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# Report on the functioning of the digital music market in Poland

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Ministry of  
**Culture**  
and National  
Heritage of  
the Republic  
of Poland ■

## **Information about the author**

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Dr Gałuszka is the author of several publications on the functioning of the phonographic industry and of new media. The most important ones are the book entitled "Music business. Economic and marketing aspects of phonography" and scientific articles published in the magazines First Monday and Virginia Sport and Entertainment Law Journal. At present, dr Gałuszka is conducting a research into the functioning of crowdfunding services and into the new organisational forms of the phonographic activity.

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## **The abbreviations most frequently used**

- ▲ Digital Rights Management (DRM) – management of digital rights – term used for describing different methods of protecting content against unauthorised copying
- ▲ Directive – Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012) 372) in the version proposed by the European Commission on 11.07.2012
- ▲ GEMA – German collective management organisation – Gesellschaft für elektroakustische und mechanische Apparate
- ▲ Digital formats – all new, non-physical formats for the transcription of phonograms – files, subscriptions, mobile formats and others
- ▲ IFPI – International Federation of the Phonographic Industry
- ▲ Internet use – type of use corresponding to acts of “making available a work in such a way

that everybody may access it from a place and at a time chosen by them”

- ▲ CMO – collective management organisation
- ▲ PRS – british collective management organisation – PRS for Music
- ▲ SAWP – Polish Music Performing Artists’ Society
- ▲ STOART – Union of Performing Artists
- ▲ ZAiKS – ZAiKS Authors’ Association
- ▲ ZPAV – Polish Society of the Phonographic Industry

## 1. Introduction

The need to create a system of on-line music sales in digital formats appeared just after the emergence of peer-to-peer filesharing networks, such as, e.g. Napster. After 2001, when the Napster network was definitely closed, a number of attempts were made to launch services selling music online in digital formats. The majority of those initiatives, including stores launched with the participation of the biggest music companies such as PressPlay and MusicNet, failed.<sup>1</sup> The first shop with music files which gained global success – the iTunes Music Store – was created by Apple in 2003. Since then, the on-line music market is systematically growing (see table 1).

Tab. 1.1. The digital music market in 2004-2012

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012
Revenues in bln USD	0,4	1,2	2,2	2,9	4,3	4,7	4,8	5,1	5,6
Share of revenues from the sale of new formats in the entire phonographic market	2%	5%	11%	15%	20%	27%	29%	32%	34%

Source: subsequent editions of the Digital Music Report published by IFPI, 2009-2013. The values showed in the second line include the revenues from the sale of files, subscriptions and sale via cellphones, calculated at the fixed exchange rate of dollar to local currency.

Already in 2009 the digital format market in the USA was estimated at 40% of the phonographic market, whereas in Europe its share amounted only to 15%.<sup>2</sup> In subsequent years, these proportions have not significantly changed. For example, in 2012 1.6 billion works were sold in the USA, whereas in Europe only 391 million.<sup>3</sup>

One of the reasons for the slower development of the digital music market in Europe is the territorial nature of copyright, which makes it more difficult to open a shop offering access to on-line music in the entire Europe than, for example, the launching of such a project in the USA<sup>4</sup>. This report shows the reasons behind the problem and makes an analysis of the proposed solutions in the context of the development of the music market Poland.

<sup>1</sup> See. analysis of the failure of the first services selling music files: Choi, D. Y., & Perez, A. (2007). Online piracy, innovation, and legitimate business models. *Technovation*, 27(4), 168-178.

<sup>2</sup> IFPI Digital Music Report 2010, 10. <http://www.ifpi.org/content/library/dmr2010.pdf>

<sup>3</sup> IFPI Digital Music Report 2013, 35. <http://www.ifpi.org/content/library/DMR2013.pdf>. The data originating from different countries can be hard to compare due to the adoption of different definitions of a file or a stream.

<sup>4</sup> See point 13 and 14 of the present report.

## 2. Habitual patterns of Internet use in Poland

The ways Internet is being used in Poland are the subject of several analyses, including the *Social Diagnosis 2011*<sup>5</sup>. They reveal the following facts<sup>6</sup>:

- in the first half of 2011, 61.1% of households had access to Internet and 66.9% in the first half of 2013<sup>7</sup>;
- 15% of Internet users (9% of households) use a cell phone to connect with the Internet (data for 2011);
- the respondents mentioned that the main reasons for the lack of access to Internet were “we do not need Internet” (44.0%), “lack of the necessary equipment” (31.25%), “lack of the necessary skills” (25.8%) and that the “cost of access is too high” (22.4%);
- over 35% of people not using Internet have access to it at home;
- the use of Internet is closely linked with age (the older the respondents were, the less they were using Internet) and with the educational level (the higher the level of education, the bigger was the percentage of respondents using Internet);
- the use of Internet is also linked with the wealth and size of the city of residence. However, this relation is weaker than in the case of age and education;
- 19% of Internet users are using it for 2 hours per week, 42% of users use it up to 7 hours per week, 22% of users use it at least 21 hours per week, 12% of users use it 40 and more hours per week;
- people using Internet watch television more rarely than those that do not use it;
- 68% of people using Internet (over 40% of Poles) have an account on one of the social platforms;
- Internet users participate more actively in cultural and social life, although this can result from the fact that they are predominantly composed of younger and better educated people, which is reflected in the above mentioned active participation;

<sup>5</sup> Diagnoza Społeczna 2011 Warunki i Jakość Życia Polaków [*Social Diagnosis 2011 Life conditions and quality of Poles*] – Report. *Contemporary Economics* 5(3).

<sup>6</sup> Id., 299-322. All the data referred to under the points on the present page come from this source, unless specified otherwise.

<sup>7</sup> Diagnoza Społeczna 2013 Warunki i Jakość Życia Polaków [*Social Diagnosis 2011 Life conditions and quality of Poles*] – preliminary report, available at [http://diagnoza.com/pliki/raporty/Diagnoza\\_raport\\_wstepny\\_2013.zip](http://diagnoza.com/pliki/raporty/Diagnoza_raport_wstepny_2013.zip); The precise results of the Social Diagnosis 2013 will be communicated after the work on the present report will have been completed.

- the percentage of people downloading music and films from Internet is increasing – in 2009 it accounted for 20.7% and in 2011 - 27.4%<sup>8</sup>.

The report *Circulation of culture. Social circulation of content*<sup>9</sup> provides more information on the use of music online. It demonstrates that the most popular sources of music in the respondents' opinion were radio (91%), music files and copied CDs (81%), online streaming services, e.g. YouTube (71%), CDs (55%) and concerts (30%)<sup>10</sup>. The report focuses a lot on people downloading content from the Internet. The reasons given for downloading music from the Internet are a bigger choice than in the official distribution channels (73%), an excessive price for the original content (72%), convenience (67%), up-to-date nature of the content available in the Internet (56%), the lack of a better alternative in the place of residence (15%)<sup>11</sup>.

Since the issue of music use online is complex and is subject to dynamic changes, it is recommended to carry out a separate research solely devoted to this issue.

### 3. Online music distribution models in Poland

The classification of the online music distribution models in Poland can be based on a number of criteria<sup>12</sup>. In this study, two criteria are applied: the medium criterion and the fee calculation criterion.

One should note that the boundaries between considerable parts of the different models are getting blurred and what is expected in the future is the far-progressing convergence of all the models. In addition, it should be noted that the classifications of the distribution models presented in this point focus only on the last level of the distribution chain, that is on the service which offers content to the end users. A more profound analysis of the entire distribution chain is made under point 5 and 12 of this study.

<sup>8</sup> Diagnoza Społeczna [Social Diagnosis] 2011, 117. The given values correspond to the percentage of people downloading music and films during the last week in the trial panel.

<sup>9</sup> Filiciak, M., Hofmokl, J., & Tarkowski, A. (2012). Obiegi kultury. Społeczna cyrkulacja treści [http://creativecommons.pl/wp-content/uploads/2012/01/raport\\_obiegi\\_kultury.pdf](http://creativecommons.pl/wp-content/uploads/2012/01/raport_obiegi_kultury.pdf)

<sup>10</sup> Id., 65

<sup>11</sup> Id., 65-66.

<sup>12</sup> See the criteria applied by authors analysing the situation in other countries, for example, Fox, M. (2004). E-commerce Business Models for the Music Industry. *Popular Music and Society*, 27(2), 201-220; Vaccaro, V. L., & Cohn, D. Y. (2004). The Evolution of Business Models and Marketing Strategies in the Music Industry. *International Journal on Media Management*, 6(1-2), 46–58.

When applying the medium criterion, the following models can be distinguished:

- models based on the distribution of physical carriers;
- models using mainly Internet;
- models using mainly mobile telecommunications

When applying the fee calculation criterion, the following models can be distinguished, in which:

- the consumer is given access to music free of charge;
- the consumer pays for single works;
- the consumer pays for albums;
- the consumer is given access to music in exchange for a subscription fee;
- the consumer is given access to music when purchasing other products.

Tab. 3.1. Online music distribution models according to the fee calculation method and the medium used

<b>Method for fee calculation / medium</b>	<b>Physical carriers, traditional model</b>	<b>Internet</b>	<b>Mobile<sup>13</sup></b>
<b>Access to music free of charge</b>	Music played in the media, e.g. radio	Advertising model, music published under Creative Commons licences	Ringback – (the listener does not pay) and the same models as in the case of Internet
<b>The consumer pays for single works</b>	Singles in the form of different physical carriers (e.g. CD single)	“Pay per download” model (e.g. iTunes, iplay.pl)	Ringtones – ringtones and the same models as in the case of Internet
<b>The consumer pays for albums</b>	Albums in the form of different physical carriers (e.g. CD album, vinyl)	“Pay per download” model (e.g. iTunes), sale of physical carriers via www pages	The same models as in the case of Internet
<b>Access to music in exchange for a fee paid upfront</b>	Record clubs (mainly in the USA in the 90s of the 20 <sup>th</sup> century)	Subscription model (e.g. Deezer, Muzo, Spotify, WIMP)	Subscription model (e.g. Muzodajnia) and use of subscription services (e.g. Muzo, WIMP) through

<sup>13</sup> It is important to stress that the differentiation between Internet and mobile channels will gradually lose its sense as fast wireless Internet (LTE) will become more common. The purchase and consumption of music will then be done via Internet by using several devices, one of which will be cellphones. Only ringtones and back ringtones will remain purely mobile services.

			smartphones
<b>Access to music when purchasing other products</b>	Phonograms sold as a supplement to, e.g. newspapers (so-called “inserts”)	Access to the catalogue when purchasing other products (e.g. access fee added to the Internet connection bill)	Access to the catalogue when purchasing other products (e.g. Nokia Comes with Music, Orange + Deezer)

Source: own study.

When focusing further analysis only on models using Internet, the following models can be distinguished:

- the pay-per-download model, which gives consumers the possibility of buying individual works at the price of about 4 PLN, 1 USD, or 1 EUR (higher prices are often charged for high sound quality files, e.g. in lossless FLAC formats). This model gained popularity thanks to the iTunes store, which attracted many followers, e.g. Amazon MP3 and several smaller services<sup>14</sup>;
- the subscription model, which gives consumers unlimited access to the music catalogue in exchange for a fee paid regularly (usually once a month)<sup>15</sup>; unlimited access means that each consumer may choose any work from the catalogue of the service; the music is sent by streaming and does not become the consumer's property – the consumer loses access to it when he stops making payments; these types of services use different types of tariff plans addressed to consumers with different payment abilities; the criterion for differentiating consumers with different payment abilities can be, e.g. displaying advertisements (the consumers which agree to the display of an advertisement pay less), limiting the listening time (consumers who will agree to the limitation of the service, e.g. up to 20 hours monthly, pay less), mobile access to the catalogue (consumers wishing to have mobile access pay a higher subscription fee);
- the advertising model, which gives consumers access to music free of charge; the functioning of the service is financed from the fees paid by advertisers<sup>16</sup>, who can develop highly personalised advertising messages (which is possible thanks to the detailed knowledge about the service users' behaviour); this model is often linked with a subscription

<sup>14</sup> An analysis of the stores operating in this model in Poland is presented in point 5.

<sup>15</sup> Fox, M. (2004), footnote 12; Wikström, P. (2009). *The Music Industry: Music in the Cloud*. Polity.

<sup>16</sup> Fox, M., & Wrenn, B. (2001). A broadcasting model for the music industry. *International Journal on Media Management*, 3(2), 112-119; Fox, M. (2004), footnote 12.

- model, which makes it the cheapest (free of charge) variant;
- the product bundling model, which offers access to the catalogue for consumers buying a product or a service which constitute the main part of the offer; an example of this type of offer is Nokia's „Comes With Music”<sup>17</sup> and access to the Deezer service offered to consumers signing a subscription agreement with Orange;
  - models based on voluntary payments<sup>18</sup> and independent distribution of music<sup>19</sup> by the artists; this is a group of models in which the artists are releasing phonograms themselves, often making available at least a part of them free of charge (e.g. using Creative Commons licences<sup>20</sup>), counting on the popularisation<sup>21</sup> of their creation (which will give hope for potential revenues in the future), or will encourage listeners to make voluntary payments, e.g. in the form of donations, or under a model which enables the consumer to choose the price that he wants to pay for the music;
  - crowdfunding, which can be defined as an “open call, made usually via Internet for the purpose of raising funds in a form of a voluntary donation, or exchange for certain values, and/or granting the right of vote”<sup>22</sup>; this mechanism is often used to finance phonograms<sup>23</sup>, which ususally entails that they are made available in the Internet, so that people who are willing to provide financial support for the artist can familiarise with the artist’s work; in Poland, this model is developed for example by MegaTotal.pl<sup>24</sup>.

<sup>17</sup> Wikström, (2009), footnote 15, s. 113.

<sup>18</sup> Belsky, L., Kahr, B., Berkelhammer, M., & Benkler, Y. (2010). Everything in its right place: Social cooperation and artist compensation. *Mich. Telecomm. & Tech. L. Rev.*, 17, 1 and Benkler, Y. (2011). Voluntary payment models, w: *Rethinking music: A briefing book*. Cambridge, Mass.: Berkman Center for Internet & Society, Harvard University, [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking\\_Music\\_Briefing\\_Book\\_April-25-2011.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Briefing_Book_April-25-2011.pdf)

<sup>19</sup> Belsky et al., (2010), footnote 18; Morrow, G. (2009). Radiohead’s managerial creativity. *Convergence: The International Journal of Research into New Media Technologies*, 15(2), 161-176.

<sup>20</sup> Bloemsaat, B., & Kleve, P. (2009). Creative Commons: A business model for products nobody wants to buy. *International Review of Law, Computers & Technology*, 23(3), 237-249.

<sup>21</sup> Galuszka, P. (2012a). Netlabels and democratization of the recording industry. *First Monday*, 17(7) <http://journals.uic.edu/ojs/index.php/fm/article/view/3770/3278> and Galuszka, P. (2012b). The Rise of the Nonprofit Popular Music Sector – The Case of Netlabels, w: *Music, Business and Law. Essays on Contemporary Trends in the Music Industry*, AV. Karja, L. Marshall & J. Brusila [Red.]. Helsinki: IASPM Norden & Turku: International Institute for Popular Culture, 65-90 <http://ssrn.com/abstract=2194086>.

