University of Pécs Faculty of Law

Péter Lánchidi

Collective Management of Music Rights and Competition Policy in the European Union

Ph.D. Thesis

Consultant:
Dr. Zsolt György Balogh
Associate Professor, Head of Department, Deputy Dean

Budapest, 2010

ABSTRACT

The focus of the present thesis is on the competition policy related issues of collective management of music rights within the European Union. In analysing the present market situation in the field of management of music rights by collecting societies, the thesis takes account of the basics of copyright and competition law, it looks into the legislative development within the European Union, and scrutinises the policy decisions and the case law of the European Commission.

The thesis points out the possible mistakes that led to the present situation full of uncertainties, in which music publishers started to withdraw their repertoires from collecting societies, and thereby jeopardising the existence of the core element of collective rights management, one-stop-shop, which could bear severe consequences for virtually all the stakeholders.

Taking stock of the characteristics, the purposes, and aims of the respective legal institutions of the field, further the various interests involved, and the unfolding turbulent events, the thesis proposes considerations that are to be taken into account in working out a feasible solution that would not raise competition concerns.

TARTALMI ÖSSZEFOGLALÓ

A jelen értekezés a zenei közös jogkezelés és a versenypolitika, valamint a versenyjog viszonyát vizsgálja az Európai Unióban. A közös jogkezelés jelenlegi problémáinak vizsgálata során az értekezés a szerzői jog, valamint a versenyjog alapjainak szem előtt tartása mellett az Európai Unió vonatkozó joganyagának változását, a policy döntéseket, továbbá a kapcsolódó jogesetet elemzi.

Az értekezés rámutat a területen jelentkező bizonytalanságokhoz vezető azon tényezőkre, amelyek következtében a zeneműkiadók elkezdték visszavonni a közös jogkezelő szervezetektől a repertoárjuk képviseletére vonatkozó megbízást, veszélybe sodorva ezzel a közös jogkezelés alapját képező egy-ablakos jogosítási modellt, ami súlyos következményekkel járhat az összes érintett piaci szereplőre nézve.

Figyelembe véve a két jogintézmény jellegzetességeit, valamint értelmét és célját, továbbá a jelenlévő érdekeket és a területen jelentkező aggasztó fejleményeket, az értekezés egy lehetséges megoldás kidolgozásának olyan főbb szempontjaira tesz javaslatot, amelyek nem vetnek fel versenyjogi aggályokat.

TABLE OF CONTENTS

1. INTRODUCTION

This thesis focuses on the competition policy related issues of collective management of music rights within the European Union. In particular, it is aimed at examining how the system of management of rights by collecting societies has been affected by policy decisions and the case law of the European Commission.

Though the system of collective management of rights looks back to a history of more than 100 years, and copyright has changed a lot since then, the very basics of the system of collective rights management have not changed. It has kept its traditional principles; and what is of particular importance is that it has kept its functionality. The core of the system remained basically untouched, and could remain workable and efficient. If we take a closer look of the principles upon which the system rests, then, it should not come as a surprise. These principles build upon (some of) the aims and principles of copyright law, which has not changed since. These aims are to protect authors' rights, and to secure a way by which they are rewarded, and at the same time to provide the means by which music finds its way in a legal and smooth manner to users, hence to the public. Despite all the technological changes and the advent of the Internet, these aims remained, and so the function and the way of operation of collecting societies.

However, in the effort to introduce pan-European licensing schemes, the European Commission took very questionable steps. The 2005 Recommendation and the CISAC decision of the Commission brought about a situation in which the core feature of rights management, the one-stop-shop started to fall apart in the online right clearance. In other words, the licensing of multi-repertoires transformed into the licensing of mono-repertoires. That is, the mono-territorial multi-repertoires licences were taken over by multi-territorial but mono-repertoire licences.

In this thesis, my aim is to point out the drawbacks of the present situation which is the result of the aforementioned steps taken by the Commission, and to take account of the competition aspects of collective rights management, in particular, as the reasoning of the Commission is mostly based on competition law arguments. Building on the basics of copyright law and competition law, I am arguing that in assessing the collective rights management system, non-competition considerations / policies have to be taken into account as well, moreover under certain conditions collective rights management should fall outside of the scope of competition law. Besides arguing against the reasoning of the Commission, both that is put forward in the 2005 Recommendation and in the CISAC decision, I take account of the recent market developments, and I am suggesting a possible solution that could satisfy all the stakeholders and the Commission as well.

In the course of the analysis, on the one hand, I go back to the very basics of the two fields of law, copyright and competition, to take account of the justifications and aims thereof, and on the other hand, I employ analytical methods with regard to the Commission's policy decisions, legislative steps, its decision in the CISAC case, and the reactions and arguments of the stakeholders thereto.

In line with the above methodology, the structure of the thesis is the following. Given the importance of the principles on which the legal instrument of intellectual property law – and in turn the rationale behind the existence and functioning of collecting societies – and

competition law stand, the thesis starts with the justifications for the two fields. Then, a short account is given of competition law and copyright. An introduction to the system of collecting management of rights will be followed by two chapters on the music industry and on digitisation. Then, following an introduction to EC law on intellectual property, the EC legislation on collective rights management, and the case law thereon will be scrutinised. Thereafter, an extensive analysis of the Commission's Internal Market DG's legislative steps and on the Competition DG's decision will be given. A separate chapter is devoted to the question of exemption from Article 81(1). Finally, recent market developments, including the new legislative plans, will be touched upon before arriving to the conclusions.

It is hoped that the present thesis, besides providing a comprehensive overview of collective rights management and its relationship with competition law within the European Union, can offer a balanced view of the present legislative and market situation in the field, and that the solution it suggests to the addressed problems is one that takes into account the interests of all stakeholders, and at the same time satisfies competition concerns as well.

15 December 2009

2. JUSTIFICATIONS

2.1. Justifications for intellectual property

2.1.1. Introduction

In order to be able to see how the two fields, copyright law (or more generally intellectual property law) and competition law, match together, and to understand the difference in the approach when it comes to collecting societies, it has to be demonstrated what they do have in common and where the points of difference are. Therefore, the main characteristics of the two legal instruments need to be presented: the justifications, the aims and the tools.

Though the general goals are by and large the same, the means, however, as how to reach those goals necessarily differ.

Later on, when looking at the limits of the two fields, these considerations will be of high importance. On the one hand, the internal limits of intellectual property are of importance, while on the other hand the external limits have their role to play. Especially so, as one of them being competition law.[1] At the same time, competition law's internal limits are of great significance as well, as those draw the lines as to how far it can go in forming intellectual property's borders. Therefore, let's first see the justifications for intellectual property rights.

Not that the concept and justification of regular property is so clear, but the basic issue that emerges in connection with intellectual property rights is the issue whether what we call intellectual property can be a property at all, and if so, to what extent? Property – the right of ownership; the right to possess, use, and enjoy a determinate thing[2] – is a conceptual matter. In reality, there is no such thing as property. It is not a matter of fact like possession. Property is a matter of law. It is a concept, the force and reality of which is to be found in the normative nature of law and in its acceptance by society.

With physical goods, the legal concept of property is as old as humanity. Its existence is almost "natural". This feature of natural existence of property right comes with the nature of physical property. Most physical objects cannot be possessed, used or enjoyed at one and the same time by two or more individuals; hence these objects have an exclusionary nature when it comes to their usability. Therefore, the abstract legal instrument of property right came into existence for the sake of solving this everyday problem. Once a particular individual has a property right over one particular object, the question, who should or could possess, use or enjoy the determinate thing, is solved.[3]

When it comes to intellectual property, the first and foremost difficulty that one comes across is that the content of intellectual property is radically different than that of conventional property. Though the subject of intellectual property can take material form when expressed, the subject of this kind of property is entirely abstract. In its essence it does not exist in any sort of material form. Thence, in its conventional sense, it cannot be possessed nor owned to that matter at all.

