we all know what we are talking about but no one can define it. Convergence referred loosely to the integration of the IT, the Telecommunications and the Entertainment industries. Media content such as films in new networks would bring about this integration. But without easy access to content, the process faltered. Today´s file sharing or P2P technology is basically a tool for the users to create a catalogue of content among themselves and a possibility to share this content using a file transfer protocol. This combination gave the user easy access to content and the process that started was very efficient.

Two years after Bangemann, another Commission report, this time a "Green Paper" focused again on Convergence. Content alone was no longer seen as the main driver; instead the focus was on the Internet. And once again a plea was made to observe a balance between the need to protect copyrights with the need for a flexible environment that encourages the emergence of new business models.

The 1997 green paper is probably the last time this focus on a balance appears in official Commission documents. After the Bangemann era, the Commission system of directorates went through a series of changes with different divisions looking after their own areas of competence, and a marked absence of a general overview. Various policy areas (and related administrative entities) became involved:

- Legal concerning intellectual property issues,
- Information Society directorate covering access to infrastructures and e-applications, business models,
- Internal Market looking at monopolies, mergers, access to the market,
- Culture and the issues of protecting and developing European cultural heritage

2.5 IPRs should enjoy strong protection.

The IPR issue became the responsibility of the legal specialists whose duty was to transfer the WIPO copyright convention from 1996 into European law via the Copyright Directive of 2000. This directive cemented two important principles:

a) The telecom operator's lack of conduit responsibility. This meant that operators whose customers found ways of exchanging copyrighted materials for "free" could not be held financially responsible, even if they were earning revenue from providing the service.

b) A far greater focus on the copyright owners power to control usage via prior permission in a digital environment, as well as a corresponding decrease in the notion of fair use by consumers.

That the latter came into conflict with the general public's notion of fair copyright is becoming more and more evident. It provided the opportunity for the entertainment industry for the first in the case of a new disruptive technology such as file-sharing, to sue not only the firms providing the technology, but also individual users. Which in its turn led to a conflict with other EC goals, such as "broadband for all", one of the leading goals of the Information Society directorate. Ever since the rise and fall of Napster as well as successors such as Kazaa, Gnutella, DC++ (Peer-to-Peer networks used mainly for sharing music and films), and Skype (IP telephony), such traffic has been the main driver of broadband usage. We are a long way away from the Bangemann vision of controlled video-on-demand services driving uptake of networked services.

When the Copyright Directive was implemented in Sweden on July 1st, 2005, no detectable decrease in broadband traffic could be noted, suggesting that the general public more or less ignored the tougher demands of the updated copyright law.

In October 2005 there is still no detectable decrease in the file sharing contribution to broadband traffic.

In an ongoing study initiated after July 1st, 2005 interviews have been completed with a representative selection of the Swedish population (2000 persons). Two questions were posed:

Question 1: Are you aware that there is a new law from July 1st regarding downloading copyrighted material via Internet? The answers were: No: 33%. Yes: 67%.

Question 2: Are you aware of the implications of this law? 67% of all that answered said No and 33% answered Yes.

Of those who answered Yes to Question 1, 49% answered No and 51% answered Yes.

The above results are preliminary since they build on 800 received answers and another 1200 are expected are still being analysed. But it is interesting to observe that surprisingly many (2/3 of the population) have perceived that there is a new updated copyright law and, about half of them appear to be well aware of the implications.

2.6 Other policy-making directorates with other perspectives.

While the IPR issues were being handled by the Commission's legal specialists, the Information Society Directorate was focusing on the different e-prefixes, supporting research with billions of Euros via the various Framework programmes. New goals for the information society were formulated, eagerly supported by many politicians. In the Lisbon declaration of March 2000, heads of government had stated boldly that Europe, by 2010, would be" the most competitive knowledge-based economy in the world capable of sustainable economic growth, with more and better jobs and greater social cohesion". In retrospect, it is not surprising that this goal was formulated at the peak of the stock-market IT boom, and with Europe's economy looking in excellent shape. These overall goals were adopted warmly by the Information Society directorate, and were reformulated in more detail (the e-2005 and e-2010 programmes). The focus was on building out communications infrastructures, the growth of the Internet (a sub-goal of Lisbon was all schools having access to the Internet), and slogans such as "broadband for all". So-called peer-to-peer technology (P2P), so hated by content owners and a major target of copyright legislation, was becoming more and more significant as a driver. Major EU research investments were made in the area known as "GRID technology", an enhanced variant of P2P used for linking computer resources (mainly processing and data bases) together with high speed transmission links for complex scientific calculations and with a strong focus on security regarding the resources that can be used.