<sup>22</sup> Belleflamme, P., Lambert, T., & Schwienbacher A. (2011). Crowdfunding: Tapping the Right Crowd. *CORE Discussion Paper No. 2011/32*, <http://ssrn.com/abstract=1578175>

<sup>23</sup> Gałuszka, P. & Bystrov, V. (2012). Społecznościowe finansowanie produkcji dóbr kultury na przykładzie serwisu MegaTotal.pl. *Zarządzanie w kulturze*, 13(4), 329-339 oraz Gałuszka, P. & Bystrov, V. (2013). Platforma finansowania społecznościowego jako nowy typ przedsiębiorstwa na rynku kultury, *Studia i Prace Kolegium Zarządzania i Finansów* 125, 145-162.

<sup>24</sup> Interview No 16. The list of all the respondents who have been interviewed for the purpose of this study is presented in point 16.

Since the above mentioned models are presently dominated by “pay per download” models and the subscription model, it is worth making further comparison between those two.

Tab. 3.2. Comparison of the “pay per download” model and of the subscription model

	<b>“Pay per download” model</b>	<b>Subscription model</b>
Subject of transaction	Single music files, the buyer “owns” the files	Access to the music catalogue, the buyer does not “own” the files – he loses access to them when he stops paying the subscription fee
Forms of payment	Each time for every single file (usually prices are within a range of about 1.5 PLN to 4.9 PLN), or for the whole album (prices usually start from around 20 PLN)	Monthly subscription fee for the unlimited access to the entire catalogue (currently, the fees in Poland start from 9.9 PLN for access via computer and from 19.99 PLN for mobile access, which represents about half of the prices paid, e.g. in Germany); there is often a possibility to acquire single works, after having paid a fee as in the “pay per download” model
Internet connection	Necessary only at the moment of purchase and downloading of the work on the disc	In lower subscription plans, the Internet connection is necessary all the time during the playing of the work, in a higher subscription plan (from 19.99 PLN monthly), it is also possible to listen to works in portable players (in such a case, the Internet connection is not necessary)
Possibility of copying in case the files are protected by DRM technologies	Only to a limited number of computers and portable players; usually it is possible to copy the purchased works on a limited number of audio CDs; currently, the trend is to depart from DRM protection in this model (see also point 10)	The subscriber gets access to music from each computer and in a higher subscription plan, it is also possible to listen to works on portable players; the subscriber loses access after having stopped paying the fee and cannot copy the music on audio CDs (unless the subscriber pays an additional fee which is

similar to that offered by stores operating on a “pay per download” basis)

Source: study made on the basis of the publication by Galuszka, P. (2009). *Biznes muzyczny. Ekonomiczne i marketingowe aspekty fonografii*. Placet, 228.

The models described above can be supplemented by models which are closer to traditional radio broadcasting than phonography:

- webcasting, which can be defined as the broadcasting of musical works in “interactive networks by radio or television ”<sup>25</sup>; from the perspective of the recipient, webcasting in its pure form can be compared to the reception of a traditional radio programme; in principle, the recipient does not have an influence on the selection of the broadcaster’s music repertoire.
- interactive webcasting – form of webcasting in which the recipient has the possibility of influencing the selection of the broadcaster’s music repertoire, e.g. by deleting certain works from the playlist, accelerating the playing of subsequent works ( by “jumping” to the next work), or influencing what he is listening to in any other way;
- podcasting – type of online sound or film publication, distributed in files using the RSS technology; the user downloads podcasts on his disc and can play them at a time chosen by him, which makes this form of communication different from webcasting and interactive webcasting.

From a technological point of view, there is a similarity between webcasting, interactive webcasting and subscription services. From the user’s perspective, the difference between them is of a qualitative nature – in the case of webcasting, the recipient plays a rather passive role, whereas in the case of a subscription service, the role is active and the listener has almost the same set of tools as a person playing music from compact discs. Interactive webcasting represents an intermediary variant. The differences between the various types of services are taken into account, e.g. by the British collective rights management organisation - PRS for Music – by differentiating the tariffs paid by users who offer webcasting and interactive webcasting services<sup>26</sup>.

<sup>25</sup> ZAiKS (2008). *Table of author’s remuneration rates of the authors’ association zaiks for broadcasting works in interactive networks (webcasting)* [http://www.zaiks.org.pl/pliki/256/Tabela\\_Stawek\\_WC10.pdf](http://www.zaiks.org.pl/pliki/256/Tabela_Stawek_WC10.pdf)

<sup>26</sup> See also the problem of institutional piracy described in point 9.

In addition to the models described above, a separate group of products, closely related to mobile technologies, can be distinguished<sup>27</sup>.

These are:

- ringtones – a sound which signals the incoming telephone connection; it can be a fragment of a musical work;
- ringbacktones – a sound heard by a person calling the service subscriber, in place of an ordinary call-waiting tone; it can be, e.g. a musical work; although it is difficult to verify the information provided on the website of one of the companies operating on this market, which estimates that over 50% of the digital music in Poland is sold in the form of ringbacktones<sup>28</sup>, the information provided by the respondents confirms that the ringbacktone market constitutes a significant part of the Polish digital music market<sup>29</sup>.

#### 4. The value of the market for online phonogram sales in Poland

The analysis of the volume of sales of music in digital formats is difficult. This is due to the problems of reporting of the digital formats' sales.

First of all, such reporting is by nature more difficult than the reporting of physical media sales (e.g. the question arises: how to take into account the work which has been listened to in the form of a stream? Does such work have to be listened to until the last second, or is it enough to listen to half of it?) Secondly, the procedures for the reporting of sales and consumption of music in digital formats do not function as well as the procedures for traditional formats<sup>30</sup>. Therefore, the data relating to the sale of formats should be carefully interpreted and compiled with the data on the sale of physical carriers. The latter are presented in the graphs below.

<sup>27</sup> These are the only services (unless new ones are invented), which will in the future remain closely linked with mobile technologies. See, footnote 13.

<sup>28</sup> Quote following the note *More digital music for Wind Mobile* dated 19.11.2012 r., available at: <http://www.windmobile.pl/aktualnosci/170-wiecej-muzyki-cyfrowej-dla-wind-mobile.html>

<sup>29</sup> Interview No 1 and 6.

<sup>30</sup> Interview No 11.

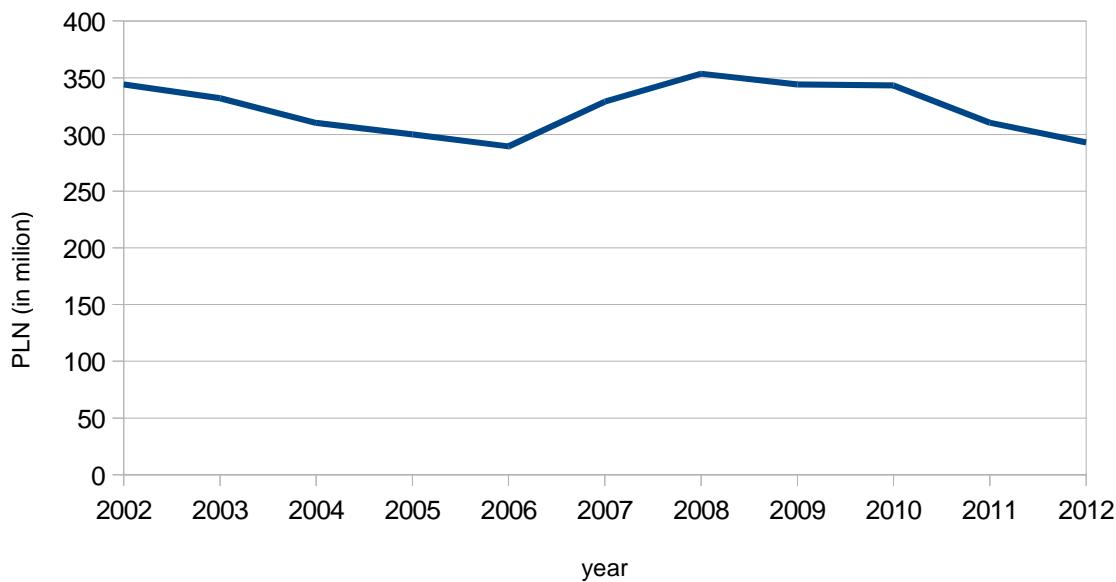


Fig. 4.1. Nominal value of the physical audio carrier market in Poland in subsequent years expressed in million PLN<sup>31</sup>. Source: ZPAV.

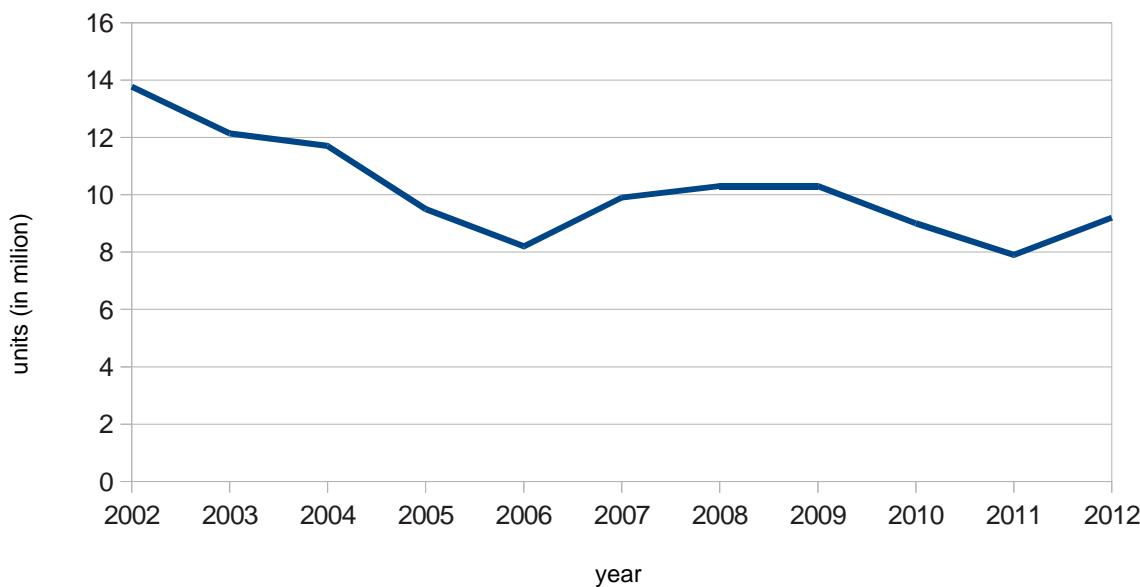
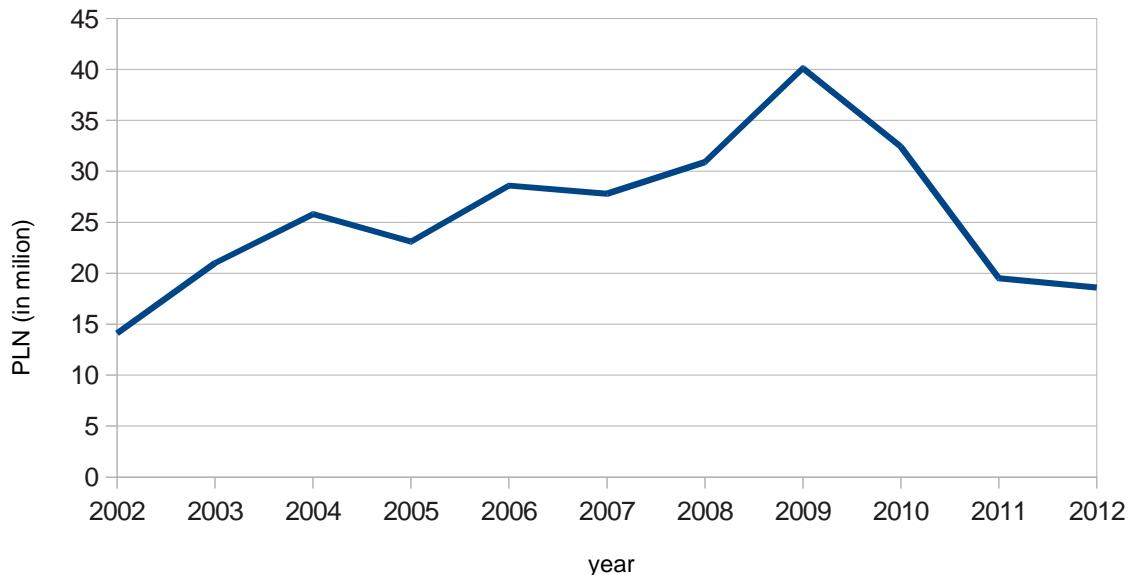


Fig. 4.2. Number of physical audio carriers sold in Poland in subsequent years (in millions of units). The physical carriers are singles, LPs, cassettes, audio DVD and CDs<sup>32</sup>. Source: ZPAV.

<sup>31</sup> Notice: since 2005 the numerical data are given in packages (a package – product counted irrespective of the quantity of specific components of the set, e.g. album composed of 2 CD discs = 1 package), hence the data for subsequent years are not comparable.

<sup>32</sup> Notice: since 2005 the numerical data are given in packages (a package – product counted irrespective of the



Graph 4.3. Nominal value of the video music market (DVD and VHS) in Poland in subsequent years expressed in million PLN. Source: ZPAV.

The first publicly available information on the situation of the Polish market for digital formats was presented in the report of the Polish Music Information Centre *Music Market in Poland. Report*<sup>33</sup>. The data are presented in table 4.1.

Fig. 4.1. Sale of digital music in Poland broken down by format in 2006 and 2007.

Year	Music files sold online (as a percentage of the total digital music market in Poland)	Sales by cell phone (as a percentage of the total market for digital music in Poland)	Subscriptions	Total (in million USD)	Total (in million PLN)	Change
2007	8%	92%	0%	2,2	6,2	472,3%
2006	14%	85%	1%	0,4	1,1	-

Source: POLMIC, 2008, p. 8.

quantity of specific components of the set, e.g. album composed of 2 CD discs = 1 package), hence the data for subsequent years are not comparable.

<sup>33</sup> Polskie Centrum Informacji Muzycznej. (2008). *Rynek Muzyczny w Polsce. Raport* [Polish Music Information Centre. *Music Market in Poland. Report.*] <http://www.polmic.pl/images/stories/pliki/raport-rynek-muzyczny-polska.pdf>.

The data presented in table 4.1. are difficult to verify today (especially if we take into account the above mentioned difficulties with measuring and reporting the online sales of music). They confirm the prevailing opinion that the Polish market for digital music started to develop, first of all, in the mobile sector, and in 2006-2007 the market for digital files was very small.