[1] See Eklöf.
[2] See Black's Law Dictionary.
[3] Whether this solution is right or the only workable one is a legitimate question, though not an issue here.

However, as Himma observes it properly[4], this line of reasoning is vulnerable to at least two objections. First, it is not clear that ownership requires physical possession, as its essence lies in its power to exclude others from certain behaviours. (For example: people often claim property interests in corporations and the same, though it is not entirely clear what these entities exactly are.) Second, though it is true that something that is not property should not be protected as property, intellectual property do not fall in with conventional property. Perhaps it is only the name that makes the confusion. However, the protection offered under intellectual property rights is very similar to that of what is offered under property rights. The point is to give some sort of protection to the content-creators.

For the sake of providing the power of property for the owners of intellectual property, various justifications have been put forward. The main arguments against and for intellectual property protections are as follows.[5]

The classical foundations of intellectual property law are twofold: the natural law approach, on the one hand, and the utilitarian approach, on the other. The natural law approach embraces ethical and moral arguments: authors' natural or human rights over the product of their labour. The utilitarian approach is an instrumental justification where the legal instrument of intellectual property induces or encourages desirable activities.

Under the natural law approach protection is granted because it is right and proper to do so; and because such productions emanate from the mind of an individual author. It is the expression of a particular author's personality. The fruit of the mind. The work is the extension of the persona of its creator, and as such, it should be seen as his or her property. Copyright is the positive law's realization of this self-evident, ethical precept. As Geiger puts it: "the law concretises pre-existing rights of the author, to which he is by nature entitled."[6]

The utilitarian approach, on the contrary, denies the pre-existing nature of the right. The right is granted by society for reasons serving cultural and economical goals. (The dominance of which is a highly important question, which is to be addressed later.) Typical arguments under the utilitarian approach are the reward and the incentive arguments.

The "reward for labour" argument states that copyright is a legal expression of gratitude to authors for doing more than society expects or feels that they are obliged to do. The reward is an end in itself. This is especially so in the cultural industry, where creation is the end result of (financial) investment.

The incentive argument is closely linked to the previous one. If it is accepted that creating involves labour that is to be rewarded, then this reward serves as an incentive to create. It is a stimulus. There is a presumption that without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level.

However, both the natural law and the utilitarian arguments have their weaknesses. When it comes to the natural law argument, it is difficult to grasp any concreteness. The vagueness of the approach makes it apt to serve the interests of the one who would like to misuse it. In addition to this, the central role of the personality makes it difficult to use the natural approach to works with mere technical character. At the same time, the utilitarian approach

[4] See Himma, p 4.
[5] In the following, in part, I will freely draw upon Geiger's and Himma's works.
[6] Geiger, p 378.

has its own weaknesses. Namely, it views the creative activity only along economic motives. At the same time, a wide range of creative activities (and to a high percentage) is carried out for entirely different motives than of economic ones (such as fame, recognition, and prestige). Furthermore, as remuneration (usually) comes well after the creation, the financing of creative activities, if not done by the state, is provided by private entrepreneurs, who want to see their investment recovered. In this case "copyright is much more of an incentive for the exploiter than for the creator."[7] In additional to this, another point that has been suggested is that "the copyright system does not especially reward creators of great works of lasting social value. It favours instead the commercial, popular work with large sales."[8]

2.1.2. Arguments for intellectual property protection

– effect-based arguments for intellectual property protection

This line of argument says that society needs intellectual property in order to ensure that the time, effort and labour are going to be invested in the future in order to create. This interest, which is protected by the state, does not rise to the level of a moral right.

It is commonly objected to these arguments that it is a false presupposition that the only incentive to create is material. It is also disputed whether the arguments are strong enough to justify intellectual property rights. The dispute over intellectual property's promotion of well-being is also very far from being settled.

– investment related arguments

This argument goes back to the classical Lockean argument of 'original acquisition'. An un-owned piece of material can be acquired by someone upon his or her investment of labour. However, this argument cannot directly apply to intellectual creations. Most of the time there is no pre-existing object with which the creator works with, and the result is abstract. Therefore, the Lockean argument has to be modified in order to be applied to intellectual creations. Some say, therefore, that creators bring new value – though this argument is vulnerable to the objection that all intellectual creations build on the ones that have been created before.

Therefore, a more viable argument is the one that is based on the effort that the author puts into her creation. It can be argued then that the person who puts all the effort into the creation has a superior claim to the result of that effort than anyone else does. However, this reasoning is open to some objections as well. In many occasions the effort that the author puts into the creation is closer to nothing than to 'much'.

Yet another argument is based on the personality of the creator. According to this reasoning, the creation is the materialization of the author's personality, the expression of his or her intellect. Or to put it another way, the content is the extension of the personality. One can simply query these statements. Further, it is legitimate to ask why it follows from these premises that the relationship between the author and her work should be one of an ownership?

[7] Geiger, p 380.
[8] Davies, p 248.

– the promotion, enrichment and dissemination of national culture

To take but one example the WIPO handbook attaches high importance to copyright law from a cultural point. „Copyright constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The greater the number of a country's intellectual creations, the higher its renown; the greater the number of productions in literature and the arts, the more numerous their so-called "auxiliaries" (the performers, producers of phonograms and broadcasting organizations) in the book, record and entertainment industries; and indeed, in the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development."[9] At the same time, there is a plethora of arguments stating just the opposite.

– public interest

When it comes to the question of public interest, it first must be stated that copyright is a tool that is good and bad at the same time. From a public interest point of view, it is beneficial to provide incentive and reward for the author, and thereby securing a flourishing artistic and literary environment. But on the other hand, it is also for the benefit of the public to secure the unlimited access to cultural assets. As Lord Macaulay phrased it: "The system of copyright has great advantages and great disadvantages, and it is our business to ascertain what these are, and then to make an arrangement under which the advantages may be as far as possible secured, and the disadvantages as far as possible excluded."[10]

In striking the balance, the state makes decisions on various issues, such as limitation and duration; and all these decisions are matters of policies. Cultural, economic and social policies, just to mention a few. The lack of balancing of interests will be apparent with regard to collecting right management cases.

– social requirements

Some argue that copyright brings along social benefits.[11] A direct proportion exists between the level of copyright protection and the urge to create. This, in turn, enriches the literary and artistic domain.

2.1.3. Arguments against intellectual property protection

– the special character of intellectual property

One of the most common arguments against the property-like protection of intellectual creations is based on its nonrivalrous character.[12] The argument goes like this. When it comes to rivalrous things, in order to avoid conflicts that stem from their scarcity, it makes sense to employ certain artificial tools – in this case property right – in order to (try to) avoid the

[9] WIPO Intellectual Property Handbook: Policy, Law and Use, 2nd ed. 2004, Geneva. Point 2.166. Available at http://www.wipo.int/about-ip/en/iprm/index.html.
[10] Davies, p 235.
[11] Davies, pp 16-17.
[12] Lessig, pp 19-23.

tragedy of the commons[13]. At the same time, when it comes to intellectual creation, the non-rivalrous nature of it – that is everyone can use the same idea or sing the same song without preventing anyone else to do the same – does not give rise to the need of applying property right protection to intellectual creations.

However, the above argument is purely descriptive, and being such it does not bear with relevance to the legal protection, which is normative. That is, the non-rivalrous nature of intellectual objects does not answer the question whether intellectual property protection is right or wrong.

– freedom of information

Another line of argument is that "information should be free". The advocates of this argument see intellectual property rights as an obstacle to the free flow of information. However, this reasoning does not provide clear answers as how information should be defined and in what sense do intellectual property rights go against the free flow of information.

– the value of free expression

The conflict between free speech versus intellectual property right is one that can hardly be resolved satisfactorily. Intellectual property, by its very nature, imposes some restrictions on free speech. As the right to free speech is one of the fundamental principles of democracy, the delicate balance between the two will always be a matter of question, which has to be solved on the grounds of all the circumstances, and with a view to the actual social and cultural environment. (At the same time, it must be remembered that the right to free speech, like many other rights, is not absolute.)