Cultural diversity became the responsibility of the directorate for culture and education and left the Information Society focus, even if the term "cultural diversity" has emerged more recently as something every good politician should warmly applaud. The debate on a UNESCO convention and the relation of cultural products to the on-going WTO-TRIPS negotiations can have been a contributory factor. On the other hand, the audio-visual area was extracted from the cultural fold with the change of Commissioners in 2004 and was moved to the Information Society directorate. There, once again, the question will no doubt be raised;

can the Information Society and its technology assist the cross-border exchange of European films and TV programmes which exploit the rich and diverse cultures of the Union? A non-existant European DTV standard will certainly not help the situation. It is worth recalling the Bangemann reports belief that: "once products can be easily accessible to consumers, there will be more opportunities for expression of the multiplicity of cultures and languages in which Europe abounds". Up to now, conflicting policies and market activities seem to have produced a situation where citizens receive more of the same via more and more channels, rather than a steadily increasing range of choice. The only apparent exception is content availability within P2P communities in the Internet environment. With the mandate for media moving into the Information Society directorate, new responsibilities and opportunities arise which must be taken seriously, together with other decision- and policy-makers in other specialities.

3. Competition Law, Vertical Integration and Collective dominance and related policy issues and incompatibilities.

3.1 Alleviating disturbing symptoms but not always coming to grips with the underlying problems

Horizontal Integration involves firms in the same sector increasing market share by buying up competitors in the same business (record company A buys record company B)

Vertical integration involves firms along the value chain from creator to consumer joining together (example record company A buys music publisher B). Major conglomerates in the media industry can control publishing rights, production rights, distribution and manufacturing rights and channels to consumers. Such a conglomerate can have interests in traditional media (radio, TV, film), on-line distribution services, book and newspaper publishing etc.

Collective Dominance involves vertically integrated media conglomerates seeking synergy effects between different areas of activities to attain advantages in the market not available to smaller competitors.

Our starting point, once again is the Bangemann report and its vision of "Europe and the global information society" ("*Europe and the global information society. Recommendations to the European Council"* Brussels, May 1994). The Internet is seen as a key basic prerequisite. The route to critical mass goes via de-regulation (above all of the telecommunications industry) and attractive services which will draw investment capital. The report notes that no one owns the Internet, and that serious security flaws can arise without any actors having to take overall responsibility. The role of competition policy should be dynamic, "not to freeze any sets of regulations, but rather to establish procedure and policies through which the exploding dynamism of the sector can be translated into wealth and job creation" (Bangemann report page 20).

Almost ten years later we can note that applications based on file sharing and P2P technology have produced the critical mass. They have also opened, as predicted, opportunities for the rapid spread of malicious software (viruses, worms). And competition policy has had to move forward from simple analyses based on market-share in a specific industrial sector, to looking at combinations of effects as convergence has brought the IT. Telecommunications and Content industries closer together, in a number of strange relationships, often coloured by a desire to tame the un-regulated Internet.

Telecoms deregulation followed the pattern of other former monopoly industries such as radio/TV, electricity and water. Deregulation produced numerous new suppliers offering competitive prices for consumers in some of these. By and by an inevitable process of concentration of ownership produced an inevitable oligopoly. Competition law could handle a simple case of members of an oligopoly providing the same services/products seeking further internal mergers (horizontal integration), by measuring the resulting market share in a specific

sector of any proposed new amalgamations. A maximum rule of thumb in the region of 40+ percent provided the answer.