Taking into account the improvement in the reporting of data on the digital formats' sales, we can assess with more confidence the information provided by the respondents<sup>34</sup>, which shows that the market for digital formats in Poland accounted for 6.7% of the market for physical formats, which would give about PLN 22 million. However, the data are most certainly incomplete, which results from the fact that not all companies have sent to the Polish Society of the Phonographic Industry (pol. ZPAV) reports on the sales and the actual value of the market for digital formats in Poland could have been higher in 2011. The report comparing the sales of digital formats in Poland in the first quarters of 2012 and 2013 provides additional information on the value of the domestic market for digital formats. It shows that in the first quarter of 2013, the revenues from the sales of digital formats in Poland amounted to 7 242 999 PLN as compared to 4 729 175 in the same period in 2012, an increase of 53.16%.<sup>35</sup> The revenues which showed the biggest increase came from "websites supported by advertisements and streaming audio-video services"<sup>36</sup> (i.e. websites based on an advertising model, e.g. YouTube, or the free Spotify offer supported by advertisements) – from PLN 1 477 833 in the first quarter of 2012 to PLN 2 840 484 in the first quarter of 2013, an increase by 92.21%. The revenues from subscriptions fees paid by subscribers amounted to PLN 1 758 532 in the first quarter of 2013 (compared to 1 096 857 PLN for the same period in 2012), which represents an increase of 60.32%.<sup>37</sup> An important category is also the income from online downloads accounting for PLN 1 882 829 in the first quarter of 2013 (compared to PLN 1 467 524 in the same period of 2012), although it shall be noted that the growth dynamics in this market segment are considerably lower and amount to 28.3%.<sup>38</sup>

The situation is further described in the information provided by the respondents. Some phonographic producers estimate that the share of digital formats in their revenues reaches the level of about 30%.<sup>39</sup> The estimates of the respondent representing the global music industry show that

<sup>34</sup> Interview No 11.

<sup>35</sup> ZPAV (2013). *Over 50% increase of the market of sales of digital music in the I quarter this year*. Information published on 4.06.2013 available at <http://zpaiv.pl/aktualnosci.php?idaktualnosci=583>.

<sup>36</sup> Id.

<sup>37</sup> Id

<sup>38</sup> Id.

<sup>39</sup> Interview No. 2.

the revenues from the digital distribution in the case of this company amount in Poland to about 25%-30% of the physical sales revenues.<sup>40</sup> The publication of more precise data can be expected in the coming years.

## 5. The characteristics of the main players in the market for services giving access to music on the Polish territory<sup>41</sup>

The entities offering services that give access to music on the Polish territory can be divided into two categories: foreign and domestic services. The origin of the service offering music content is important from the point of view of the relationship between the costs of acquisition of a broad music catalogue and the revenues which can be generated from a given website on the territory on which it is providing its services. The problem faced by services functioning only on the Polish market is the unfavourable proportion of expenditures, which have to be borne to gain access to a broad music catalogue, in relation to the size of the chosen market. This is reflected in the respondents' statements: "we operate on a given territory, the territory of our country, but we have to build the same technology which someone else builds, let's say, on a global scale".<sup>42</sup>

In other words, each service which wishes to make a broad catalogue available to the customers must incur significant costs for the acquisition of the rights to the music content, regardless of the size of the chosen market. This favours global players and at the same time, it is placing services which limit their operations to the Polish market in a slightly worse position. Those are confronted with a dilemma: a smaller catalogue and hence, lower costs and possibility to compete on the price, or a broader catalogue and as a consequence, higher costs and higher prices.

Surprisingly enough, local services, such as Muzodajnia or Muzo, are not in a position to obtain the same music catalogues as global players, like iTunes or Spotify, from music producers.<sup>43</sup> As a result, global players declare that they have at their disposal a 20-million catalogue, and Polish services can offer a maximum of 4-6 million works.<sup>44</sup> It can be assumed that the existing

<sup>40</sup> Interview No 10.

<sup>41</sup> The analysis conducted in this point was carried out from the end user's point of view. Therefore, it focuses on the last level of the distribution channel of music online – the retailer. The other levels are described in point 12. However, the list of entities presented under this point is not complete because a number of relatively unpopular websites localised in different countries can be used in Poland.

<sup>42</sup> Interview No. 4.

<sup>43</sup> Id.

<sup>44</sup> Id.

situation may result from the fact that global services are more active in the acquisition of content. On one hand, it is easier for services operating on a global scale to finance an active search of the owners of less popular content. However, on the other hand, the biggest global players are in a position to negotiate with the owners of the most popular music that the latter will be offered exclusively on one website (e.g. The Beatles on iTunes and Metallica on Spotify). Obtaining this type of exclusivity is expensive, which can explain why it is mainly the biggest entities that take part in such agreements. When discussing the difficulties faced by smaller services, it is worth noting that the fees for the servers, i.e. the place for the storage of music files, are significant. Global services can use one place for all the countries – Polish services must pay the same fees, although the scale of their operations is much smaller.<sup>45</sup> The factors described above place Polish services in a less privileged competitive position compared to global companies.

The foreign services operating on the Polish market include<sup>46</sup>: iTunes (<http://www.apple.com/itunes>), Deezer (<http://www.deezer.com>), WIMP (<http://WIMP.pl>), Spotify (<http://www.spotify.com>) and Rara (<https://www.rara.com>). Each of these services can be classified as a global player. Each of them, except for iTunes<sup>47</sup>, can be defined as a subscription service based on *streaming*. The global services operating in Poland include also YouTube (<http://www.youtube.com/>), although it is not strictly a music undertaking.

In addition to the champions, there is also a number of services devoted to direct communication between the artists and the audience, which allows artists, who are not working with traditional music producers, or who are represented by independent small producers, or by so-called “netlabels”<sup>48</sup>, to present their works and make money. Such services include, eg. Bandcamp (<http://bandcamp.com/>), SoundCloud (<http://soundcloud.com/>) and Mixcloud (<http://www.mixcloud.com/>).

The Polish services include: Muzo (<http://www.muzo.pl/>), Muzodajnia (<http://muzodajnia.pl>), iplay (<http://iplay.pl/>) and Empik (<http://www.empik.com/>). Muzo is linked with the biggest Polish media company – Cyfrowy Polsat, which gives it the opportunity to compete with the biggest players. Muzodajnia, created by Polkomtel, is also indirectly connected

<sup>45</sup> Id.

<sup>46</sup> Since the offers of all the online music services in Poland often change, giving prices in the case of actively operating stores does not make much sense as they become outdated very quickly.

<sup>47</sup> Although recent news about the planned launch of iRadio change this situation, see ZPAV (2013). *Powstaje iRadio. Apple porozumiało się z „Wielką Trójką” wytwórniami fonograficznymi [iRadio is created. Apple got on with „The Big Three” of the phonographic producers]*. Information published on 10.06.2013 r. available at <http://zpav.pl/aktualnosci.php?idaktualnosci=586>.

<sup>48</sup> Galuszka, P. (2012), footnote 21.

with Polsat (Zygmunt Solorz-Żak is the owner of Polkomtel and Cyfrowy Polsat). Muzodajnia has built over the years a strong position on the Polish market of online music. One of the reasons was the use of the link between the service and the mobile telecommunications network, which allowed for the use of the Plus mobile network fee collection system. By adding the service fee to the telephone bill, the financial costs associated with the purchase of music online can be saved. As a result, the seller and the person buying the files do not have to deal through a financial intermediary (e.g. companies handling payments by credit cards), which translates into lower prices paid by the consumers.

Moreover, the iplay service should be mentioned, as it was one of the pioneers of the digital formats' sales in Poland and is the one, next to Soho.pl, which survived to the present day. Iplay, in addition to the files in mp3 and wma formats, offers the possibility to subscribe until 31.08.2013, but after this date, it will have removed this option from its offer. Another website with noticeable potential is Empik, which, when launching its offer on a "pay per download" basis, completed it with other cultural products.

In addition to the above mentioned services, there is a number of companies selling music in the form of files or ringtones online, or use music in another way (e.g. as suppliers of technological solutions relating to music, especially in the telecommunications sector).

They include Soho.pl (<http://www.soho.pl/>), Polish Sound (<http://www.polishsound.com/>), NuPlays (<http://nuplays.pl/>), Mobila (<http://www.mobila.pl/>), Papla (<http://www.papla.pl/>), PlayTheMusic (<http://www.playthemusic.pl/>), Mood (<http://www.mood.pl/>), Wind Mobile (<http://www.windmobile.pl>). These companies usually use music content supplied by aggregators.<sup>49</sup>

It is worth mentioning two more services which implemented a slightly different model, with no acquisition of music from the biggest labels. These are: Sound Park (<http://soundpark.pl>) and 3 MegaTotal.pl (<http://www.megatotal.pl>) mentioned in point 3. Sound Park, which can be considered as the Polish equivalent of Bandcamp, addresses its offer to, first of all, individual artists and independent labels.<sup>50</sup> A characteristic feature of Sound Park is the use of widgets which can be embedded in the artists' websites and their profiles on Facebook in order to boost music sales. According to the information provided by the creators of the service, the majority of music is sold via the Sound Park website and widgets displayed on the artists' websites. The sales by means of widgets embedded in the artists' profiles on Facebook constitute about 10% of the total sales of

<sup>49</sup> See point 12.

<sup>50</sup> Interview No 7.

Sound Park.<sup>51</sup> Among the music available in the service, the biggest share in the sales goes to genres such as Metal/Punk (34,28%) as well as HipHop & Rap (30,90%).<sup>52</sup>

The second of the above mentioned services – MegaTotal.pl is the first Polish platform of social financing. MegaTotal was set up in 2007 by the creative agency Sfera from Łódź. Over a period of five years of activity, MegaTotal helped in raising funds to make 97 phonograms, of which 75 have already been released and the remaining part is in production phase.<sup>53</sup> The value of the financed projects is within the range of 5000 PLN to 40 000 PLN.<sup>54</sup> The total value of the projects which have been completed so far exceeds 765 655 PLN.<sup>55</sup> MegaTotal.pl also runs an online store (<http://www.megatunes.pl/>) where you can buy the music files of the artists which have been published thanks to the support from the website users' community and the music made by other artists.

This list should be completed with the services that have stopped operating:

- OnetPlejer – a store which functioned on the Onet.pl portal. The service offered both to purchase and listen to music (4 PLN for the purchase of 1 file, or possibility to listen to 400 works; the system awarded a bonus for the purchase of a bigger quantity of works). The files were registered in the WMA format, with DRM protection measures, of 128 kbps quality. Thanks to co-operation with the British company OD2 (taken over by Nokia), the service was in a position to offer a big choice of music.<sup>56</sup>
- Melo.pl – a shop with files which functioned under the “pay per download” model on the interia.pl portal. In 2009, the price for a download of one work ranged in the majority of cases from 1.99 PLN to 3.29 PLN and the price of the whole album amounted to 29.99 PLN; the shop offered WMA files, secured by DRM technologies; it stopped operating on 31.12.2009.<sup>57</sup>
- mp3.pl – a shop with files which functioned under the “pay per download” model on the Wirtualna Polska portal. The shop was managed by the iplay service and the prices were similar. The Mp3.pl service offered mp3 files (320 kbps) without DRM protection

<sup>51</sup> E-mail exchange with the creators of the Sound Park service on 9.07.2013 and 10.07.2013.

<sup>52</sup> The data refer to the share of music which can be classified as representative of the above mentioned genres in the total sales of the website on 10.07.2013 r. The data come from the Sound Park service.

<sup>53</sup> As on 12.06.2013

<sup>54</sup> Interview No. 16.

<sup>55</sup> Id.

<sup>56</sup> Gałuszka, P. (2009). *Biznes muzyczny. Ekonomiczne i marketignowe aspekty fonografii*. Placet, 222.

<sup>57</sup> See <http://melo.pl/> and Gałuszka, P. (2009), footnote 56, p. 223

measures.<sup>58</sup>

- 3pm.pl – small shop offering music by Polish artists at 1.22 – 2.44 PLN per file. It offered the possibility to pay in two ways – via PayU and by SMS, (in the latter case, the buyers bore additional costs for text messages amounting to 50% - as a result, a person buying a music file at 1.22 PLN, paid 2.44 PLN for the text message).<sup>59</sup>
- Niagaro – service functioning under the Eurozet Group brand; it offered the possibility of listening to and downloading music, as well as social functions. According to the information given by Eurozet, there were over 2 million Polish and foreign works in the website catalogue.<sup>60</sup>

## 6. Readiness to pay for music in electronic format

On the basis of the analyses of the available sources and of the conducted interviews, the following factors, which have a significant impact on consumers who decide to use online music services, can be identified:<sup>61</sup>

- the size and depth of the catalogue; the size should be understood as the number of works in the catalogue<sup>62</sup>, and the depth should be understood as the level of genre diversification; to a large extent, both factors are interrelated because the increase of the size of the catalogue at a certain point of time leads automatically to the increase of its depth;
- the level of fees for the access to music and the application of different tariff plans adjusted to the expectations of different consumer groups;
- the interoperability with the biggest number of devices working in different operating systems (smartphones – Android, iOS, Blackberry, Windows Mobile; computers – Windows, Mac, Linux);
- the free transfer of data if the access is by mobile phone (3G, LTE);
- the integration with stereo equipment (e.g. possibility to use Spotify with a Philips mci900 set connected to Wifi, without using a computer);
- the sound quality – the higher the quality, the more attractive is a given service for the most

<sup>58</sup> Gałuszka, P. (2009), footnote 56, p. 223.

<sup>59</sup> Id., 223.

<sup>60</sup> Data from the press materials of Eurozet “Niagaro – muzyczna rewolucja w wersji beta” dated 7.06.2010 r.

<sup>61</sup> The sequence of the elements does not predetermine their importance.

<sup>62</sup> Interview No 9.

- demanding customer groups;
- the introduction of different payment possibilities corresponding to the payment preferences of different user groups (credit card, PayPal, scratch cards, text messages and others);
- the active communication of the service with users, e.g. by recommending playlists to users;<sup>63</sup>
- the user's comfort (e.g. if in the case of music played from a computer, the playing process can be controlled from the keyboard, without the need to look at the computer screen; how advanced are the social functions embedded into a given service and the integration with social platforms, such as Facebook, or Last.fm).

Some respondents remarked that if the prices for the files sold under the “pay per download” model would drop, it could lead to a considerable increase of demand (“if we would have the chance to sell something at 1 PLN (...), I am convinced that the sales would increase considerably and the websites, which are, let's say, pirate websites, would cease to exist”<sup>64</sup>).

Other respondents, however, pointed to the fact that many legal websites offer free access to music, so if the price for some consumers is the factor that matters, this group of users can find a legal offer<sup>65</sup>. It is worth noting that the price matters not only for the market segment which is the least prone to pay, but also for consumers paying higher prices, e.g. those who decide to use Premium offers (giving, e.g. mobile access to the music catalogue). What proved that the services entering the Polish market are aware of the importance of the price, is that two weeks before the start of the Polish version of Spotify, the prices on Deezer have been lowered.