– the information commons

Some argue that information is morally protected as a resource to everyone. Therefore, when intellectual property protection gives the right to someone to control one segment of this information commons, it restricts the access to the commons. However, intellectual property commons, unlike land commons, are not existent and available. It has to be created and made available by someone through expenditure and/or labour.

– the social character of intellectual content

The proponents of this argument say that the social character of intellectual content makes all information common. Since every piece of information has been built on previous knowledge, no one can claim property-like ownership on a particular intellectual content.

While this argument acknowledges that certain people contribute to the common knowledge, it does not answer the question whether the contributor should be compensated for the contribution, and why should those who have not contributed have access to the "product" on same conditions as those who have contributed.

[13] Where the tragedy lies in the fact that in a finite world everyone is seeking to maximise its own well-being, and thus bringing ruin to all. See Garrett Hardin: The Tragedy of the Commons, in *Science*, 13 December 1968.

Furthermore, this reasoning can be applied to every kind of property. To take but one example, when it comes to the building of a car, it is not just the material that is needed, but the design and the knowledge of the workers. Both the design and the knowledge of the workers derive from the experience and knowledge of the past. However, the legitimacy of the automaker to ask for compensation for his contribution to society does not called into question.

– effect-based arguments

These arguments are based on the presumption that a law, to be morally legitimate, has to maximise the well-being of humans. However, theorists disagree on the indicator of well-being.

From a law and economics viewpoint, intellectual property fails to maximise well-being. For instance, restriction on the use of scientific information (patent) impedes the development of new technologies. The restriction on the use of artistic content (copyright) prevent people with low income to get as many of the content as otherwise they would.

One objection to law and economics arguments (from a legal theorist viewpoint) is that the law has other values to protect than the efficiency. Even more, the protection of the moral rights of individuals is actually one of the primary functions of the law. Most of the arguments against intellectual property protection are based either on the characteristics of information itself or on the interest of other persons.

2.1.4. The interests involved

This takes us back to the very principles of the approaches. Namely all the approaches, even the natural law one, are employed in the *interest* of groups of people or of noble ideas. The just reconciliation of these interests is the foremost goal in reshaping the system of collective rights management. In balancing the interests right, what is of utmost importance is the appropriate policy option: which interest is to be preferred over others, and on what public interest grounds.

This is increasingly true in the light of the development within the music industry. "It is, then, not surprising that copyright has evolved more and more into an investment-protection mechanism. It must be noted that copyright has gradually become an industrial right and the *investment has become the reason for protection*. The copyright, which was originally intended to promote the interests of the public, presents itself increasingly as a protection of the interests of some few private entities. The bond between the author and society has loosened, and copyright has come to be seen by the public as a weapon in the hands of large companies. The social dimension of the law is progressively disappearing in favour of a strictly individualistic, even egotistic conception. This means that the balance between the different interests within the system is threatening to tip in favour of the investors."[14]

Therefore, considering the controversial legislative proposals regarding collective rights management in the field of online music services, it is the public interest what bears importantly upon the conclusions reached later. Of the wide range of possible arguments, based on public interest in favour of intellectual property protection some has to be mentioned

[14] Geiger, p 381.

here. One of them was brought forward by the Organisation for Economic Co-operation and Development (OECD) in 1989[15], and the other was issued by the Director General of the WIPO in 2002.[16]

The OECD paper identified, among other things, the following economic arguments. Intellectual property 1) disseminates new ideas and technologies quickly and widely; 2) makes the fruits of these processes of creation and invention available to the consumer; 3) encourages international trade; 4) promotes investment, and 5) fosters competition.

Kamil Idris, the Director General of WIPO, in a message in 2002 made the following statement. "In this 21st Century, intellectual property (IP) is a powerful driver of economic growth. When linked to the development of human capital, it results in educated, skilled and motivated individuals and becomes a dynamic combination in terms of stimulating creativity and innovation, generating revenue, promoting investment, enhancing culture, preventing "brain drain", and nurturing overall economic health."[17]

Equally important is the role of intellectual property within the European Union. The Commission pronounces its position as follows. "To create a genuine Single Market in Europe, restrictions on freedom of movement and anti-competitive practices must be eliminated or reduced as much as possible, while creating an environment favourable to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Single Market. In our growing knowledge-based economies the protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness."[18]

More specifically, industrial property and copyright are addressed on their own. "The importance of protection of Industrial Property rights (in particular the protection of inventions, industrial design and trade marks) for innovation, employment, competition and thus economic growth, cannot be underestimated. The Commission focuses in particular on these "knowledge-based" aspects of the Single Market."[19] "Copyright and related rights provide an incentive for the creation of and investment in new works and other protected matter (music, films, print media, software, performances, broadcasts, etc.) and their exploitation, thereby contributing to improved competitiveness, employment and innovation. The field of copyright is associated with important cultural, social and technological aspects, all of which have to be taken into account in formulating policy in this field."

Further, it is worth quoting here what the Commission has to say on the economic impact of copyright. "The copyright industries are critically important to the European Community because they involve media, cultural, and knowledge industries. Development in the industries is indicative of performance in post-industrial society especially where related to the information society."[20]

---

[15] Economic arguments for protecting intellectual property rights effectively, OECD, Paris, 3 January 1989.
[16] Davies, pp 354-355.
[17] WIPO Magazine, Geneva, February 2002, available at http://www.wipo.int/wipo_magazine/en/pdf/2002/wipo_pub_121_2002_02.pdf.
[18] European Commission, Internal Market, Protection of Rights. Go to http://ec.europa.eu/internal_market/top_layer/index_52_en.htm.
[19] European Commission, Internal Market, Industrial Property. Go to http://ec.europa.eu/internal_market/indprop/index_en.htm.
[20] Go to http://ec.europa.eu/internal_market/copyright/index_en.htm.

The above statements reflect certain public interest arguments imbedded in public policy. Accordingly, the following can be inferred.

Right at the beginning, something particularity specific to the European Union is pointed out. A balance needs to be kept between the aim of creating a genuine *Single Market* in Europe, and the aim of creating an *environment favourable to innovation and investment*.

Besides this, the importance of intellectual property is emphasized in respect of

- promoting *innovation* and *creativity*,
- developing *employment* and
- improving *competitiveness*.

These aspects are repeated in connection to industrial property and copyright respectively. When it comes to copyright and related rights, these aspects serve as *incentives* for the creation of and investment in new works (e.g. music, performances, broadcasts, etc.) and their exploitation.

As all of the above goals are economic ones, the Commission hurries to add that

- important *cultural*, *social* and *technological* aspects have to be taken into account in formulating policy in this field.

Here, a just balance seems to be conveyed; a balance where economic, cultural, social and technological aspects are taken into consideration. It is so even if the economic arguments rest on one side of the scale, and all the others on the other side. However, the devil is in the details. Despite these proclamations, when it comes to the policy choice made by the DG Internal Market in respect of collective rights management in the field of online music services, the Commission is alarmingly biased toward industry and against artists. That is, biased toward the economic aspect and against the cultural one.

2.2. Justifications for competition law

2.2.1. The function and objective of competition[21]

Having seen some of the basic notions of intellectual property law, now it is time to turn to the function and objectives of competition. The objectives of competition (law) are many. The views differ considerably depending on the writer, the competition law regime, jurisdiction, historical events and the period. As Richard Whish puts it: "competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally."[22] In what follows, I will present some of the most important possible objectives of competition policy.

1. Welfare (allocative and productive efficiency combined)

Welfare shows the capacity of an economy of producing surplus for society as a whole. Society's Welfare is maximised in conditions of perfect competition, where prices are low,

[21] In this section I drew freely upon Motta, pp 17-30, and upon Whish, pp 19-25.
[22] Whish, p 19.

the products are better and are available in a greater variety of choice, and undertakings are more efficient. This maximisation is achieved through the combined effect of allocative and productive efficiency.