But convergence, and the Internet led to a new and more complex form of vertical integration, which in the case of the music industry initially involved record companies buying music publishing. By the mid-90s, five record companies controlled almost 75% of global phonogram sales, and their sister publishing divisions almost the same percentage of all music copyrights. These two groupings formed de facto oligopoly cartels, which were to have considerable implications for competition as the Internet's potential for music distribution exploded. These implications, however, hardly attracted the attention of the competition authorities until the year 2000, when AOL-Time Warner and EMI proposed a merger.

3.2 Another buzzword – disintermediation and issues concerned with monopoly intermediaries

One possible reason is another 1990s buzzword: dis-intermediation. The Internet, according to many prophets of the time, would decrease the need for many traditional intermediaries between creators/producers of services and products, and their customers/consumers. Every composer/artist could hardly be expected to deal individually with each and every consumer of their cultural products, but there was a functioning intermediary system of organisations that collected copyright revenues and distributed them. But there was a problem; these copyright collection societies (or Collective Rights Management societies or CRMs as the Commission now calls them) were monopolies in their own national territories and thus had to be carefully scrutinised.

The scrutiny had actually started way back in the early 1980s. The so-called GEMA ruling from December 4th 1981 determined that composers could withdraw certain rights from these monopoly societies and offer them to another society in a different country if they so wished. Few composers ever availed themselves of this option, a variant of which was to emerge again almost 25 years later in a new bid from the Commission to stimulate music trade over digital networks (see below).

The 1981 GEMA ruling did however provide the first warning regarding the possible negative effects of vertical integration. It noted that appropriate means should be available for "eliminating the negative effects of vertical integration, as for example in the case where a record company manufacturer subjects the use of certain works to the condition that these works be published by the publishing house he controls" (Commission Decision IV/29,971 Gema Statutes 82(204/EEC clause 39).

This analysis clearly understood that if a major record company (a music user and customer of GEMA) only recorded music published by its in-house publisher (a major rights holder within GEMA) then the result could either be unreasonable influence over GEMA or a bypassing of the CRM society via in-house clearance. The latter would radically increase administrative costs for those players who could not use such advantages. The integrated music firm could exert "collective dominance" to achieve advantages in the market, whilst making it harder for independent publishers to find an outlet for their works within the market.

The GEMA ruling is still significant even in today's Internet debate, since it encouraged the major publishers and their "big brother" record companies to act a) as though they were separated by a Chinese wall and b) to create two de facto oligopoly cartels – the major record companies and the major publishers. This enabled strong separate lobbying in Brussels in support of the major players interests. It also enabled them to gain advantages from the copyright collection/distribution system at the expense of smaller players interests. (Wallis, R.: "Copyright and the Composer", in Frith, S., Marshall, L. (eds.): *Music and copyright*, 2nd. edition, Edinburgh University Press, Edinburgh, 2004, pp. 102-122.)

It would be naïve to believe that the Chinese wall was more than opaque. If corporate management had not continuously focused on synergy effects between the music publishing and phonogram production businesses, then they would not live up to their duties to the shareholders.

Competition law seemed to fail to analyse and deal with this very intricate form of collective dominance in the music market that was to have considerable significance, both via actions and lobbying, as the Internet developed. The evidence of the dual oligopoly/cartel was hardly hidden. BIEM (Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique) is an umbrella organisation for the CRMs that collect copyright revenues from record companies; the BIEM board meeting minutes from June 1999, referring to negotiation of rates observed that:

"A confrontation between the representatives of the publishing divisions and the record divisions of the same multinationals would place the former in a position that they now consider very uncomfortable".

In the same year the CRM that deals with moneys from record companies in the Nordic area (Nordic Copyright Bureau: NCB) received a letter from the 5 major publishers threatening to take their repertoire elsewhere if NCB did not sign a specific agreement. The letter was written on Polygram Publishing notepaper - later Universal Music Publishing - and signed by the heads of all 5 major publishers (Polygram, Sony, EMI, Warner/Chappell and BMG).