Some respondents pointed out that in addition to the price, the level of the technology available to an average consumer also plays a vital part (it is difficult to sell music via smartphones, if their penetration in the society is very low), as well as the attitude of the society towards intellectual property. Following this line of thought, in order to have a considerable increase of the number of users of online music services, there needs to be a reorientation in mentality, a change in the level of wealthiness, as well as a strengthening of the users' cultural needs, etc<sup>66</sup>. It corresponds with the conclusions from social opinion surveys, which showed no interest in having any contact with culture expressed by a considerable part of the society.<sup>67</sup>

<sup>63</sup> Interview No 15.

<sup>64</sup> Interview No 1.

<sup>65</sup> Interview No 9.

<sup>66</sup> Interview No 3

<sup>67</sup> E.g., TNS OBOP research, commented in Handzlik T., Cała Polska (nie)kulturalna, *Gazeta Wyborcza* dated 28-

Since the analysis of the consumers' will to pay for music is complex, it is recommendable to carry out a separate survey dedicated solely to this topic.

## 7. Price structure in specific models

The price analysis should start from a quite trivial observation that the prices of the files sold under the “pay for the download” model are relatively undiversified. The importance of this observation in economic terms can be understood if we take into account the observation of one of the respondents who stated that 99% of the turnover in the service is generated by 100 works and 1% of the turnover is generated by about 10 thousand works.<sup>68</sup> Theoretically speaking, this would be rational if the most popular works were considerably more expensive than the less popular ones, but this is not what happens. It can be explained by the economic features of the tracks, which result in the fact that the prices of different phonograms belonging to the same price category are quite similar to one another.<sup>69</sup>

The starting point for the price analysis could be the data presented in the 2005 OECD report<sup>70</sup>. They are presented in table 7.1.

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29.07.2007, 11.

<sup>68</sup> Interview No 6.

<sup>69</sup> See, e.g. Caves, R.E. (2000). *Creative Industries: Contracts between Art & Commerce*. Harvard University Press oraz Hull, G.P. (2004). *The Recording Industry. Second Edition*. Routledge.

<sup>70</sup> Organisation for Economic Co-operation and Development. (2005). *Digital Broadband Content: Music*. <http://www.oecd.org/dataoecd/13/2/34995041.pdf>

Fig. 7.1. Price structure in the “pay per download” model

Who?	What do they do?	High costs in USD	Low costs in USD
Music producer / artist	Delivers the work in the form of a “master copy”	0,67	0,40
Financial institution clearing credit cards	Organises the payment process	0,30	0,10
Author or owner of economic rights to the work	Grants mechanical licence	0,12	0,10
Online music store (functioning costs)	Organises trade and advertising	0,25	0,10
		Total 1,34	Total 0,70
		Loss 0,35	Profit 0,29

Source: OECD Report, 2005, footnote 70, p. 54.

The respondents provided more precise information on the structure of prices. In the case of the “pay per download” model, the structure of the net price (after deducting VAT) is as follows:

- the remuneration for the related rights (producer’s rights and performer’s rights) represents about 60% of the price paid by the consumer; this value includes the costs and the margin of the phonographic company and the potential remuneration paid to artists taking part in the phonogram (its amount depends on the terms and conditions of the phonographic contract signed by both parties<sup>71</sup>);
- ▲ the remuneration for copyright, most often paid to the authors through ZAiKS, represents about 10% of the price paid by the consumer (if the file costs less than 2.8 PLN, then ZAiKS collects 0.28 PLN from the net amount<sup>72</sup>);
- the margin of the online shop, the additional fees relating to the operating costs (e.g. costs of the supply of music via an aggregator, payment for the credit card operator) constitute 30%

<sup>71</sup> See, e.g. Passman, D. S. (2009). *All you need to know about the music business*. RosettaBooks, LLC and Gałuszka, (2009), footnote 56.

<sup>72</sup> Interview No 1.

of the price paid by the consumer (when the consumer pays for the file by means of a text message, then the price may increase even by half).<sup>73</sup>

In the case of music supplied to the shops through an aggregator<sup>74</sup>, 50-60% goes to the content owners (performers and producers), about 10% to creators through ZAiKS, and 30-40% is for the technical service, the payment costs and the shop's costs<sup>75</sup>. These observations are confirmed in the literature, in which it is stated that if 0.99 USD is paid by the buyer of a file in the iTunes store, the rightholders receive about 0.60 USD<sup>76</sup>.

It should be pointed out that the companies selling online music are to a certain extent limited by the fees collected by ZAiKS. In the opinion of one of the respondents, the development of services offering the possibility of downloading music at prices which can be treated as affordable for a wide circle of recipients (e.g. 1 PLN for downloading one song) is blocked by minimum prices set by collective management organisations<sup>77</sup>. For example, in the case of downloaded music, the remuneration for copyright paid through ZAiKS is about 10% of the price paid by the consumer, but not less than 0.28 PLN. Hence, in the case the price of a track amounts to 1 PLN, the royalties paid to the collective management organisations account for as much as 28%, which makes it impossible to create a business model based on low prices<sup>78</sup>. As a result, some respondents claim that it is very difficult in Poland to build a reliable business model based on the rates that the collective management organisations demand.

The price structure in subscription based services is different.

In the case of these services, it is difficult to generalise since the amounts which go to the content owners are conditioned by a number of factors: how many times has a given work been played, the number of users paying the subscription fee, the income from advertisers and the terms and conditions negotiated between the subscription service and the content owner (the negotiations are only possible in the case of the biggest players, i.e. global music companies)<sup>79</sup>.

It is worth highlighting that very often this situation deepens the frustration of smaller

<sup>73</sup> Interview No 9.

<sup>74</sup> See point 12.

<sup>75</sup> Interview No 6.

<sup>76</sup> Wikström, (2009), footnote 15, p. 107.

<sup>77</sup> Interview No 1.

<sup>78</sup> Id.

<sup>79</sup> Marshall, L. (2013). Streaming music: financial and legal implications. Lecture delivered on 27.06.2013 during the conference *17th Biennial Conference of the International Association for the Study of Popular Music "Bridge Over Troubled Waters: Challenging Orthodoxies"*.

players who do not know exactly how much income a given service is generating (“what I dislike in the whole system is the quite unclear picture of how much has been sold in fact”<sup>80</sup>). This leads to a conviction which is expressed especially by smaller phonographic companies (the weaker party, especially in relation to global services) that the rules of the game in new models for the distribution of content are not clear.

## 8. The structure of the repertoire - what is the percentage of Polish content as compared to foreign content

The assessment of the structure of the repertoire in the case of services offering music online is difficult. These companies do not provide information on the music sales and it is only sales' data that can show reliably what is the interest in Polish content among consumers.

It is slightly easier to make an assessment for aggregators supplying music to online stores. As pointed out by the representative of E-muzyka, out of 4 million works which are in the service database, around 30 thousand are Polish works.<sup>81</sup> There could be more of them, but in the case of, for instance, older catalogues, the problem is to define who the rights to the content belong to. For example, only 11 out of 44 thousand phonograms in the Polish Phonograms database have a clear copyright status.

The assessment of the popularity of the Polish catalogue, without having access to accurate data, is very difficult also because the point of view of the respondents depends on their personal professional experience, which does not necessarily reflect the Polish music sales' data.

A part of the respondents claim that foreign services entering the Polish market are interested in acquiring the local catalogue.<sup>82</sup> This point of view was presented by the representatives of the global music industry, hence organisations which, by definition, own the music catalogue which is considered by online music services as attractive. To put it in another way, when a foreign subscription service is entering a new market, it is interested, first of all, in acquiring the local catalogue from the biggest phonographic companies.

The same was probably true in the case of the Polish market, which led the respondents to be convinced about the high interest in the Polish catalogue. On the other hand, the acquisition of

<sup>80</sup> Interview No 2

<sup>81</sup> Interview No 6.

<sup>82</sup> Interview Nos 9 and 10.

rights to the catalogues of smaller Polish producers by foreign services selling music does not have to be a priority. This was reflected in the respondents' answers<sup>83</sup>, who even proposed that the legislator should intervene to support the Polish creative sector<sup>84</sup>. Considering the diverging opinions and the fact that a considerable part of the global players have just entered the Polish market, one can assume that the answers to the question about the repertoire of the services operating in Poland will be provided only after some time in the future, preferably after obtaining access to empirical data.

## 9. The impact of piracy on the online music sales methods and trends

Looking from a historical perspective, one can risk the hypothesis that, were it not for the popularity of the exchange of music files in P2P networks, services offering access to online music would not have been launched in the past decade. Before Napster appeared in 1999, CDs – a then basic product of the phonographic industry, was very well sold in many countries. So without the objective obstacles resulting from technological changes, music producers would not have seen a reason for starting a risky process of rebuilding their business model.

The impact of piracy on music sales is difficult to measure precisely. Very often, the results obtained from the analysis of supposedly similar sets of data are contradictory, which may result from e.g. the omission of one variable.

Moreover, it should be noted that this is a controversial topic and the interpretation of the ambiguous results of analyses still depends on whether the person interpreting them is connected with the music industry. For example, IFPI refers to a research which concludes that Internet piracy significantly lowers music sales.

The examples are:

- the Michel study concluding that online filesharing “could have reduced the sale of albums (between 1999 and 2003) and in the case of some consumers by 13%<sup>85</sup>;

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<sup>83</sup> Interview No. 6.

<sup>84</sup> For example by imposing quotas for Polish content, similar to those used in radio broadcasting.

<sup>85</sup> Michel, N. J. (2006). The impact of digital file sharing on the music industry: An empirical analysis. *Topics in Economic Analysis & Policy*, 6(1), 11.

- the Peitz and Waelbroeck study showing, on the basis of data from 2000-2001, that “Internet piracy was a significant factor reducing sales in the music sector at an early stage of the filesharing network development”<sup>86</sup> and the Zentner study, conducted at the same period, showing that music download reduced the likelihood of music purchase by 30%, which, taking into account that only a part of the population used P2P, indicated that were it not for filesharing, the music sales in the European countries analysed in 2002 would have been higher by about 7.8%<sup>87</sup>;
- a study conducted in Canada suggesting that the functioning of P2P networks has a definitely negative impact on the purchase of music from official sources, which results from the fact that the users treat P2P networks as a free alternative to buying music<sup>88</sup>;
- a study conducted in Sweden showing that the implementation of legal provisions in this country which increased the likelihood of detection and conviction of persons sharing music online led to the reduction of the Internet traffic (which can be explained by the decrease of the number of P2P network users) and to the increase of music sales.<sup>89</sup>

The presented studies are only examples of analyses indicating the existence of a relationship between Internet piracy and the volume of sales of the phonographic sector's products. In the literature, however, there is a large number of articles which do not reveal any relationship between both phenomena or which suggest that this relationship is more complex and its assessment is ambiguous. The examples are the following:

- an article suggesting that the negative impact of filesharing over the Internet is counterbalanced by the readiness of consumers to pay higher prices, which results from the possibility to better discover the music before purchasing it, the adaptation of the product to the buyer's preferences is improved (which means that even if fewer people buy music, those who buy it spend more because the product which they have listened to online before

<sup>86</sup> Peitz, M., & Waelbroeck, P. (2004). The effect of internet piracy on CD sales: Cross-section evidence. *Review of Economic Research on Copyright Issues*, 1(2), 71.

<sup>87</sup> Zentner, A. (2006). Measuring the Effect of File Sharing on Music Purchases. *Journal of Law and Economics*, 49(1), 63-90.

<sup>88</sup> Barker, G. R. (2012). Assessing the Economic Impact of Copyright Law: Evidence of the Effect of Free Music Downloads on the Purchase of Music CDs. *ANU College of Law Working Paper No. 2*  
<http://ssrn.com/abstract=1990153>

<sup>89</sup> Adrian Adermon and Che-Yuan Liang (2009). Piracy, Music, and Movies: A Natural Experiment. *Working Paper 2010:18* [http://ideas.repec.org/p/hhs/uunewp/2010\\_018.html](http://ideas.repec.org/p/hhs/uunewp/2010_018.html)

purchasing it rarely falls short of their expectations)<sup>90</sup>; the mitigation of the negative impact of filesharing is possible when the consumers' preferences are sufficiently differentiated and the available music is highly varied;

- an article classifying the different motivations for downloading music from P2P networks in order to indicate those which lower, or increase the inclination to purchase phonograms; the authors conclude that the motivations which can be defined as "unwillingness to pay", or "unwillingness to buy the whole album" have a negative impact on the demand for phonograms, but they are counterbalanced by the motivations "listen before purchasing" and "song unavailable on CDs, or in online offers"; as a result, the authors do not find a relationship between the number of files downloaded from P2P networks and the sale of albums in CD format;<sup>91</sup>
- an econometric study, the results of which have been published in one of the top business periodicals – the Journal of Political Economy; the analysis of the data led the authors to the conclusion that "file sharing was not the main reason for the drop of sales of music in the USA in 2000-2002" and that "the number of users of P2P networks is not correlated with the sale of albums";<sup>92</sup>
- a research conducted in 2011 in the EU countries shows that "users do not perceive illegal downloading as a substitute for legal music in digital formats"<sup>93</sup>; the study was strongly criticised by IFPI, which expressed its criticism in these words: "In the JRC study, the data about traffic on both legal and illegal music websites were wrongly used and interpreted. The fact, which has not been taken into account, was that not every Internet user's action is of a consumption nature. The example given was the iTunes service, where the following activities have been included in the user's activities, for example: plugging of the music device to the computer, or synchronisation of the device with the computer. The examples referred above have been classified as a manifestation of legal music activity, which raises

<sup>90</sup> Peitz, M., & Waelbroeck, P. (2006). Why the music industry may gain from free downloading—The role of sampling. *International Journal of Industrial Organization*, 24(5), 907-913.

<sup>91</sup> Andersen, B., & Frenz, M. (2010). Don't blame the P2P file-sharers: the impact of free music downloads on the purchase of music CDs in Canada. *Journal of Evolutionary Economics*, 20(5), 715-740.

<sup>92</sup> Oberholzer-Gee, F., & Strumpf, K. (2007). The effect of file sharing on record sales: An empirical analysis. *Journal of Political Economy*, 115(1), 1-42.