Allocative efficiency means that under perfect competition goods and services are allocated in such a way that no one can be better off without making someone else worse off. Perfect competition presupposes that no competitor has the power to influence the market, and transparency is high. Accordingly, all market players increase their productivity until it is profitable (that is until the marginal cost does not exceed the marginal revenue). This means that consumers get what they want, and on a price they are prepared to pay for the goods and services.

Productive efficiency relates to the production side. It means, again under perfect competition, that all goods and services are provided for the lowest possible cost. Since competitors are unable to sell above cost, it is in their interest to be as efficient as possible, and by that lower their costs. (In a market where market conditions are perfect, one of the most important means of competition is innovation: research and development.)

To sum up, under perfect competition it is the consumer who decides what is sold and for how much. The needs of the consumers, the price they are willing to pay, and the costs of producers coincide. From the society's viewpoint everything is produced for the lowest cost possible and bought for the lowest price possible. Thereby, society's wealth is maximised.

2. Consumer welfare

While under certain circumstances welfare can be maximised to the detriment of consumers (perfect price discrimination by a monopolist), consumer welfare is closely connected to society's welfare (to total surplus). As all the above – what was said about perfect competition – boils down to maximising consumer welfare, this became the most important of all objectives, both in the U.S. and in the EU.[23] By pursuing consumer welfare through competition policy, ultimately that is the way to reach the best possible results – basically regarding every function of competition law.

3. Defence of smaller firms (protecting competitors)

The very essence of this objective is to protect competition not only by protecting the structure of, and the processes on, the market, but by protecting some of the competitors as well. The rationale behind this view is the idea of redistribution and to help balancing between the big firms with (significant) market power, on the one hand, and small firms, on the other. In the EU small and medium sized enterprises (SMEs) are ranked high in being dynamic, and innovative in creating employment (though empirical evidence is not convincing).

[23] In the EU, Article 81(3) allows any agreement, decision and concerted practice, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. The Merger Regulation provides for in Article 2(1)(a) that the Commission, in making the appraisal of a concentration in accordance with the objectives of the Regulation, shall take into account the interests of the ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage […].

This objective is heavily criticised as one that goes against the very essence of competition. Under workable competition (one that seeks to be perfect) a firm becomes dominant only by being efficient and better than its competitors. This is the goal of all market players: becoming better and stronger than the others. This is the incentive that makes them compete. Taking away this incentive by antitrust intervention is harmful to competition, thus to consumer welfare.

4. Market integration

This objective is exclusively EC specific. In the European Communities competition law serves as one of the tools to achieve market integration. Competition law helps levelling the playing field(s) of Europe by safeguarding trade between Member States.

5. Fighting inflation

This goal has been set by quite many competition regimes (e.g. the German), though it is rather obscure how competition law could be used to attain that goal.

6. Fairness and equity

Belonging to the realm of ethics, it is fairly difficult to concert them with pure economics. Most concerns based on fairness are at odds with economics. However, fairness can be interpreted from an economical point of view as well, where it simply means the fairness of perfect competition, where the most efficient survive. It is a kind of *ex ante* fairness, meaning that all the market players compete on a level playing field. *Ex post* fairness – e.g. the protection of small businesses from market forces – does not fit into the picture of competition policy. This sort of dilemma comes up quite frequently in connection to Article 82 decisions of the Commission. There, the Commission is sometimes criticised heavily for penalising the dominant firms for being efficient. Behaviours that are not anti-competitive when pursued by a small or medium sized company are looked upon as abusive and are prohibited. That is, a firm being efficient enough to put behind its competitors becomes dominant, still its achievements are rewarded by restriction.

2.2.2. Competition policy

The reasons for intervention of the state to the economy can be many. First and foremost the maximalisation of economic efficiency and the stability of the economy are aims that are always in the forehead of any government's economic policy. In that respect economic competition bears with high importance. In case of market malfunctions competition law serves as an effective tool in remedying the problem. At the same time, other or market failures might require other type of interventions, such as sector regulation, and other laws. Thus, one of the policies that the state employs in the quest for its economic aims is competition policy. Accordingly, first competition policy as such will be touched upon, and then its relationship with other policies will be taken into consideration.

Competition policy is the state's policy to sustain economic competition.[24] Competition law is only one of the tools, though undoubtedly the most important one, to reach these goals.[25] The

[24] Tóth, p 36.

[25] Others include competition advocacy, which, as defined by the International Competition Network (ICN), refers to those activities of competition authorities that are related to the promotion of a competitive

ways of applying competition law take the forms of prohibition and authorisation. The choice between the two options is determined by the idea behind the role of competition policy. This, in turn, is influenced by the actual political, economical and social views; that is, what do we expect from competition. The application of competition law has to find the golden mean on the spectrum of prohibition / authorisation, with *laissez-faire* at one extremity and pervasive state control at the other. At the same time, it is not to be forgotten that competition law is not for interfering directly with economic mechanisms, but to safeguard a competitive environment where these mechanisms can work for the benefit of society.

Competition policy has its special place and role within the European Union, which has to be studied against the goal of the Community. "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."[26] These tasks are spelled out in Article 3, where in (1)(g), as it was mentioned above, the Treaty reads that "[f]or the purposes set out in Article 2, the activities of the Communities shall include […] a system ensuring that competition in the internal market is not distorted." That is, competition policy, beyond the conventional tasks, has a Community specific one, namely establishing and protecting the common market. However, with the development of the integration the balancing of the aims has changed. The emphasis shifted from one task to the other. This is well mirrored in the Commission's reports on competition policy.

"Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursed in accordance with the provision of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society."[27]

"When it operates satisfactorily, competition can be expected to perform three functions that help towards a harmonious development of economic activity throughout the Community: a resource allocation function […]; an incentive function […]; and an innovative function […]. The objective of competition policy is thus to ensure that competition is allowed to have these beneficial effects, and , in the process, help mould the community into a genuine common market."[28]

---

environment for economic activities by means of non-enforcement mechanisms, mainly through their relationships with other governmental entities and by increasing public awareness of the benefits of competition. Advocacy and Competition Policy, Report prepared by the Advocacy Working Group, International Competition Network. Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf.

[26] Article 2 of the Treaty.

[27] First Report on Competition Policy, 1972, p 11.

[28] Fourteenth Report on Competition Policy, 1985, p 11.

"It is one of the commission's top priorities to strengthen the economy of the Community, so as to give a decisive push to growth and to improve international competitiveness. […] Within this economic strategy competition policy has a crucial role to play. Dynamic, innovative competition, led by entrepreneurs, is the life-blood of the economy."[29]

"'Free competition' is not an end in itself – it is a means to an end. When we strive to get markets working better, it is because competitive markets provide citizens with better goods and better services, at better prices. Competitive markets provide the right conditions for companies to innovate and prosper, and so to increase overall European wealth. More wealth means more money for governments to use to sustain the fabric of our societies and to guarantee social justice and a high-quality environment for generations to come."[30]

We can see the clear shift in the priorities.[31] While the integrating function of competition policy was in the forefront in the first years of the Community, in the report from 2006 competition policy was regarded as a means to increase overall European wealth.

It can be concluded that the two most important goals of Community competition policy are the pursuing of integration and the fostering of workable competition. But beyond those, there are other goals as well: competitiveness on an international level, fighting inflation, fair competition, consumer protection, the opening up of markets for competition, raising the employment rate, structural change in economy, research and development, promotion of innovation, and sustaining cohesion between Member States. It is clear that the EU's competition policy embraces more (and other) goals than that of the Member States'. Further, there is an aspect specific to the Community, the condition of Community dimension, which is clearly apparent in the concept of interstate trade, that is, when it comes to the application of the competition provisions of the Treaty the Community dimension is reached only if the anti-competitive behaviour is capable of affecting trade between Member States.