That the competition authorities took a long time to react to the notion of collective dominance, as practiced in these cases, probably was the result of the continued focus on CRMs as monopolies, a focus which was constantly enhanced by a series of complaints filed by both major publishers and record companies in Brussels.

3.3 Collective dominance further scrutinised – the case of AOL/Time Warner (AOL/TW) and EMI

It became impossible to ignore the issue of collective dominance when the world's largest Internet service provider (America On Line: AOL), Time Warner with wide interests in music, publishing, film and broadcasting/narrowcasting announced their plans to join up with EMI in 2000. At this time, music delivery via the Internet had exploded thanks to Napster. Most of it involved the illegal swapping of music files, and virtually no legal alternatives were available that offered materials from the major record companies/publishers. The Commission found significantly that the proposed merger could encourage a new Warner-EMI to bypass the collection societies, thus raising entry barriers and costs for smaller players. The merger would

create a "dominant position on the markets for on-line music and music software". In terms of collective dominance the conclusion was that the merger would provide "the first vertically integrated broad-band content provider" … " which would have a considerable advantage over non-integrated content providers or firms able to supply a more limited range of content" (Case COMP/M.1852 merger Procedure Statement of Objections, DG Internal Market, Brussels). EMI and AOL/TW then decided to shelve plans for the merger.

3.4 Further scrutiny – the case of SONY-BMG and their desire to merge record company interests

Sony and Bertelsmann announced a planned merger of their record companies in early 2004. In many ways it resembled the EMI-Time Warner proposal, but with one difference, the media conglomerate's two music publishing divisions would be retained as separate entities within the two owner-corporations. Otherwise there were many similarities. Sony had its own Internet distribution network (Sony Connect). Bertelsmann, as well, had extensive interests in broadcasting, the Internet etc. In May 2004 the Commission published a Statement of Objections (case COMP/M.3333 Sony/BMG 24.05.2004 D/202145). The Commission had concluded that the merger "would enhance a situation of collective dominance". The result would be less competition in the on-line market and reduce consumer choice.

These statements were followed by a public hearing and a final ruling less than two months later involving a 180-degree turnaround. The merger was compatible with the common market. "It is not likely that the merger would lead to the creation of a collective dominance of the remaining four majors on the market for on-line music" (Commission Decision COMP/M.3333 Sony/BMG C (2004) 2815 page 48).

An initial statement that the merger would most likely lead to the coordination of publishing activities became a conclusion that "there is no evidence that the joint venture would have as its object the co-ordination of the Parties' competitive behaviour in music publishing". It also noted that, even if this were to occur, the effects would be limited since it is the CRMs and not the major publishers who decide tariffs. Once again the music industry's dual oligopoly (publishers/record companies) had convinced the Commission that vertical integration was not a problem, but that the problem lay with the monopoly intermediaries, the CRMs.

3.5 Policy warnings from an outgoing Commissioner (Internal Market)

A few weeks prior to the final ruling, on July 8th 2004, the then European Commissioner for competition policy, Mario Monti, gave a keynote speech to a workshop on "quality audio-visual contents". He spoke about "access to content and the development of competition in the New Media market – the Commission's approach". Monti noted that the distinction between infrastructure services and content services is becoming increasingly blurred, at the same time that "their interaction is becoming increasingly vital to the success of both"(Monti,

M. *"Access to content and the development of competition in the New Media market – the Commission's approach"*. Speech 04/353,Brussels 8 July 2004).

The Commissioner also raised a number of concerns about competition in the area:

"The importance of access to attractive content for the success of all media is generally recognised by most operators … since the Commission's general objective is to keep media markets open and to stimulate growth as much as possible, the Commission needs to ensure that access to key inputs in the markets for delivery of content is not unjustifiably restricted. ... We certainly do not have the illusion of having removed once and for all the obstacles that, as far as content is concerned, might hamper the development and opening to competition of new media markets. .. in many cases, innovation builds up as a challenge to existing technologies and/or processes. As such, it pits new players against established firms. Such configurations obviously create incentives for the incumbents to try to block or curtail the new dynamics in the market place, to try to maintain their position at the expense of the innovations".