<sup>93</sup> Aguiar, L. & Martens, B. (2013). Digital Music Consumption on the Internet: Evidence from Clickstream Data. Institute for Prospective Technological Studies, *Digital Economy Working Paper 2013/04*, 1 <ftp://ftp.jrc.es/pub/EURdoc/EURdoc/JRC79605.pdf>

doubts in the conclusions presented by JRC (...) The Commission study erroneously presents the relationship between legal and illegal music services. There is no doubt that a small percentage of pirates legally purchases music, but it does not predetermine the fact that a majority of them have never made any music transaction. According to a study carried out in the UK, 44.8% of illegal music file-sharers have never bought it”<sup>94</sup>;

- a research conducted in Spain which shows that the willingness to pay for music is correlated with age, which can result from both a higher income of older people and also from their perception of values (e.g. the conviction that downloading music from P2P networks is illegal); people who are less sensitive to the price of music download less from P2P networks and are ready to pay higher prices for CDs and music files; moreover, people using P2P networks are strongly motivated by the availability of a variety of works (i.e. a better “assortment” than in traditional stores) and the comfort of the music purchase.<sup>95</sup>

A number of studies also aimed at learning about the attitudes of people downloading music from unauthorised sources and their reaction to anti-piracy arguments put forward by the phonographic industry. The examples of such studies are the following:

- an analysis of the data originating from 2500 French households, which showed e.g. that the users of filesharing networks are motivated by a diversified offer of music and the artists’ interest is very important for them<sup>96</sup>;
- an experiment testing the reaction of 139 adults inclined to use filesharing networks; the experiment showed that the willingness to use filesharing platforms depends on the users’ competencies, on whether a given person has already used such networks before, the attitudes towards piracy and the expectations of the relatives of the examined person; contrary to what was expected, the “anti-piracy arguments did not have a crucial impact on the behavioural dynamics lying at the basis of piracy”<sup>97</sup>;

<sup>94</sup> ZPAV (2013). *Response of IFPI to the study conducted by European Commission* <http://z pav.pl/aktualnosci.php?idaktualnosci=539>; See also IFPI (2013). *IFPI says Digital Music JRC study is flawed, misleading and disconnected from commercial reality* [http://www.ifpi.org/content/section\\_news/20130320.html](http://www.ifpi.org/content/section_news/20130320.html)

<sup>95</sup> Sandulli, F. D. (2007). CD music purchase behaviour of P2P users. *Technovation*, 27(6), 325-334

<sup>96</sup> Rochelandet, F., & Le Guel, F. (2005). P2P music sharing networks: why the legal fight against copiers may be inefficient. *Review of Economic Research on Copyright Issues*, 2(2), 69-82.

<sup>97</sup> d’Astous, A., Colbert, F., & Montpetit, D. (2005). Music piracy on the web—how effective are anti-piracy arguments? Evidence from the theory of planned behaviour. *Journal of Consumer Policy*, 28(3), 289-310.

- an analysis suggesting that the legal actions against infringers of copyright are governed by the so-called “inability paradox” – they cannot produce a deterrent effect and at the same time promote attitudes favourable to copyright (either the former or the latter can be achieved); it means that bringing Internet pirates to justice will produce a deterrent effect, but at the same time it will make it difficult to promote social norms contributing to the respect of copyright.<sup>98</sup>

It should be stressed that a doubt-dispelling evaluation of the impact of Internet piracy on the condition of the music sector as well as on the music online sales’ methods and trends will never be possible. One of the factors which is not taken into account in the majority of this type of analyses is the gradually changing way consumers perceive music. Leyshon et al. put forward the argument that the role of music in the contemporary capitalist societies is growing, but it does not translate into an increase of the significance of the phonographic sector, as it was the case in the second half of the 20<sup>th</sup> century.<sup>99</sup>

The authors indicate that music became less and less a value in itself for consumers, but on the other hand, it is increasingly valued as a part of bigger cultural phenomena or products. Therefore, music is very important because it gives a valuable experience to clubbers, film audiences and computer game players, but it does not necessarily serve these persons as an object of direct consumption, consisting in the listening of a phonogram.<sup>100</sup> This situation concerns mainly young people who use music products in a completely different way than older people, e.g. they listen more rarely to all of the songs of an album, as they are more inclined to listen to a single piece of music.<sup>101</sup>

Taking this into account, the best response to Internet piracy seems to be the development of an offer of such music services and products that will reflect the changing role of music in the contemporary societies and which will also be practical to use and be relatively inexpensive. A legal music service should be attractive enough and practical so that people who have been using filesharing networks so far cease to find them interesting. There is a high degree of probability that

<sup>98</sup> Depoorter, B. & Vanneste, S. (2006). Norms and Enforcement: The Case Against Copyright Litigation, *Oregon Law Review*, 84(4), 1127-1180 and Depoorter, B., Vanneste, S., & Van Hiel, A. (2011). Copyright Backlash. *Southern California Law Review*, 84(6), 1051-1292.

<sup>99</sup> Leyshon, A., Webb, P., French, S., Thrift, N., & Crewe, L. (2005). On the reproduction of the musical economy after the Internet. *Media, Culture & Society*, 27(2), 177 –209.

<sup>100</sup> Id.

<sup>101</sup> Similar observations are made by the respondents in interview No 2 quoted under point 11.

retrospectively the turn of 2011 and 2012 will be pointed out as a crucial momentum for the Polish music market – a time where the offer of legal music services has converged in terms of its attractiveness with the offer of filesharing networks.<sup>102</sup>

In the course of the conducted interviews, the respondents also drew attention to the piracy problem which has an institutional nature.

This term can be understood as both services allowing users to cross the limit of their private use, or directly facilitating the infringement of copyright law (such as, e.g. hosting services enabling users to easily share files), and also services taking advantage of favourable legal interpretations to reduce the fees for content use.<sup>103</sup> The example for the latter are services which offer users the possibility to considerably personalise the repertoire, and which pretend to be Internet radios offering a webcasting service (which would require to obtain a licence only from collective management organisations for copyright and related rights and to pay a fee according to pre-established tables).

In the opinion of phonographic companies, these services should be considered as *on-demand* services (which means that the tariffs need to be negotiated with rightholders, music producers). The above mentioned services rely on an interpretation of the copyright provision on the “making available of works to the public in such a way that members of the public may access them from a place and at a time individually chosen by them” according to which the user chooses a work and not an artist, which allegedly would exempt them from the obligation to negotiate tariffs with rightholders.

To sum up, it can be concluded that the interviews suggest that a part of the phonographic industry treats filesharing by individual users as a type of permanent (though unchangeably negative) element of the record companies’ functioning. As a consequence, the best method to limit this phenomenon is to create legal services distributing online content in a cheap, comfortable and attractive way for users who, out of convenience or laziness, would resign from pirate services.<sup>104</sup> What is the most worrying for the representatives of the industry is the institutional piracy, mentioned above, which, contrary to the often non-commercial filesharing in P2P networks, is based on generating revenues at the cost of the phonographic industry and of the artists’ community.

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<sup>102</sup> See also point 11.

<sup>103</sup> Interviews Nos 1, 6, 13.

<sup>104</sup> It was also emphasised in, e.g., interview No 4 that there was a necessity to undertake activities of an educational nature in the field of intellectual property rights.

## 10. Characteristics of the applied forms of protection against unauthorised copying on the access-based online music services market

The protection measures against unauthorised copying are defined by the general term of Digital Rights Management (DRM). This term comprises technologies limiting the possibility for computer users to create and distribute copies of electronic files or digital carriers<sup>105</sup>. By applying advanced computer technologies (e.g. similar to encryption), the users are subject to certain limitations of use, and in particular, of further distribution of protected content.

Piesiewicz indicates the following possibilities of DRM systems: “limiting copies, limiting the playing of a work, making the conversion to mp3/ogg format difficult, quantitative limitations of reproductions/copies, making the recording of a TV/video/audio signal difficult, making it impossible to rewind a film episode, making it difficult to read by a programme which is different from the one supplied by the producer”<sup>106</sup>. From the individual user’s point of view, this means, e.g. the possibility of making only a limited number of copies of a given file. As an example, the FairPlay DRM system used on the iTunes store limited before 2009 the number of computers on which the purchased file could be reproduced to three (and after liberalising the policy, to five) copies. From the point of view of the business model applied by Apple, it was not only about preventing the unauthorised copying of content, but also about making the customers of the iTunes Music Store tied to the equipment produced by the owner of the store.<sup>107</sup> The result of the use of DRM protection measures was that the files bought at that time in the iTunes Music Store could only be played on the players produced by Apple. The company decided to sell unprotected files when it turned out that its market position was strong and the competitors, taking advantage of the consumers’ reluctance to DRM, offered unprotected files.

The iTunes store’s withdrawal from DRM protection measures reflects a broader trend of Internet services departing from the application of protection measures which are burdensome for the consumer. It should be noted though, that streaming services are still using different types of protection measures, which mainly results from the nature of the services they provide.

<sup>105</sup> Schmidt, A., Dolfsma, W., & Keuvelaar, W. (2007). *Fighting the War on File Sharing*. T.M.C. Asser Press.

<sup>106</sup> Piesiewicz, P. F. (2009). *Music work and its creator*. Warsaw, Cracov, Publisher: Oficyna Wolters Kluwer Polska, 136.

<sup>107</sup> Gałuszka, P. (2009), footnote 56, p. 206-208.

Contrary to services selling music files per item, which after selling a work do not have to monitor how frequently the buyer is playing it, subscription services need to know about each time the subscriber is playing the work. This information is necessary for the settlements with the rightholders – the more often a given work is being played and the more subscribers choose a given artist, the more money will have to be paid by a subscription service to the authorised entities. In consequence, subscription services monitor the consumers' behaviour to a larger extent than services operating under the “pay per download” model.<sup>108</sup>

Taking into account the fact that the consumer, who decides to start using a subscription service, is not in a position to negotiate certain provisions of the agreement entered into with the service provider, it is desirable that the bodies involved in consumer protection and the protection of personal data analyse this type of agreements in order to protect the weaker party in the transaction, i.e. consumers.

## 11. Forecast for the music market and for the principles of access to music in a 5-years perspective

On the basis of the interviews that have been carried out and of the analysis of the global trends and relevant literature, a conclusion can be drawn that there are serious reasons for claiming that the Polish market for music is at a crucial moment. This is confirmed by the following facts:

- the penetration of the Polish market by global players, which happened in 2011 (e.g. iTunes) and in 2012 (e.g. Spotify, WIMP);
- actual financial successes reached by Polish artists due to the exploitation of music online; an example can be Weekend's song “Ona tańczy dla mnie”, which generated a revenue of 100 thousand PLN for the music group and the producer only from digital channels<sup>109</sup>;
- the fact that streaming subscription services are only at the start of their development and, in the course of time, they will function better and better, and as a consequence, the music consumption model will be changing; as a result, consumers will be most likely willing to

<sup>108</sup> See, for example, Makarenko, V. (2013). *Muzyczny Wielki Brat, czyli co wie o tobie Spotify i jak to wykorzystać*, text dated 17.07.2013 [http://wyborcza.pl/1,75475,14287458,Muzyczny\\_Wielki\\_Brat\\_czyli\\_co\\_wie\\_o\\_tobie\\_Spotify.html](http://wyborcza.pl/1,75475,14287458,Muzyczny_Wielki_Brat_czyli_co_wie_o_tobie_Spotify.html)

<sup>109</sup> Interview No 1.

pay higher prices in different models and the access to legal music offers will be more and more attractive and comfortable<sup>110</sup>;

- the greater availability of smartphones and fast wireless Internet connections will contribute to the development of the market, which, in turn, will lead to further integration of online music sales also by means of mobile networks;
- the use of music services for marketing purposes will be developing strongly; such activities have always been present, but the increasing number of music distribution channels and their progressing integration with social services will favour the further development of the music use area.<sup>111</sup>

Considering the above, one can risk the statement that the subscription model has the best perspectives in Poland<sup>112</sup>, and it could be extended in the future to the possibility of downloading single works and playlists in the framework of one subscription (without paying an additional fee).<sup>113</sup> Fierce competition between subscription services will help to maintain subscription prices at a low level for some time. It is unlikely that the price of 20 PLN for a Premium access (at present, this price is applied by Spotify, WIMP and Deezer) will be maintained for a long time. The price may increase, in particular if it turns out that the battle for the market will be won by one or two subscription services.<sup>114</sup>

It is more difficult to assess the long-term perspective of the “pay per download” model. There are few arguments which are not in its favour – the already mentioned costs of the authors’ remuneration, charged by ZAiKS, which make it difficult to lower the prices of files, the settlement of electronic payments (in particular, the lack of advanced micropayments and the unfavourable proportion of fees charged by credit cards operators in relation to the price of files)<sup>115</sup>, as well as the weak penetration of credit cards (although this problem concerns also subscription services).

On the other hand, the consumers’ habit of “possessing” music, which can have a crucial importance for certain groups of buyers, speaks in favour of this model.<sup>116</sup> Furthermore, consumers paying careful attention to the sound quality will also appreciate the fact that some services

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<sup>110</sup> Interview No 9.

<sup>111</sup> Interviews Nos 8 and 9.

<sup>112</sup> Interview No 11.

<sup>113</sup> Interview No 1.

<sup>114</sup> Interview No 6.

<sup>115</sup> Id.

<sup>116</sup> Id.

functioning under the “pay per download” model offer files of a quality which is comparable to the sound of a compact disc (for example, recorded in a lossless FLAC format).

The success of subscription services should, within a couple of years, considerably contribute to the decrease of the number of people using pirate services.

A relatively cheap broad access to music online, and the increase of social awareness about the advantages of subscription services, will have as a result that a major part of consumers will find it not practical for them to waste their time for searching a filesharing network or hosting services.<sup>117</sup>

Some respondents remarked that the music consumption habits are changing, which will have as a consequence a further decrease of the sales of physical carriers. This can be illustrated by the following quotation:

“it can be predicted, with a high degree of probability, that the CD is condemned to extinction. It will be the same story as with vinyl records. A small number of people will be interested in CDs, but when they die, nobody will come back to this (...), and how about young people? Unlike their parents, they treat music as another entertainment. Most often “it creates a background climate”, it is useful for dancing and is a pretext to meet at a concert. And when they like a certain song, then they download it and listen to it till they get bored. It looks like in the 50s and 60s – the most important was the single, meaning a song. Nowadays, young people download the song they like and what about the whole phonogram? Maybe if an artist has a number of songs that young people like, they will compile themselves this artist’s biggest hits, in e.g. their phone”.<sup>118</sup>

This in turn will most likely have an impact on the gradual evolution of the publishing cycle – in a longer time perspective, it is not certain if music will be further released in packages (in the form of albums). It is probable that some musicians will shift to more frequent releases of small portions of music, e.g. by releasing one work from time to time.

A lot will depend on the convention adopted in a given music genre<sup>119</sup> and on global trends (it should rather not be expected that the Polish market will significantly differ from the markets of other European countries in the long term).

<sup>117</sup> Here the question arises about what will be the policy of the rightholders towards user-generated content. However this is a topic going beyond the framework of this study.

<sup>118</sup> Interview No 2.

<sup>119</sup> Interview No 6.

## 12. The acquisition of repertoire by online stores

In order to understand how the acquisition of repertoire by online stores takes place, it is necessary to explain what rights are involved in the sale of phonograms.

This is illustrated in diagram No 12.1, which can be explained in the following way. The entity which plans to open an online music store has to obtain an authorisation for the use of each work from three entities:

- the author of the work (the author of the text and of the melodic line, it can be several different people who are, as a rule, represented by collective management organisations or by publishers)<sup>120</sup>;
- the record producer<sup>121</sup> (a person or an organisation which holds the rights to the master copy – a carrier on which the original recording has been recorded);
- the performer (a person or several people who have made an artistic performance of a given work registered on a specific phonogram; the performers are often represented by collective management organisations).

As mentioned, each of these rights can be managed by a different person or organisation, as presented in diagram 12.1.

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<sup>120</sup> The term publisher, or publishing company have been directly transposed from English for two reasons. Firstly, these are terms commonly used by people from the music industry. Secondly, the Polish translation – “wydawca muzyczny” – is not precise because it is also used to define the label (e.g. in the sentence company “x” is the publisher of the record of artist “y”). See also the definition presented under point 12.