2.2.3. Other public policies

Besides competition policy, there are numerous other policies that are taken into consideration in political decision-making, and have an effect on the market, and thereby on competition in the market. Obviously, all policies that have economic relevance have interplay with competition policy. To name but just a few: state aid, trade policy, regulation and deregulation, subsidization of SMEs, trade policy, R+D policy, regional policy, environmental policy, etc. As we will see in the next chapter the regime of intellectual property has its own effect on competition as well.

Apparently, the concerns behind other policies might be in conflict with competition policy concerns. Therefore, in resolving a conflict between policies, it is of utmost importance to underline that there is no hierarchy between the policies of the EU. And this is so even if competition policy has a central role. In case of conflicts (that are occasionally materialise in

[29] Fifteenth Report on Competition Policy, 1986, p 11.
[30] Report on Competition Policy, 2006, p 3.
[31] Regardless the shifts in priorities, competition policy as such has always been in the forefront of the tools of the Community to reach its most precious goals. It is exactly therefore alarming to see the endeavour to remove the competition phrase from Article 3(1)(g) of the new Reform Treaty and, instead, to create a "competition protocol" containing the identical words. See Alan Riley, *The EU Reform Treaty and the competition Protocol: Undermining EC Competition Law*, E.C.L.R. 2007, issue 12. See further OJ C 115, 9.5.2008, p 309.

conflicts between the directorates of the Commission) the Commission strives to resolve it, usually, in two ways.[32] On the one hand, the Commission "imports" certain goals from other policies; on the other, it tries to implant competition policy considerations to other policies. In cases of conflicts, the common goals of the policies (the goals of the Community) are to be kept in mind. For instance, environmental policy considerations can go against that of competition policy. That was the case in the decision in the *CECED* ruling[33], where the Commission approved an agreement, the parties to which together had 95% of the market of washing machines in Europe. The Commission took into account that society will benefit by the agreement as it allows for the reduction of energy consumption.

One of the most obvious examples for considerations that go against competition policy is that of protectionism. There, national champions are to be created and protected. At least that is the short-sighted goal. However, as the protected national champions are not exposed to competition, those will eventually fall out in an international (or for that matter any) competitive environment. The ways of protecting national markets and champions are many. To mention but a few: state aid, tax, and anti-dumping laws. These sort of industrial and trade policies can bring along the expected results in the short term (which might very well be rewarding in national politics), however the long-term interests of a given country call for the consistent and prevailing application of competition law.

2.3. Comparison

2.3.1. Intellectual property / copyright

As we have seen, under the natural law approach, protection is granted for the sake of the individual as such, for the source of creation. Protection for the fruit of the mind is a pre-existing right. However, when compared with competition-based arguments, which stand on economic considerations, it is more appropriate to compare the utilitarian approach which denies the pre-existing nature of the right. Instead, rights are granted by society for reasons serving cultural and economical goals, the two most important of them being the reward and the incentive arguments. Just to recall:

The "reward for labour" argument states that copyright is a legal expression of gratitude to an author for doing more than society expects or feels that he or she is obliged to do. The reward is an end in itself. This is especially so in the cultural industry where creation is the end result of (financial) investment.

The incentive argument is closely linked to the previous one. If it is accepted that creating involves labour that is to be rewarded, then this reward serves as an incentive to create. It is a stimulus. It presupposes that without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level.

Besides these arguments some others are to be mentioned here: effect-based arguments for intellectual property protection; arguments from investment; the promotion, enrichment and dissemination of national culture; public interest; and social requirements.

Beyond the argument immanent in the legal instrument, goals specific to the European Union exist as well. As was pointed out above, there are two aims to be brought to balance:

[32] Tóth, p 57.
[33] Commission Decision 2000/475/EC of 24 January 1999 (IV.F.1/36.718. – CECED) OJ L 187, 26.7.2000, p 47.

a) the aim of creating a genuine Single Market in Europe, and
b) the aim of creating an environment favourable to innovation and investment.

Besides these, intellectual property bears significance in promoting innovation and creativity; developing employment; improving competitiveness. Further, important cultural, social and technological aspects have to be taken into account in formulating policy in this field.

2.3.2. Competition policy

Starting again with the goals stemming from the nature of the legal instrument, some of the most important ones are as follows.

1. Welfare maximisation (allocative and productive efficiency combined), which shows an economy's capability of producing surplus for society as a whole.
2. The maximisation of consumer welfare, which is the previous goal but pursuing it without the detriment of consumers. This goal represents the most important goal in both sides of the Atlantic.
3. Fairness and equity can be paralleled with that of the natural law arguments of copyright protection.

Again, competition policy has its Community specific aims as well. The two most important ones are the pursuing of integration and the fostering of workable competition. Beyond these, some other goals were mentioned above:

- competitiveness on an international level,
- fighting inflation,
- consumer protection,
- the opening up of markets for competition,
- raising the employment rate,
- structural change in economy,
- research and development,
- promotion of innovation, and
- sustaining cohesion between Member States.

When comparing the goals specific to the legal fields and some of those that are specific to the Community, it is hard to find the antagonism. Besides the fact that some goals are identical (competitiveness, innovation, research and development, integration), most of the others are either complementary or neutral (environment favourable to innovation and investment – workable competition).

There are no hierarchy between the two fields; however, some important similarities and differences have to be highlighted. On the one hand, the nature of the two areas is different. Intellectual property law is applied in a relatively narrow field (at least compared to others), meanwhile competition law is one that is applicable to virtually anywhere where economic activity takes place. On the other hand, as was demonstrated above, the aims behind the two fields are either the same or with equal importance.

By and large, it is the cultural aspect that can come to conflict with those of competition policy. As we will see, in connection to the effort of reorganising the system of collective management of rights (allegedly) on competition policy considerations, it is the cultural aspect which is the most problematic.

3. COMPETITION LAW

This chapter aims at introducing competition law and the justifications for its existence. For the sake of easy understanding, first, I will present a short history of competition law, and thereafter, I will explore the justifications lying behind competition law, and the objectives of competition policy.

3.1. History

Competition law and policy was born in the United States, though under the name 'antitrust', which tells a lot about its origins. Trusts, huge conglomerate enterprises, started to appear in relatively large numbers due to the dramatic improvements in certain industries: in transportation and telecommunications, and then in other fields as well, such as energy. The more and more interconnected territories (and markets) produced a dramatic fall in costs and intensified competition. However, prices were artificially kept high by agreements, which caused considerable loss both to producers and consumers. Small businesses were going out of business or bought up by the giants. These conflicts were present on the political level as well. As Senator John Sherman put it, "[i[f we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[34] Having had the political power, the small businesses achieved that adequate laws were passed on federal level to protect the freedom of markets. Thus, the Sherman Act, the oldest antitrust law in the world was adopted in 1890.

In the turn of the century, more than hundred companies were sued under the Sherman Act. Perhaps the most important antitrust case was the one against the Standard Oil Company of Rockefeller. The trust was split into 34 separate companies in 1911. The Clayton Act of 1914, besides specifying certain behaviours that were caught by the law (e.g. price discrimination), and allowing treble damages to victims of anti-competitive behaviour, introduced merger control. What necessitated the introduction of merger control was that firms wishing to avoid to be caught by the Sherman Act were merging together, thus were being able to coordinate prices. Another important act from the same year was the Federal Trade Commission Act that established the FTC, a body independent of the government, and shared its competences with the Department of Justice.

During and after World War I, antitrust enforcement was rather weak. This was due to the mutual support between business and politics under the war, and it remained so afterwards. After the Great Depression until the mid-seventies the antitrust activity was strong again. But this period was also characterised by regulatory practices that were rooted in the efforts of getting through the depression. However, from the middle of the seventies and onwards, critiques of interventionism were gaining ground. The authors of such views were connected to the University of Chicago. The Chicago School was promoting the efficiency rational behind mergers. Under the influence of the Chicago School, the enforcement of antitrust law started to change. The Reagan administration was characterised by a "hands-off" approach where market forces were the prime factors in sorting out the most efficient firms.