One wonders how the Commissioner would have reacted if he had known then that Sony-Ericsson, manufacturers of mobile phones, were planning a service to provide embedded recordings in each new phone – these recordings will only be provided by the new Sony-BMG record company.

Not everyone accepted the final ruling. IMPALA, an organisation representing smaller record companies in Europe filed a complaint with the Court of First Instance in Luxembourg, maintaining that issues of collective dominance had been ignored when allowing SONY and Bertelsmann to merge their record company divisions.

The findings of the court will be announced in the late autumn of 2005. Should they overturn the decision to approve the merger, then a radical rethink of policies concerning vertical integration and collective dominance will be an imperative.

3.6 The CRMs and the on-line environment.

The CRMs were somewhat taken by surprise in June 2005 when the Commission's Internal Market directorate published the draft of an "Impact assessment" examining the "present structures for cross-border collective management of copyright and related rights for the provision of legitimate on-line services" (Staff Working Document DG Internal market June 2005). This was followed up by a set of proposed "recommendations", as opposed to a full directive, issued in late September 2005.

As with the Bangemann report from almost a decade earlier, it took as its starting point a comparison with the USA. On-line sales of music were growing at a far greater rate on the other side of the Atlantic. In fact the report failed to note that this sluggishness in Europe was more than compensated by European on-line sales via another type of network, mobile phone networks (ring tones etc).

The Commission concluded that the system of reciprocal agreements between CRMs was a hinder to the growth of the on-line market since it was hard to get a pan-European license at one single point. A worst case scenario, according to the analysis, could involve a provider

desiring to start an new Internet music service could have to attain up to 200 different licences. The analysis agreed that any system that allowed major content providers to shop around the CRMs of Europe for pan-European licenses, could lead to a collapse of established tariffs, as different societies competed for business. It also recognised the issue of collective dominance by major players as being a key issue in seeking a functioning and efficient on-line market.

The solution proposed, however, did not involve means of hindering collective dominance, for instance, via decreasing the degree of vertical integration through enforced divestment or other similar means. It focused merely on the symptom, which was accepted as an important market factor.

The Commission suggested that rights holders should be encouraged to move their on-line rights for attractive cultural products to a small number of large CRMs who would thereby attain the clout needed to defend tariffs and revenues paid to composers/publishers when negotiating with leading on-line service providers.

This proposal highlights, once again, the patchwork quilt of EU policies in the Internet arena.

The obvious beneficiaries would be those representing non-European rights, particularly US-based content owners, who could make such a switch, if not at the click of a mouse, certainly after a short and intense period of bargaining. For individual European rights holders linked up to their own domestic CRM, the process would be much harder – most musical works include more than one rights holder, and all would have to agree.

A proposal to move attractive repertoire to a few central European negotiating "hubs" would probably mean that many smaller CRMs working with domestic repertoire in smaller territories would find it hard to survive – not mentioning the problems an emerging artist from a small country would have. This would certainly work against the goal to support, develop and exploit cultural diversity.

There is also the old axiom that all business is local, even if the networks are global.

It is hard to see how a CRM society hub in, say, London, could adequately monitor what exactly goes on with Swedish-language repertoire on-line in the domestic Swedish market.

The problem had been identified – collective dominance by major players in a market. The symptom has been described and an aspirin has been prescribed, an aspirin that can have disastrous effects on a weak culturally diverse stomach.

4. Final word

We have noted how wise overall goals, easy for almost everyone to applaud and digest, can lead to a fragmentation of policy-making when specialised units focus on specific areas. Their actions can move in different, uncoordinated directions, leading to the emergence of potentially serious embedded conflicts.

The most telling examples concern the balance issue between IPR protection and the development of new business models /issues of access for SMEs to new markets and distribution channels. The case of Cultural Diversity is also a key issue – it cannot be seen only as a challenge to protect cultural heritage, however important this is. It is a key to unleashing a huge potential for innovation, higher self-esteem and respect for different cultural aspirations/traditions and thereby, the all-important inclusion goal.