<sup>121</sup> It should be noted that the term “producer” is used here in a different meaning than the one commonly used. It is not used to define the person responsible for the recording of the music in a record studio, but it is used for the publisher – most often, a music publishing company.

Diagram 12.1. Entities involved in the granting of licences to an online music service

		Music file	
Copyright category		work	record
Entity owning the rights		Composer of the melodic line author of the lyrics	most often record company or other owner of the master copy  Performer, who can transfer the rights to the record company
Entity authorised to grant a licence	Collective management organisation (e.g. ZAiKS) and/ or publisher	Most often music record company or other owner of the master copy (e.g. the artist); in the case of some types of use – ZPAV	Music record company and/or collective management organisation (e.g. SAWP, STOART)

Source: Own study.

The most frequent situation, which usually takes place in the case of the biggest labels, is the management of the record producer's right and of the performer's right by the music label. The entity planning to launch an online store will approach this company to obtain the two categories of rights. The offering of the music file online will also require an agreement with the person or organisation managing the copyright to the work in order to obtain a licence for its use. In this case, the situation is even more complicated.

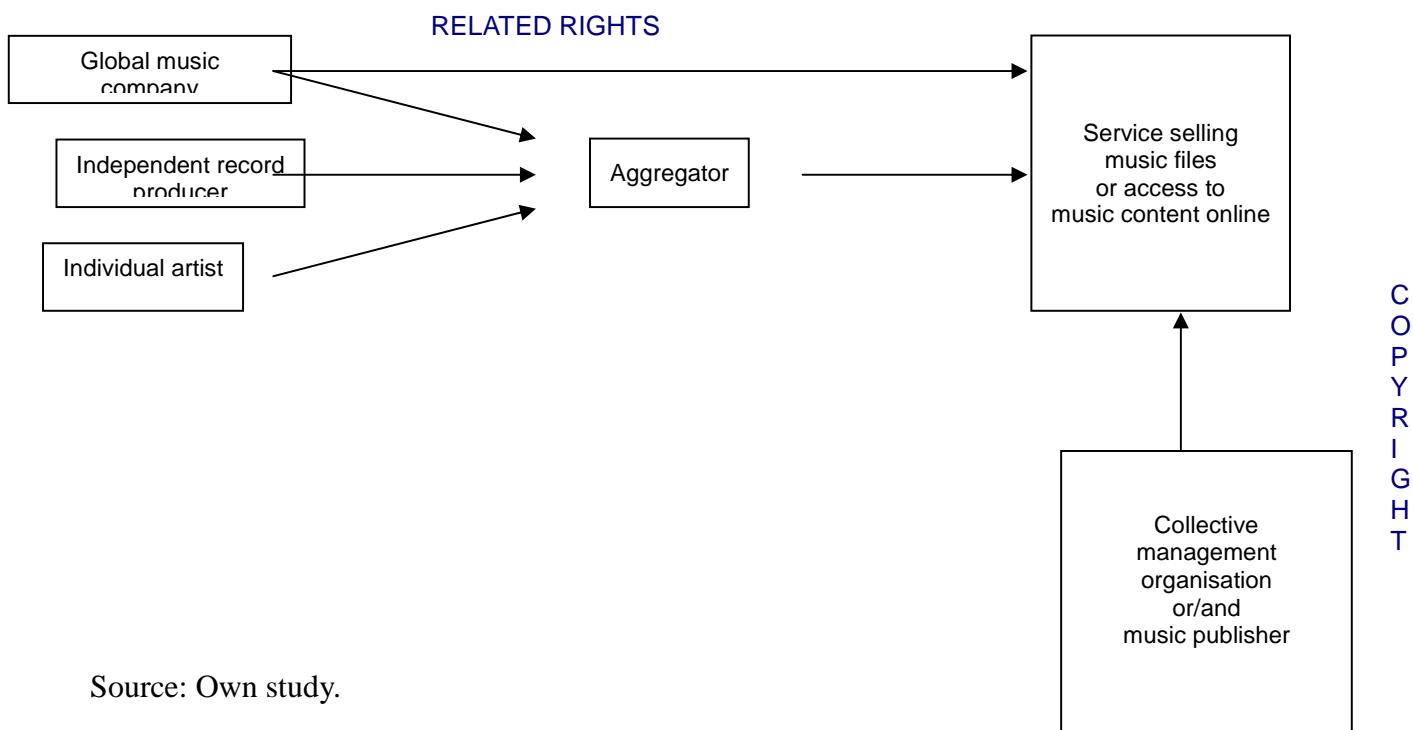
In general, the author can manage these rights individually, but he can also entrust their management to a collective management organisation, or to a specialised organisation dealing with the management of the rights to the works – to a publisher.

In practice, a collective management organisation can manage rights for some types of use (e.g. for "public performance") and the publisher can manage rights in other fields (e.g. for the "synchronisation of sound and image"). Additional complications appear when a given work was written by several creators, each of which entrusted the management of their rights to different

organisations operating in different countries. In theory, the entity that wishes to open an online store selling files on the entire territory of the EU will have to establish the legal status of the work in each EU Member State. The difficulties faced by such entity are considerable and they are even more emphasised due to the legal discrepancies between EU Member States, due to problems with the identification of the authorised entities and in some cases, due to insufficiently precise legal provisions.

The analysis of the acquisition of the repertoire by online stores needs to start from the presentation of all the entities participating in the distribution channel of online music content. Diagram 12.2. shows in a simple way which entities can participate in the online music distribution chain. The entities which are on the left side of the diagram control the producer's rights and the performers' rights which are directly transferred to the service selling music online (this is possible mainly for the biggest players), or via an aggregator. As already mentioned before, in order to create an offer, the service which makes music available online still needs to acquire the copyright attached to the content. These rights are acquired from the collective management organisation operating in this area (in Poland – The Association of Authors ZAiKS), and/or from music publishers.

Diagram 12.2. Process of repertoire acquisition by online stores.



Source: Own study.

Aggregators are entities operating on the B2B market as intermediaries between the labels (more rarely – individual artists) and users – mostly companies making music available to final customers online or by means of mobile technologies. The aggregator's task is to obtain licences from authorised entities for the use of related rights<sup>122</sup> for online use and to grant such licences to the interested users (distributors of online content and telecommunications companies). Two companies of this type have a strong position on the Polish market – E-Muzyka and Independent Digital.

A global player, a company called The Orchard, with which e.g. the independent music publishing company MJM Music signed a contract, can also be added to the aggregators present on the Polish market<sup>123</sup>.

The iplay service, which distributes music to Netia, undertook to provide aggregation services.<sup>124</sup>

An aggregator is an intermediary whose existence on the market is extremely important for the digital market. These companies solve the following problems faced by phonographic companies:

- the problem of placing an offer in a store – in most cases, big online retailers do not want to negotiate directly with publishers, especially if they do not have an extensive catalogue; the exception are global music companies (*majors*), which have a sufficiently big catalogue that they are in a position to directly negotiate with retailers;
- the problem of adapting formats – in order to sell music online, the files and metadata must be adapted to the requirements of the online retailer; since both labels and online stores use different recording formats, an entity is needed to adjust (unify) the formats used by both parties to the transaction<sup>125</sup>; moreover, this process is sometimes very time-consuming, which explains why the “loading” of works to all the services can take about a month;
- the digitisation problem – smaller labels often did not digitise their catalogue at all, therefore an entity is needed to take care of it in their stead; this task encompasses not only the digitisation of phonograms, but also, e.g. the scanning of covers;<sup>126</sup>
- the problem of monitoring the rights status – labels can control the rights only for some time (e.g. in the case when they have concluded an agreement with an artist for a determined

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<sup>122</sup> Recording rights, though it can also be video content.

<sup>123</sup> Interview No 2.

<sup>124</sup> Interview No 9. See also <http://e-sklep.netia.pl/muzyka-2-k-4-g-3-w.html>

<sup>125</sup> Interview No 6.

<sup>126</sup> Id.

period), which requires a constant monitoring of the rights status; it is especially important bearing in mind the fact that music products have very often a short life cycle, which means that it is costly for a company to miss the moment when a song becomes popular (in the sense that it is unable to sell it online because the rights to the work have expired);<sup>127</sup>

- the problem of delivering marketing materials to online retailers – on the basis of materials sent by labels, the aggregator prepares and delivers promotional content to online stores; only the biggest phonographic companies would be in a position to operate in this field fully independently; aggregators know how to promote the works in online stores, and they do not confine themselves to displaying the content in the store, but they also support the sales actively<sup>128</sup>; this also makes sense for online retailers for whom the sale of music is an additional activity<sup>129</sup> - it is more profitable for such a company to delegate certain tasks to the aggregator, rather than to hire specialists to create the marketing messages which appear in the online store.<sup>130</sup>

The agreements signed between phonographic companies and aggregators depend on the size of the catalogue owned by a given label. For example, a global music company signs with an aggregator very concrete, non-exclusive agreements for the delivery of selected content to strictly defined services.<sup>131</sup> As a principle, the global company prefers to keep a direct relationship with a given contractor (an online retailer), but sometimes, due to business considerations, it will reach certain services through an aggregator. In such a situation, the company grants a licence for the use of music to the chosen aggregator, which in turn sublicenses it to a specific service.<sup>132</sup>

In the case of a small phonographic company, the conditions for the co-operation will be different. As a rule, the agreement entered into with the aggregator will usually be of an exclusive nature. The agreement is usually entered into for a determined period and then it is prolonged for an indefinite period upon a few months' termination notice.<sup>133</sup>

The detailed terms and conditions of the agreements are covered by trade secrets, but a certain relationship may be noticed – the bigger and more attractive the catalogue of a given label

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<sup>127</sup> Id.

<sup>128</sup> Interview No 1.

<sup>129</sup> See, e.g. Netia store <http://e-sklep.netia.pl/muzyka-2-k-4-g-3-w.html>

<sup>130</sup> Interview No 6.

<sup>131</sup> Interview No 9.

<sup>132</sup> Id.

<sup>133</sup> Interview No 1.

is, the better conditions this company is able to negotiate with the aggregator.<sup>134</sup>

There are cases of co-operation between an aggregator and an artist which individually manages his performance rights and recording rights. However, taking into account the fact that, from the aggregator's point of view, each subsequent contractor generates costs, such artist should have a strong position on the music scene.

Another entity which role on the digital market needs to be explained is the publisher (the publisher is not mentioned in the Polish Law on Copyright and Related Rights). The publisher deals with the management of the economic rights (to the music and text) on the basis of an agreement between the author and the publishing company, signed for a definite period of time, or if these rights have been acquired and assigned to the publisher, for the term of protection of the economic rights: from the signature of the agreement up to 70 years after the author's death. The publisher has the right to manage and use the works created and delivered by the author on the basis of the economic rights. For some types of use, these rights are transferred to ZAiKS (within so called mechanical rights, resulting from the the economic right to reproduce works on carriers, and communication to the public rights, which relate to all forms of communication ), and for other types of use, they are not (e.g. sound and image synchronisation, print reproduction, exercise of copyright for derivative works, e.g. for the making of essays, adaptations, arrangements, translations, combining with another musical, literary or dramatic work, or the addition of new words to the music, or of new music to the lyrics).<sup>135</sup>

There are four big publishers operating on the Polish market: SM Publishing (an affiliate of Sony/ATV Music Publishing managing also the EMI Music Publishing catalogue), Universal Music Publishing, Warner/Chappell and Schubert Music Publishing. These companies are branches of international publishing companies and, as a result, they largely represent the catalogues of foreign works. In addition, these companies manage the rights of Polish artists and sign agreements with new creators.

The question of the management of rights in foreign catalogues by publishers, as well as their co-operation with collective management organisations, is complex.<sup>136</sup>

For example, the Anglo-American repertoire of Sony/ATV - in the case of online use - has not been entrusted to the local branch of the company because the head office manages it directly,

<sup>134</sup> See also point 7 above.

<sup>135</sup> Interview No 3

<sup>136</sup> See point 14..

or e.g. via PAECOL<sup>137</sup> (the local branch may represent the head office in the negotiations with contractors, but it cannot sign the agreement for the Anglo-American repertoire itself).

As a result, the rights to the Anglo-American repertoire for the territory of Poland have not been entrusted to ZAiKS (only the Polish repertoire was entrusted). As a consequence, the multi-territorial licences for the Anglo-American repertoire can be obtained by users from the organisation indicated by Sony/ATV Europe (PAECOL), but the licences for the Polish repertoire can be obtained from ZAiKS. This leads, however, to a collision of rights<sup>138</sup>, because ZAiKS grants them irrespectively of the repertoire to users interested in the Polish territory pursuant to art. 21 paragraph 2<sup>1</sup> (radio and TV organisations are allowed to broadcast works only on the basis of an agreement concluded with a collective management organisation, which is also applicable to the Internet<sup>139</sup>). Despite the lack of a mandate, ZAiKS grants these licences considering paragraph 2<sup>1</sup> as a provision establishing a statutory licence allowing for the use of works via collective management organisations.<sup>140</sup> This situation does not result from any bad faith on the part of the parties involved, but from the complicated legal regime which came into being after the entry into force of the EU Recommendation of 2005, as well as after the CISAC Case (see point 14 and footnote 137).

### **13. The extent to which the territorial nature of services and online stores results from the territoriality of copyright and the extent to which it is conditioned by economic factors**

The reasons for the territorial limitations standing in the way of the development of the music digital market in Europe are complex and are not confined to the problems pertaining to the territoriality of copyright. When analysing the reasons for the relatively late arrival of global players

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<sup>137</sup> The initiative was commenced after Recommendation of the European Commission of 2005 took effect [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l\\_276/l\\_27620051021en00540057.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_276/l_27620051021en00540057.pdf) and also in the so-called CISAC Case, see point 14 and [http://www.cisac.org/CisacPortal/miscDocs/CISAC\\_Case\\_Briefing%20paper\\_EN.pdf](http://www.cisac.org/CisacPortal/miscDocs/CISAC_Case_Briefing%20paper_EN.pdf)

<sup>138</sup> Interview No 3

<sup>139</sup> The literal meaning of Art. 21 of the Law on Copyright and the Related Rights is the following: "1. Radio and TV organisations are entitled to broadcast small published music pieces, words, words and music only on the basis of the agreement concluded with the collective management organisation managing the copyrights unless the right to broadcast the works ordered by the radio, or TV organisation is vested in it on the basis of a separate agreement. 2. The creator can resign from the intermediation of the collective management organisation managing the copyrights in the agreement concluded with radio, or TV organisation, which is referred to in section 1. The resignation shall be in writing under the pain of invalidity. 2<sup>1</sup>. Provisions of section 1 and 2 are respectively applicable to the public dissemination of the works in such a way so that everybody could have an access to them at a place and at a time chosen by themselves".