[34] Go to http://en.wikipedia.org/wiki/Antitrust#History_of_antitrust_in_the_United_States.

The present trends are more in the middle between interventionism and *laissez-faire*. The enforcement seems to be more balanced, but at the same time fight against cartels is gaining more and more importance.

On this side of the Atlantic[35], desiring a long-lasting piece after World War II the European integration began within certain economic sectors – keeping politics away. Having established the Coal and Steel Community, the economic integration could be furthered into other areas of the economy, and it was only then that political integration was taken up. Today, the integration expands to more and more areas, and the supranational elements overweigh the intergovernmental ones. However widespread is the integration today, it is the economy what servers as the driving force for the European Communities. Accordingly, competition law has always been of central importance to that matter.

European Community's competition law has always had a special integrating feature. (See e.g. the rules on vertical agreements.) The basic idea appears in Article 3(1)(g) of the Treaty of Rome, where it reads that "the activities of the Communities shall include […] a system ensuring that competition in the internal market is not distorted". Still, the primary objective for competition policy was more to ensure a common European economic progress, and by that the welfare of the European citizens. After fifty years, the goal is somewhat different: to integrate the European market, and to create economic efficiency.

Before seeing into the (possible) objectives of the Communities' competition policy, in what follows, a short overview of the competition law will be given by reviewing the notions of competition, market power, types of markets and relevant market, and the structure-conduct-performance paradigm.

3.2. Competition

Among the principle pillars of open market economies of modern democratic societies the principle of fair and undistorted competition has a distinguished place. It is a cornerstone to effective competition, a marketplace where the competitors independently compete with each other by providing better price, quality and service. This is how consumer welfare is maximised.

Here, for a better understanding of the concept of competition, it is worth quoting two relevant sources: the EU and the OECD.

The Glossary on the website of the European Union provides the following definition. "A market where there is free competition is a market on which mutually independent businesses engage in the same activity and contend to attract consumers. In other words, each business is subject to competitive pressure from the others. Effective competition thus gives businesses a level playing field but also confers many benefits on consumers (lower prices, better quality, wider choice, etc.)."[36]

[35] The history of competition law in Europe can be addressed on two different levels; one being the national and the other being that of the European Union. For the purposes of this work, the national level will be left out of consideration.

[36] Glossary of terms relating to European integration and the institutions and activities of the EU (hereinafter Glossary). Go to http://europa.eu/scadplus/glossary/competition_en.htm.

The OECD defines competition as "[a] situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g., profits, sales and/or market share. Competition in this context is often equated with rivalry. Competitive rivalry between firms can occur when there are two firms or many firms. This rivalry may take place in terms of price, quality, service or combinations of these and other factors which customers may value.

Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower prices. It gives rise to increased consumer welfare and allocative efficiency. It includes the concept of "dynamic efficiency" by which firms engage in innovation and foster technological change and progress."[37]

3.3. Market power

Competition law is concerned with those distortions of competition when one or more undertakings posses market power and use it for their own interest. Therefore, for the purpose of maximising consumer welfare by the most efficient allocation of resources and the reduction of costs, the aim of competition policy is to guard competition on the market by:

a) protecting traders from the collective power of other traders (cartels);
b) protecting small firms against the big ones (abuse of dominant position);
c) guarding the structure of the markets against distortion (merger control).

However, to being able to establish a market power, it is inevitable to define a market on which the said market power is held. Market power is a relative notion, it may exist only on a given, defined market, a so-called relevant market. Before seeing into the concept of the relevant market, it seems to be expedient to touch upon the basic types of market. For the sake of convenience, let us turn to the definitions offered by the Glossary of the European Union and the OECD.

3.4. Types of market

3.4.1. Perfect competition

How competition works may be best described with the help of the hypothetical market condition, the so-called "perfect competition". Here the number of buyers and sellers, sufficient information, and the lack of barriers to entry eventuate a market where nothing but the market forces (and the efficiency of the sellers and buyers) drive the market. Under perfect market conditions the consumer can get the best quality on the best price (i.e. on the optimum price) among a wide variety of goods and services.

"Perfect competition is defined by four conditions (in a well-defined market):

a) There is such a large number of buyers and sellers that none can individually affect the market price. This means that the demand curve facing an individual firm is perfectly elastic.
b) In the long run, resources must be freely mobile, meaning that there are no barriers to entry and exit.
c) All market participants (buyers and sellers) must have full access to the knowledge relevant to their production and consumption decisions.

[37] See the Glossary of Industrial Organisation Economics and Competition Law, OECD, point 29. on p 22. Available at http://www.oecd.org/dataoecd/8/61/2376087.pdf.

d) The product should be homogenous. When these conditions are fulfilled in any well-defined market, the market is perfectly competitive; when they are fulfilled in all markets, the economy is perfectly competitive."[38]

3.4.2. Monopoly / dominant position

Monopoly refers to situations where a market player (monopolist) is able to restrict its output, and hence raise prices. As a result of this situation, it holds a market power that is not subject to competition. The consequences of a monopoly usually are higher prices, lower output and quality, and extra profit.[39]

The monopoly is a form of dominant position. "A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market."[40]

Though dominant position, by its very nature, represents a risk to competition, in itself it is not caught by competition law. What is illegal is the abuse of such a position.[41] A dominant position can be hold by not just one but more than one company. This is called collective or joint dominance. This phenomenon is most common in oligopolistic markets.

3.4.3. Oligopoly

A market is oligopolistic if only a handful of sellers are present on the market, which can behave similarly without having to enter into any agreement. Given the limited number of players in the market, independent decisions can be taken with the practical effect of coordination.

"An oligopoly is a market characterized by a small number of firms who realize they are interdependent in their pricing and output policies. The number of firms is small enough to give each firm some market power. Oligopoly is distinguished from perfect competition because each firm in an oligopoly has to take into account their interdependence; from monopolistic competition because firms have some control over price; and from monopoly because a monopolist has no rivals. In general, the analysis of oligopoly is concerned with the effects of mutual interdependence among firms in pricing and output decisions."[42]

---

[38] *Ibid.* point 150. on p 66.

[39] However, a market's contestability is of high importance when a monopolist's situation and behaviour is scrutinised. In a contestable market no barriers to entry exist, all firms have access to the same production technology, there is perfect information on prices, available to all consumers and firms, and entrants can enter and exit before the incumbents can adjust prices. See Point 44 of the Glossary of the OECD. Available at http://www.oecd.org/dataoecd/8/61/2376087.pdf.

[40] See the Glossary, available at http://europa.eu/scadplus/glossary/competition_en.htm.

[41] It must be noted that merger control does not follow this logic. It tries to accomplish its objective – undistorted competition – by controlling those concentrations which may significantly impede effective competition. For further details see EC Merger Regulation: Regulation 139/2004/EC of the Council of 20 January 2004 on the control of concentrations between undertakings, OJ L24/1, 29.1.2004.

[42] See fn. 37, point 142. on p 62.

3.5. Relevant market

As was mentioned above, market power can be defined only on a given market, a so-called relevant market. It is the definition of the relevant market that every competition assessment (with some exceptions that are not to be addressed here) begins with. The correct market definition is of utmost importance in the course of any competition proceeding.

By the terminology used in EU Competition Policy relevant market means: "The definition of a relevant market is a tool to identify and define the boundaries of competition between firms. It establishes the framework within which the Commission applies competition policy principles. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. Market definition makes it possible, inter alia, to calculate the respective market shares of the undertakings active on the relevant market, which convey meaningful information regarding market power for the purposes of assessing dominance. A relevant market is defined according to both product and geographic factors."[43]

Both the notions of relevant product and geographic market are based on the concept of substitutability. Substitutability means the extent to which the products are interchangeable with one another, either from the consumers' or the producers' viewpoint. A product is interchangeable from the consumers' point of view if they are willing to buy product B instead of product A for the same purposes based on the product's price, nature, quality, and availability. Depending on the level of the production chain where substitutability takes place, demand-side or supply-side substitutability can be distinguished.

Having been defined the concept of substitutability the product and geographic markets should be clarified. The product market means all the products that, based on their nature, quality and price, are interchangeable with one another. The characteristics of the product allow substitutability. In defining the relevant product market, not only the marketed products are to be considered, but also those that are potentially can be put on the market within a reasonable time and without significant costs.

The geographical market means the geographical area within which in reasonable time and with reasonable costs one product can be replaced with another. Though Company A's milk is supposedly perfectly interchangeable with Company B's milk (that is in the product market these are substitutes to one another) if a consumer, wanting to get hold of Company B's milk, has to go to another city, then it is not a substitute product for Company A's milk in terms of geographical dimensions.

So the relevant market is the point of departure. Without a thorough relevant market analysis it is hardly possible to define, for instance, a dominant position. A dominant position can be established only in a certain product and geographic market. Thus, without defining a relevant market the whole concept of dominant position would not make sense.

However, it should be noted that in establishing the market power of an undertaking, other factors are also to be taken account of, such as barriers to entry and exit, and buyer power. "Barriers to entry are factors which prevent or deter the entry of new firms into an industry even when incumbent firms are earning excess profits. There are two broad classes of

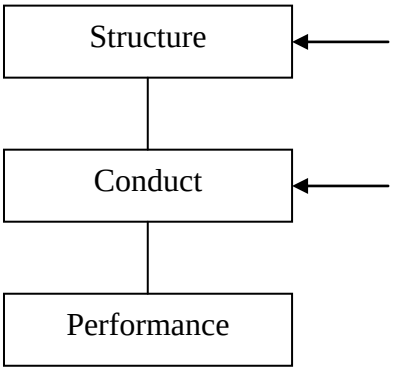
[43] See the Glossary.

barriers: structural (or innocent) and strategic. These two classes are also often referred to as economic and behavioural barriers to entry."[44]

3.6. Structure–Conduct–Performance paradigm

As it is clear by now, competition among competitors takes place always in a relevant market. But to see how this market works, the dynamics of it has to be demonstrated. A model used for this purpose – linked to the Harvard school – is the so-called S-C-P scheme, which stands for Structure–Conduct–Performance. This is a model to show the interplay between the elements of the market. In accordance to the S-C-P scheme the performance of the market players is conditioned by their conduct (behaviour), which is in turn hinge upon the structure of the market. The structure of the market is defined by the architecture and the concentration of the market and the presence of entry barriers. These are the main elements that determine competition in the market. The behaviour of the competitors means the strategies, price and development policies, etc. Finally, efficiency refers not only to that of the market players, but also to that of the market as a whole.

Competition policy aims to protect the proper functioning of the market, meaning the protection of competition on the market. Accordingly, the power of competition authorities to impose appropriate remedies to effectively bring the infringements to an end is exercised on the level of structure or conduct. That is, the remedies can be either structural or behavioural. The levels where competition law can affect the market are to be illustrated with the following diagram[45]:



The tools of competition law affect directly or indirectly the above two levels.[46] Merger control is a remedy for anti-competitive effects on the structure of the market. At the same time, though indirectly, this legal tool affects conduct as well. The fight against cartels is a remedy against conduct.

[44] See fn. 37, point 14. on p 13.
[45] See Boytha Györgyné, p 3.
[46] A further distinction between remedies should be mentioned: *ex ante* and *ex post* remedies. *Ex ante* means that the remedy is applied to prevent an anti-competitive event – merger control comes typically under this category. *Ex post* means that the remedy is to redress an anti-competitive action that has already occurred – abuse of dominant position is an example of this. Of course, certain anti-competitive behaviours may come under both categories. A cartel can be caught either before having done any harm or after several years of restrictive practice.

3.7. European competition law – substantive provisions of the law

As it is defined in the Glossary on the website of the European Union "European competition policy is intended to ensure free and fair competition in the European Union. The Community rules on competition (Articles 81 to 89 of the EC Treaty) are based on five main principles:

- prohibition of concerted practices and agreements and abuse of a dominant position liable to affect competition within the common market (antitrust rules);
- preventive supervision of mergers with a European dimension, to determine whether they restrict competition;
- supervision of aid granted by the Member States which threatens to distort competition by favouring certain undertakings or the production of certain goods;
- liberalisation of sectors previously controlled by public monopolies, such as telecommunications, transport or energy;
- cooperation with competition authorities outside the Union."[47]

The most important provisions on European competition law are to be found in Article 81 and 82 of the Treaty, and in the Merger Regulation[48].

Article 81 on cartels and Article 82 on abuse of dominance are directly applicable. It means that those provisions are enforced both on the Community level and on the level of Member States. On the Community level it is the Commission (Competition DG) that enforces competition law, while in the Member States, if trade between Member States is affected, the national competition authorities and the national courts apply Article 81 and 82.

Article 81(1) prohibits agreements between undertakings and decisions of association of undertakings, further concerted practices, which have their object or effect the prevention, restriction or distortion of competition within the common market. However, Article 81(1) is not applicable where the criteria set out in Article 81(3) are satisfied. If Article 81(3) does not apply, then the agreement (decision or concerted practice), which is prohibited under Article 81(1), is automatically void according to Article 81(2).

Article 82 provides for a prohibition of abusive practices by a dominant undertaking within the common market in so far it may affect trade between Member States. Firms with dominant position are to take caution how to behave unless they might be caught by Article 82. However, it should be remembered that dominance in itself is not prohibited.

With regard to merger control, the Commission and the national competition authorities do not apply the same substantial law. On the EC level, it is the Merger Regulation that is applicable (though certain articles of it apply to the national competition authorities as well), while in the Member States the national laws apply. The jurisdiction between the Commission and the national competition authorities is divided according to thresholds, above of which the concentration is to be assessed by the Commission. It must be mentioned however, that the Merger Regulation makes it possible to refer a case from the Commission to the Member States and *vica versa* "as an effective corrective mechanism in the light of the principle of subsidiarity"[49]. In case a concentration that falls below the threshold is to be notified in more than three Member States, than the Regulation makes it possible to refer the case to the

[47] See the Glossary, available at http://europa.eu/scadplus/glossary/competition_en.htm.
[48] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p 1.
[49] Regulation, recital (11).

Commission in order to prevent legal uncertainty in assessing the case differently. Referral from the Commission to a Member State may take place, where a concentration with a Community dimension threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market.

4. COPYRIGHT

To comprehend the effect of competition policy on collective rights management, it is of crucial importance to understand the role of collecting societies in the music business. Thus, before going into details as how these societies work, the background and the overall picture have to be explored.

One has to see the subjects of copyright law in the field of musical works, the rights attached to the works, the players of this market and their interests, and the net-like connections of all the concerned.

4.1. Intellectual property

Intellectual property law is a relatively separate area of law. It is a body of law connected to the creations of the intellect and the exploitation attached thereto. It is not a tangible (physical) thing to which it attaches property right but an intangible one. It might be fair to say that the law creates a double fiction. First, it created the fiction of property (as opposed to possession, which is a fact), then it created various categories for intellectual creations upon which one can have property rights. The physical object is separate from the creation of the mind. A sheet music in its physical form might very well be my property. However, the music that is scored with the notes on the piece of paper (my copy of the sheet music) is separate from my property. In fact, the property right on the music belongs to someone else. It is up to the owner of that property right to dispose of it.

Intellectual property has developed its own areas. It is common to divide intellectual property into two broad categories: industrial property and copyright. For the sake of better understanding a very brief overview of the most common forms of the two areas is given in the following.

Industrial property covers a wide range of forms, of which the most important ones are the following.