<sup>140</sup> Interview No 3.

on the Polish market, the following factors can be identified<sup>141</sup>:

1. Insufficient access to broadband Internet and mobile Internet (3G, LTE) and other technological barriers, e.g. insufficient availability of smartphones (this situation is improving fast)
2. Low percentage of credit card holders in the target groups defined by the services offering online access to music (young people). An important factor is also the lack of trust of consumers in online transactions by credit card (uncertainties related to the security of payments).
3. The view of companies running online music services about the high level of piracy in Poland (though the fact that global players such as iTunes, Deezer, or Spotify entered the Polish market shows this belief was not decisive).
4. Reasons purely related to business, depending on the business model adopted by a given company. As an example, the Apple business model is based, first of all, on the sale of music players (iPod, iPhone) and this is why this company enters, in the first place, markets which give the opportunity to boost the sales of these devices. Most likely, the Polish market has been assessed only recently by this company as a prospective one.
5. Legal provisions not related to copyright and related rights. The rules governing the protection of personal data or the protection of consumers are one of the examples. It is difficult to assume that the differences between European countries can create serious obstacles in the long-term for companies running online music stores. Nevertheless, at a certain stage of their development, these companies may choose markets on which it is relatively easy to conduct this type of business, in compliance with the existing rules.
6. The success of an online music store requires the launching of a widely designed promotion and information campaign aiming at persuading consumers to use new channels to access music. It is not only about convincing users who download files from unauthorised services

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<sup>141</sup> See also: European Commission, (2012). *Commission staff working document. Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*, [http://ec.europa.eu/internal\\_market/copyright/docs/management/impact\\_assesment-com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/impact_assesment-com-2012-3722_en.pdf)

that it is worth paying for music. It is essential to show to less technology knowledgeable consumers that the use of legal online music stores is easy, comfortable and safe. In consequence, the entities entering the Polish market are challenged by the following dilemma: the company which, as the first one, will want to attract a considerable number of customers, will have to bear the burden and cost of launching a widely designed promotional and educational campaign aiming at making the consumers aware of the advantages of consuming music online. The outcome of such a campaign could be either reaching the market leader's position, or the position of a service which would have done the "dirty work" for others and which would have, as the only one, borne tangible costs of running a promotional and educational campaign, and the benefits flowing from that campaign would also benefit the competitors. In this situation, the companies running this type of services may tend to adopt an expectative attitude and plan promotional actions very carefully. As mentioned in point 11, within the two coming years at most, it is expected that the situation will be subject to a rapid change in this respect (the first symptoms of change were visible while this report was drafted).

#### **14. The projected impact of the introduction of the European licence passport, based on the project of Title III of the Directive on collective management of copyright and related rights and multi-territorial licencing of rights in musical works for online uses in the internal market, on the situation of Polish entities operating in the area of making music available online**

According to the CISAC data of 2011, collective management organisations collected 7584 million EUR around the world, of which 4537 million EUR in Europe alone. In 2011, 88% of the money collected around the world (about 6800 million EUR) came from the use of musical works.<sup>142</sup> To compare, the world sales of music in 2010 was worth around 16146 million USD.<sup>143</sup> Therefore, collective management organisations are big players in the music industry in the broad sense and Europe is in their case a key area generating a considerable part of revenues.

<sup>142</sup> CISAC (2011). *Authors' Royalties Report*. <http://www.cisac.org/CisacPortal/documentLink.do?id=24896&lang=en>

<sup>143</sup> RIAJ (2012). *RIAJ Yearbook 2012*. <http://riaj.or.jp/e/issue/pdf/RIAJ2012E.pdf>

In addition to the purely financial dimension, collective management organisations managing copyright play a key role in facilitating the development of the online music market.

From an economic perspective, the activities of collective management organisations are characterised by a number of features which determine their specificity as compared to the majority of economic entities operating on competitive markets. The description of the economic characteristics of collective management organisations will allow to make an impact assessment of the solutions proposed in Title III of the Directive on the functioning of Polish entities operating in the area of the making available of music online.

Firstly, collective management organisations are, as a rule, natural monopolies.<sup>144</sup> This means that due to the specific structure of costs (the average long-term costs are constantly decreasing) on the market covered by them (most often, on the territory of one country), the most economically sensible solution is to have one collective management organisation operating for a given group of entities.

In other words, the costs of the market production (in this case, the costs of the provision of services) are the lowest because it is concentrated in the hands of one company – two or more entities operating on the market would generate higher costs than one undertaking.

In the case of the Polish music market, from among four collective management organisations, only two, SAWP and STOART offer their services to the same group of rightholders (performers), whereas ZAiKS and ZPAV are monopolists in their area. It is worth noting here that the efficiency of the natural monopoly in the case of Polish collective management organisations is limited as regards certain forms of use (mainly “public performance”) due to the doubling of the structures used for controlling if users have purchased licences for the use of music. In other words, from an economic point of view, it would be more efficient to send one inspector representing all of the four organisations to the place where music is being played (e.g. discothèques), rather than the way it is done at present, i.e. that each organisation is sending her own inspector. The interviews show that collective management organisations have made steps in this direction.<sup>145</sup>

It is worth analysing to what extent the phenomenon of a natural monopoly takes place in the case of online use. On the one hand, the Internet is not subject to geographical limitations, which could suggest that part of the costs related to the control of the rights users should not appear

<sup>144</sup> Directorate-General Internal Policies, Policy Department C. (2006). *The Collective Management of Rights in Europe. The Quest for Efficiency. Study*. <http://www.keanet.eu/report/collectivemanpdffinal.pdf>, 16.

<sup>145</sup> Interview Nos 13 and 14.

(e.g. travel costs in order to perform control). This would be an argument for abandoning the natural monopoly thesis in the case of online use. On the other hand, at the present stage, the collection of fees for online use requires significant investments in IT systems and generates costs related to the management of authorised entities (which is, as explained earlier, time-consuming and costly), which, in the current situation, calls for the postponement of the evaluation to what extent the problem of the natural monopoly occurs in the case of online use. As long as the online use does not dominate the traditional types of use, the argument about the natural monopoly can be defended.

Secondly, the activities of collective management organisations benefit from economies of scale. In economic science, economies of scale describe a situation in which “a proportional increase of all the outputs leads to a more than proportional increase of the production size”.<sup>146</sup>

In the case of collective management organisations, it is of course not the production that is concerned, but the size of the catalogues of rights which are managed by a given collective management organisation. The bigger the catalogue, the lower the costs per work (one rightholder) borne by a given organisation.

Thirdly, the market on which collective management organisations operate can be defined as a two-sided market.<sup>147</sup> On the one hand, collective management organisations operate on the market of rightholders (creators, producers, performers), and on the other hand, on the users' market. As long as for each of these groups the collective management organisation is a monopolist, the consequences of the two-sided market are not a factor which can impact on the choice of a concrete collective management organisation by the rightholders or the users. However, if there was competition between collective management organisations, then the collective management organisations which acquire the biggest number of rights would naturally be more attractive to users who wish to acquire content, which, in turn, taking into account the impact of the network effect, would increase the market opportunities for the biggest collective management organisations.

Fourthly, the activities of collective management organisations are conditioned by the relationship between transactional costs and distribution of revenues, which is defined in statistics as “long tail”. One of the goals of the functioning of collective management organisations is to reduce transactional costs. This results from the core of the collective management organisations’

<sup>146</sup> Frank, R.H. (2007). *Mikroekonomia jakiej jeszcze nie było*. Gdańsk: GWP, 331.

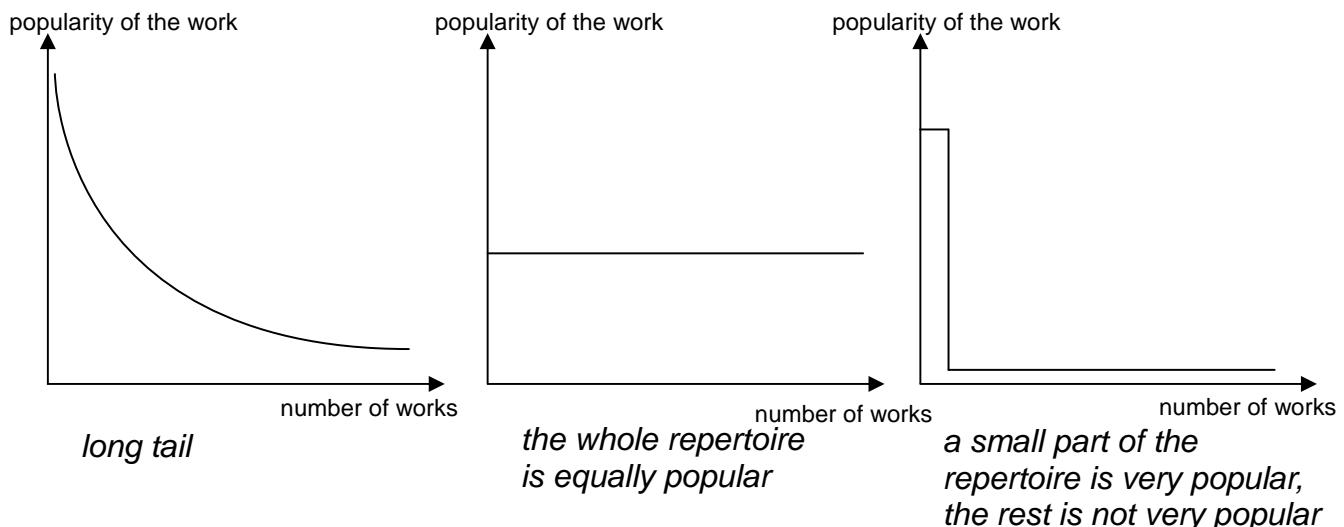
<sup>147</sup> Zob. Drexel, J., Nerisson, S., Trumpe, F., & Hilty, R.M. (2012). *Comments on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*, Max Planck Institute for Intellectual Property and Competition Law,

[http://www.ip.mpg.de/files/pdf2/Max\\_Planck\\_Comments\\_Collective\\_Rights\\_Management1.pdf](http://www.ip.mpg.de/files/pdf2/Max_Planck_Comments_Collective_Rights_Management1.pdf), 5.

functioning: by entrusting their rights, the rightholders do not have to collect the fees themselves – this is done for them by one organisation.

As a result, a simple relationship occurs - the more rights have been entrusted to a given collective management organisation, the more savings are generated from its activities (the large number of transactions between the dispersed rightholders and individual users are replaced by licences granted by collective management organisations).<sup>148</sup> However, it is worth considering what would be more profitable for the collective management organisation: to focus on the services provided to rightholders who have the most attractive content for users, ignoring the rightholders whose rights are seldom used, or to serve all rightholders? The answer to this question is illustrated by the distribution of the popularity of the given rights. Three possible variants are illustrated in diagram 14.1.

Diagram 14.1. Three possible distributions of rights popularity



Source: Own study.

In the case of a distribution where every work in the catalogue is equally popular, it is profitable for the collective management organisation to equally manage each work. In the case of a distribution where a small part of the repertoire is very popular and the rest of the works is less popular, it is profitable for the collective management organisation to focus only on the more

<sup>148</sup> It is worth noting that in the case of traditional types of use, considerable savings can also be owed to geographical factors. As an example, it can be cheaper to collect fees from users in small and highly urbanised Netherlands than in big and poorly urbanised China.

popular part of the catalogue.

The “long tail” distribution type is an intermediate variant – the assessment of the profitability of managing the rights of each rightholder would require detailed data in each case (i.a. the data showing the length of the tail, i.e. the proportion of popular works in relation to less popular ones). In practice, it seems that the popularity of works is tending extremely in the direction of a narrow group of very popular works. As a representative of E-muzyka estimated, from about 4 million of works in their catalogue, only about 100 thousand generated any income.<sup>149</sup>

In practice, collective management organisations adopt a solidarity strategy, which means they treat each rightholder equally, regardless of the revenues that the entrusted works generate. The proposals set out in the Directive raise the question about the application of this strategy by collective management organisations granting multi-territorial licences.

Even if the Directive imposes an obligation of non-discrimination of smaller entities by the entities granting multi-territorial licences<sup>150</sup> (e.g. of small collective management organisations which do not grant the above mentioned licences), there is a risk that the weak negotiating position of small entities, resulting from the fact that their less popular repertoire (on an international scale) will practically constitute only a cost for the big collective management organisations, will prevent them from ensuring a proper protection of the interests of the represented creators.

Fifthly, if we consider introducing competition between collective management organisations established in different countries (one of the proposals set out in the Directive), one should remember that the repertoires which the collective management organisations represent are not, from an economical point of view, substitution goods, but complementary goods. This means that in the majority of cases, the user, who did not make a deal with e.g. the Czech collective management organisation, will not be interested in replacing its catalogue with the catalogue of e.g. the Hungarian collective management organisation. In other words, the catalogues of different collective management organisations established in different EU Member States are not substitutes for one another, but they are complementary - only together they can form an attractive proposal for users. The only exception is the Anglo-American catalogue, which due to its popularity and commercial attractiveness, is capable of meeting the users' expectations on its own.

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<sup>149</sup> Interview No 6. It can be noted, however, that the quoted data refer to recordings, and not to works, although the data representing the works would look similar, which is raised by, e.g. Kretschmer, M. (2005). Artists' earnings and copyright: A review of British and German music industry data in the context of digital. *First Monday*, 10(1).

<sup>150</sup> This is stated in art. 28 section 1. (...) „The mandated collective management organisation shall manage these online rights on a non-discriminatory basis.”

Sixthly, serious economic consequences result from the fact that it is not enough for the entity wishing to open an online music store to obtain a licence for the use of the rights from the collective management organisation representing creators, or from other entities representing them (publishers).

As mentioned in point 12, the phonograms catalogue and the performers' rights also have to be acquired. This situation corresponds to a phenomenon defined in economy as *anticommons* (which can be translated into Polish as "a trap of reciprocal exclusion").<sup>151</sup> It takes place when the fulfilment of a certain goal (e.g. the opening of an online music store) requires the consent of many entities, of which each has a right of veto, meaning that it can decide to impede the development of the undertaking. Such a situation leads to a suboptimal use of resources and causes social loss.

In the case of an online music store wanting to open and operate on the territory of the whole EU, it is necessary not only to obtain the consent to use the catalogues of works from many countries (where collective management organisations or publishers owning the rights to the most attractive catalogues will have a power equal to a right of veto), but also to obtain the authorisation to use phonograms and artistic performances, which would generate an additional risk of blocking the undertaking by the owners of the most attractive phonogram catalogues.

The economic features of collective management organisations presented above set the framework for the analysis of the proposed provisions of the Directive. Moreover, the proposal for a Directive has to be interpreted in the context of the outcome of the 2005 Recommendation and of the CISAC Case (see footnote 137). The 2005 Recommendation and the CISAC Case contributed to the gradual disintegration of the system of reciprocal representation by allowing for the transfer of rights' management from collective management organisations to other organisations (other collective management organisations or rights management companies). Such organisations include:

- CELAS (The Centralised European Licensing and Administrative Service) – an entity belonging to the British collective management organisation PRS for Music and to the German collective management organisation GEMA, dealing with the granting of licences for the use of the EMI Music Publishing catalogue on the Internet and mobile services;

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<sup>151</sup> Buchanan, J. M., & Yoon, Y. J. (2000). Symmetric tragedies: Commons and anticommons. *JL & Econ.*, 43, 1.

- PAECOL (Pan-European Central Online Licensing) – an entity belonging in 100% to GEMA, dealing with the use of the Sony/ATV Music Publishing catalogue on the Internet and mobile services;
- DEAL (Direct European Administration and Licensing) – agreement signed with the French collective management organisation, SACEM, and Universal Music Publishing Group, giving the right to the former to grant to the latter, under its own name, Pan-European licences for the use of the Universal Music Publishing catalogue on the Internet and mobile services;
- PEL (Pan-European Licensing Initiative of Latin American Repertoire) – initiative of the Spanish collective management organisation SGAE and of the Central and South American collective management organisation, as well as of Sony/ATV Music Publishing, aiming at granting Pan-European licences for the use of the catalogues of the entities taking part in this initiative on Internet and mobile services;
- PEDL (Pan-European Digital Licensing) – initiative of Warner/Chappell and six collective management organisations (British PRS For Music, Swedish STIM, French SACEM, Spanish SGAE, Belgian SABAM and Dutch Buma/Stemra) aiming at granting Pan-European licences for the use of the Warner/Chappell Anglo-American catalogue on the Internet and mobile services;
- IMPEL (Independent Music Publishers European Licensing) – initiative of PRS for Music giving smaller publishers<sup>152</sup> the possibility of granting (via PRS) licences for their Anglo-American catalogue on the Internet and mobile services.

As Mazziotti points out, “contractual practices and arrangements that the national collecting societies developed in order to protect their authors (i.e., composers and lyricists) in their bargain with music publishers heavily hindered the progressive implementation of E.U.-wide monorepertoire licenses. This situation occurred because the full withdrawal and transfer of mechanical and public performance rights over music works from traditional collecting societies to new centralized agents implied the consent of authors for all works whose ownership remained with

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<sup>152</sup> i.e. independent publishers.

them or was split with music publishers".<sup>153</sup> Due to the differences between the law in the United Kingdom and the laws of the countries of continental Europe, the withdrawal of the rights entrusted to the local collective management organisations, without the necessity of obtaining the authorisation from authors or from collective management organisations representing the authors, is limited to the mechanical rights to the Anglo-American repertoire. As a result, the above mentioned agencies do not own the full catalogue of works (although it should be highlighted that that catalogue is composed of the part of rights to the most attractive, i.e. to the Anglo-American repertoire).

An example of the solutions which Mazziotti refers to is, in the case of the Polish market, art. 21 paragraph 2<sup>1</sup> of the law on copyright and the related rights (see footnote 139). In the opinion of the publishers, this article does not fully specify, in the case a publisher (publishing company) grants a licence to an entity offering access to content online, if it will not be questioned by ZAiKS.

For this reason, and also due to the small size of the digital market in Poland, which results in the lack of interest in the re-negotiation of agreements for online use, the consequences of the CISAC decision and of the 2005 Recommendation are still not really affecting ZAiKS.

What needs to be highlighted is that such organisations like CELAS are taking actions aiming at extending the rights which were entrusted to them, in order to be able to offer a complete package of rights to a given repertoire to users.<sup>154</sup> It is a slow process, which is illustrated by, e.g. the information on the CELAS website that "users may need to obtain additional licences covering the local repertoire or an additional repertoire, in order to obtain the rights for specific territories".<sup>155</sup> Despite that, there is no doubt that agencies such as CELAS will reach a certain critical mass (a repertoire, which will be sufficiently big and attractive for users). Then, the specificities of the functioning of a two-sided market will have a beneficial impact for them, which can mean that smaller players may not have any other alternative than to join such initiatives. It is important to emphasise that this scenario may come true even if the Directive is not adopted.

If the Directive is adopted as it is proposed by the European Commission, the most probable scenario is the dominance of several collective management organisations (in the extreme case, of one collective management organisation), which are in a position to offer multi-territorial licences.

<sup>153</sup> Mazziotti, G. (2011). Collective Management of Copyright: Solution or Sacrifice?: New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management. *Colum. JL & Arts*, 34, 757-808.

<sup>154</sup> Mazziotti, footnote 153, p. 781.

<sup>155</sup> CELAS (2013). *Licensing Online and Mobile Use*, <http://www.celas.eu/CelasTabs/Licensing.aspx>

Without assessing in deep the actual readiness of specific collective management organisations to grant multi-territorial licences, the collective management organisations which have the biggest chance for success are those that have the most attractive catalogues – PRS for Music, GEMA and SACEM. It is also highly probable that the main players on the rights' market will not be collective management organisations, but publishers and the agencies established by them (in co-operation with collective management organisations). If this scenario develops, the collective management organisations which will have the biggest chance for surviving and growing will be those that take part in the establishment and functioning of the above mentioned agencies (as described above, these are mainly PRS for Music, GEMA, SACEM and SGAE).

The processes which may happen in case the Directive is adopted are well described in the ELIAMEP report:

“Should survival become conditional upon the volume of such repertoire, it is argued that Eastern European collecting societies will be the first to disappear because they enjoy a limited domestic portfolio. Western European collecting societies established in countries like Greece and Portugal will follow. Although the size of the domestic repertoire is significant in these countries, local collecting societies lack the required know-how for the provision of multi-territorial licences. Their economic sustainability will thus depend on their ability to extend their activities on wider territories and modernise their licensing processes. Scandinavian, Dutch and Belgian collecting societies will be in the third position. Despite being familiar with processes of multiterritorial licensing, their domestic repertoire is not strictly indispensable to the launch of pan-European online music services.”<sup>156</sup>

One may risk the statement that the size of the catalogue is a factor which positively differentiates ZAiKS among the collective management organisations from other Central and Eastern European countries, but despite this, it is threatened with processes which are reflected in the cited excerpt from the ELIAMEP report. The reason for this is, first of all, a relatively poor

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<sup>156</sup> Hellenic Foundation for European and Foreign Policy (2009). *Collecting societies and cultural diversity in the music sector*. [http://www.uni-muenster.de/Jura.itm/hoeren/veroeffentlichungen/hoeren\\_veroeffentlichungen/Collecting\\_Societies\\_and\\_Cultural\\_Diversity\\_in\\_the\\_Music\\_Sector.pdf](http://www.uni-muenster.de/Jura.itm/hoeren/veroeffentlichungen/hoeren_veroeffentlichungen/Collecting_Societies_and_Cultural_Diversity_in_the_Music_Sector.pdf), 23.

technological development of ZAiKS<sup>157</sup> and a relatively low interest in the Polish catalogue outside the borders. The first problem can be overcome, but it requires significant investments in the building of an IT system allowing for an advanced and fast reporting.

Taking the other factor into account – the popularity of the Polish catalogue, the interest in the catalogue of a given country can increase<sup>158</sup>, but to achieve this, time and investments are needed to promote Polish music.

How difficult this task is is demonstrated by, e.g. the fact that the majority of collective management organisations have a negative exchange balance with organisations from the Anglo-Saxon countries<sup>159</sup>; this even concerns collective management organisations established in countries which enjoy a relatively strong local music market (e.g. Japanese JASRAC, Italian SIAE<sup>160</sup>). The exception, which can be used as an example to follow, is Sweden – in 2004, the commercial value of Swedish music amounted to 83 mln EUR<sup>161</sup>, and in 2008, the total export of the Swedish music industry exceeded 800 mln EUR<sup>162</sup>. The analysis of the Swedish case should be considered as one of the recommendations of this study.

Summing up, the development of the situation depends on the final text of the Directive, which can be subject to changes. The main factor which will have an impact on the functioning of smaller collective management organisations is the pace at which the online music market will develop in the EU. As long as the traditional distribution channels for music (not only record sales, but also, e.g. music broadcasting by traditional radio stations) generate tangible revenues, the threats described in this point are not conclusive for the existence of smaller collective management organisations. However, it can be expected in the longer term that the importance of traditional sources of income for collective management organisations will decrease, which will make it crucial for the survival of these organisations to efficiently function in the online world (see Table 14.1).

<sup>157</sup> This was highlighted by respondents who wanted to stay anonymous.

<sup>158</sup> The example is the world success of the South Korean hit “Gangnam style”, although there is no evidence today that the popularity of one song could be translated into the popularity of the whole catalogue coming from a given country. Undoubtedly enough, the success of one work can be used as a strong advantage in the process of building the country’s brand.

<sup>159</sup> As an example, in 2000 the United Kingdom was an exporter of music compositions, achieving a surplus of about 321 mln EUR. *The Collective Management of...*, footnote 144, p. 40.

<sup>160</sup> Page, W. & Carey, C. (2010). Economic Insight Issue 20  
<http://prsformusic.com/creators/news/research/Documents/Economic%20Insight%202020%20web.pdf>

<sup>161</sup> *The Collective Management of...*, footnote 144, p. 40.

<sup>162</sup> See *The Swedish music export phenomenon* <http://www.sacc-sandiego.org/415/>

Table 14.1. Summary of the projected impact of the introduction of the European licence passport on the situation of Polish entities operating in the area of making music available online.

<b>Category of the entity</b>	<b>Scenario I: ZAiKS grants multi-territorial licences</b>	<b>Scenario II: ZAiKS does not grant multi-territorial licences</b>
Creators	The preparation for the granting of multi-territorial licences requires considerable investments into the infrastructure and software programmes. If ZAiKS decides to grant the above-mentioned licences, then part of the costs borne in relation to this will be incurred by creators.	If ZAiKS decides not to grant multi-territorial licences and chooses the collective management organisation which will do it on its behalf, then the majority of creators will most likely not initiate any action on their own (they will not withdraw the rights from ZAiKS). The exception could be creators co-operating with big publishers who will probably decide to manage their rights for online use through them.
ZAiKS	ZAiKS bears the costs of key investments in infrastructure and software programmes, without guarantee that they will allow it to compete successfully with big players (e.g. PRS for Music, GEMA).	In practice, ZAiKS will act exclusively in the framework of traditional types of use. In the long-term, the role of ZAiKS may diminish as online use will gain importance.
Publishers	They choose the entity which offers the best terms, and in the mid-term, they can reach a dominant position in relation to collective management organisations (providing that copyright law is changed).	They choose an entity which offers the best terms, and in the mid-term they can reach a dominant position in relation to collective management organisations (providing that copyright law is changed).
Polish branches of global music companies	They act in the same way as related publishers.	They act in the same way as related publishers.
Smaller Polish music labels	The changes will most likely not affect them. These labels, which will also represent the creators' rights (as independent publishers), will look for an entity which will offer the best terms, but in the case of smaller labels this can mean not only a commission of a given collective management organisation, but also the minimisation	The changes will most likely not affect them. These labels, which will also represent the creators' rights (as independent publishers), will look for an entity which will offer the best terms, but in the case of smaller labels this can mean not only a commission of a given collective management organisation, but also the minimisation of formalities (the

	of formalities (the one that will win will be the one that offers all the rights on a “one click” basis).	one that will win will be the one that offers all the rights on a “one click” basis).
Users (e.g. online retailers)	They choose the entity which offers the best terms. In the case of global services, it is highly probable that ZAiKS, even if it becomes competitive in terms of prices, may have a repertoire that is not attractive enough to compete with the big players.	They choose the entity which offers the best terms. The Polish online retailers may have difficulties in competing with foreign big players.
Aggregators	Supposing that the Directive will not cover related rights, then the position of aggregators will not change in the short term.	Supposing that the Directive will not cover related rights, then the position of aggregators will not change in the short term.
Individual consumers of music	They will not be affected by the changes.	They will not be affected by the changes.

## 15. Summary and recommendations

To sum up, the following shall be emphasised:

- ▲ the Polish online music market will be developing in the coming years, whether the Directive is adopted or not ;
- ▲ in the Polish law, there are few provisions that need to be clarified, which results from the fact that fast technological development renders the old solutions outdated (e.g. clarification of interactive webcasting rules, change of the definition of online use, provisions regarding the provision of e-commerce services);
- ▲ the changes in the area of Pan-European management of rights and multi-territorial licensing have already started (as a result of the 2005 Recommendation and of the CISAC Case); they will progress independently of the adoption or rejection of the Directive, and their direction is rather not favourable for small collective management organisations;
- ▲ it is recommended that Polish collective management organisations make all possible efforts to adjust their functioning to the requirements of a fast changing digital market;

- ▲ taking into account the interests of ZAiKS, the proposed provisions of Title III of the Directive should be assessed with criticism; the extent to which the interest of ZAiKS is identical to the interest of different Polish creators requires further assessment;
- ▲ the way subscription services observe provisions on the protection of personal data should be monitored;
- ▲ the development of the Polish music market should be monitored on a regular basis so that administrative bodies can assess annually in which direction this market evolves;
- ▲ the systems of the countries in which the music market is exceptionally strong should be analysed (in relation to the size of the country, as in the case of Sweden) in order to reach conclusions which could help to undertake actions supporting the national creative sector;
- ▲ one of the goals which should be paramount in the actions undertaken in relation to entities operating on the music market, is to take care of its diversity; this could be done through rules which would favour smaller entities (small labels, independent artists), the promotion of the development of user-generated content, supporting the development of alternative business models built on a local scale, in order to enable the existence of a local music scene independently of the condition of the global music market.

## 16. The used research methods and list of respondents

In order to prepare the report, the publications and information sent by the entities operating on the music market were used at the request of the Ministry of Culture and National Heritage, as well as the responses provided by the above mentioned entities in the course of public consultations, and information collected in the course of in-depth interviews conducted with the following respondents:

1. 7.03.2013. Andrzej Dąbrowski, Independent Digital
2. 8.03.2013 Andrzej Paweł Wojciechowski and Tomasz Mosiołek, MJM Music
3. 8.03.2013 Anna Laskowska, SM Publishing (Poland) Sp. z o.o.
4. 8.03.2013 Piotr Turek, Redefine Sp. z o.o. and Jarosław Mojsiejuk, Cyfrowy Polsat

5. 8.03.2013 Piotr Kabaj, EMI Music Polska
6. 14.03.2013 Robert Knaź, E-Muzyka
7. 14.03.2013 Marcin Grabski, Asfalt Records
8. 14.03.2013 Łukasz Mielniczuk, STX Jamboree
9. 15.03.2013 Izabela Ciszek-Podziemska, Sony Music Entertainment Polska
10. 20.03.2013 Łukasz Grzejek, Universal Music Polska
11. 21.03.2013 Bogusław Pluta, ZPAV
12. 21.03.2013 Anna Biernacka, ZAiKS
13. 21.03.2013 Jarosław Kamiński, SAWP
14. 22.03.2013 Włodzimierz Wiśniewski, STOART
15. 23.05.2013 Adrian Ciepichał, WIMP
16. 12.06.2013 Aleksander Pawlak, MegaTotal.pl

The interviews lasted on average 60 minutes, each one has been recorded and analysed. Moreover, the information which was crucial for the drafting of the report was obtained via electronic mail. The information was provided by:

- 17.05.2013 Przemysław Pluta representing Spotify
- 9 i 10 07.2013 Jacek Brzuz representing Sound Park