Patent

Patent is an exclusive right granted in return for the disclosure of information on a new technical solution to a problem. In order a patent to be granted, the invention has to fulfil certain conditions (patentability requires that the subject matter is capable of industrial application, is new, and involves an inventive step). Once a patent is granted, the owner of the right has the right to exploit the invention for (usually) a 20-year period, under which only with the consent of the patent owner may one commercially make, use, distribute or sell the invention.

Utility models

A utility model is another form how inventions are protected. It is similar to patents, while the required inventiveness is lower, and it is registration-based. The reason behind this lies with the nature of the protected inventions, which are characterised with a short commercial life span and less technical complexity. Accordingly, this solution is a cheaper and quicker protection compared to patent, yet the term of protection is shorter.

Industrial design protection

Industrial design is an applied art used for enhancing the aesthetic and practical aspects of a product, and thereby adding value to it. Quite commonly, the value (both for consumers and manufacturers) lies with the visual appeal and its usefulness and effectiveness. The industrial design protection rewards the creator and gives incentive for investment. A notable feature of this protection is that it is applied (as implied by the adjective 'industrial') to designs that can be utilised in industry, that is, in large scale.

Trade marks

Given the need for being able to distinguish between goods, the history of trade marks goes back to ancient times. It meant an identity of quality, an identity of source. With industrialisation, the function of trade marks in advertising became obvious, and since then the sign is more than the indication of origin or its suitability to distinguish the good from other goods, and to promote it on the market. It is an asset in itself. The exclusive right (to use it and to prevent unauthorised third parties from using it) is given to the owner or the registered mark.

Geographical indications

As the name suggests, this protection is offered for goods that have a specific geographical origin. That way the products' quality and reputation is embedded in a sign. This sort of protection is especially important to food and agricultural products, such as Tokaj Wine and Szeged Paprika. Unauthorised parties may not use these labels or ones that can be likely mistaken for the original sign.

Plant variety rights

Plant variety rights (or plant breeders' rights) are granted to plant breeders who produce new varieties of plants, which differ from all other known varieties in important botanical characteristics, like resistance to pests or increased yields. This *sui generis* right secures the owner the exclusive marketing or the licensing of the plant variety.

Copyright

Copyright and neighbouring rights, the areas of the other branch of intellectual property, are elaborated in greater detail in what follows. Suffice it to mention here the main characteristics. In contrast to industrial property, where in case of patents for example it is the idea itself, the solution to a technical problem what is protected, in case of copyright it is the form of expression of an idea what is protected. It is the physical embodiment of artistic creations. And while in the field of industrial property protection is granted upon application, copyright vests on the piece of art automatically.

4.2. International developments on the field of copyright and related rights

The law of intellectual property has developed within national borders. The territorial nature of it – the protection was confined to the territory of a given country – made national intellectual property law regimes quite different from each other. However, in the nineteenth century, as international relations and trade gained more and more significance, governments

started to give protection to each other's citizens on the ground of bilateral treaties. This so-called 'national treatment' helped the different regimes to survive beside each other, as all the countries were able to develop and enforce their own laws. In the second half of the nineteenth century, instead of a high number of bilateral treaties, countries started to enter into multilateral treaties. However, the national treatment clause still occupied a central place in these treaties, and that is what made the national regimes to survive – but only to a certain extent. The lack of harmonisation eventuated huge discrepancies in national intellectual property laws. Differences in national laws forced the interested parties to harmonize the laws.

4.2.1. Berne Convention

Following several bilateral treaties on the international level, the Berne Convention on the Protection of Literary and Artistic Works was adopted in 1886 in order to meet the need for a unified system of protection. Today, the Treaty has 164 members,[50] and is still open to anyone to join. Though it has been revised several times, the three key provisions are still in force, the first of which is the national treatment. According to this a member country should not discriminate between its own and those of the other members' citizens in providing the protection. As was mentioned above, this clause made the Berne convention a survivor. Second is the principle of automatic protection, that is the protection is given without any formalities. The third is the independence of protection, which means that the existence of rights and the protection provided in the country of origin are independent of each other.

As the number of members grew and development in the field of intellectual property progressed, minimum standards were adopted. The aim of the Berne Convention, as spelled out in its rather short preamble, is "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works".

4.2.2. Universal Copyright Convention

At the time the Universal Copyright Convention (UCC) was prepared, basically no copyright relationship existed between the United States of America and the Berne countries. However, the United States of America was party to some of the conventions of the Americas, named Pan-American Conventions[51], which were, otherwise, influenced by the Berne Convention. Taking into account the desire to have as many states party to the Berne Convention as possible, especially the United States of America, the UCC was drawn up in order to create a link between the Berne countries and those that are party to the various Pan-American conventions. It was prepared under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), and was signed in 1952. Accordingly, the UCC was acclaimed as a milestone in the history of copyright. It provided a unified global protection, though on a lower level than the Berne Convention. Therefore, it was more attractive to some countries to join, especially to those of the developing countries. However, following the accession of the United States of America to the Paris Act of the Berne Convention (1981)

[50] See WIPO's Treaties Statistics at http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en.

[51] These conventions are those of Mexico City, Rio de Janeiro, Buenos Aires, Caracas, Havana and Washington. See Copinger, 1238-40.

and the numerous other countries over the subsequent years, the UCC has lost its importance.[52]

4.2.3. Rome Convention

Since the Berne Convention covers only literary and artistic works, protection for performers, producers of sound recordings, broadcasters, and others are not provided protection under this treaty. There were attempts to expand the Berne Convention so as to cover these art related activities, but it was refused on the grounds that those who perform these activities lack the level of creativity that is necessary to be qualified as authors. It was the phonogram industry that sought protection, both on national and international level. At the Diplomatic Conference in Rome in 1928, it was proposed that in case of an adaptation of a musical work to a mechanical instrument, the performing artists should benefit from the protection as well. However, the only result was a resolution asking national governments to consider the adoption of such rights. The following step was made in 1934, when the CISAC (International Confederation of Societies of Authors and Composers) signed an agreement with the International Federation of the Gramophone Industry as to incorporate protection into the Berne Convention of phonograms against unauthorized duplication and the right of producers of phonograms to equitable remuneration for communication to the public of their phonogram by broadcasters. These addendums were to be made at the following revision of the Berne Convention, however, the Second World War brought the process to a halt. After the war, with several drafts behind, the developments eventually (in 1961) resulted in the adoption of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, known as the Rome Convention.

As the works of performers, producers of phonograms, and broadcasters are connected to the works of literary and artistic works (neighbouring rights), the Rome Convention establish in Article 1 that "[p]rotection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection." The central principle in the convention is the national treatment.

Performers were not given the right to control the reproduction, distribution, or public communication of the recordings of their performances, unless it is made illicitly. Producers of phonograms have been granted the right to prevent the reproduction of their recordings. Broadcasting organisations received exclusive rights to authorize or prohibit the rebroadcasting of their broadcast. However, the treaty was a result of compromise of the various interests. Regarding remuneration, a single equitable remuneration was conferred by the contracting states in case phonograms are broadcasted or played in public. Furthermore, it was up to the contracting states to decide whether the beneficiary of the right is the performer, the producer of the phonogram or both.

4.2.4. Phonograms Convention

The Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (Phonograms Convention) was adopted in 1971, in Geneva at a joint Diplomatic Conference of the UNESCO and the WIPO. The purpose of the

[52] In 1971, both conventions had 59 members. While the UCC has 100 members, the Berne, as of October 2008, has 164 contracting parties.

Convention was to fight piracy of phonograms.[53] While authors and composers were provided adequate legal protection both on national and international levels, the producers did not have legal tools to fight piracy, which assumed considerable proportions by that time. The Rome Convention did not provide for protection in connection to importation and distribution of unauthorised copies. In addition to this, the national legislation on phonogram protection came in huge variety, which made situation even worse. As a result, the solution, in the form of the Phonogram Convention, was reached with a hitherto unprecedented speed.

4.2.5. TRIPS

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) was negotiated in the 1986-1994 Uruguay Round of the GATT (General Agreement on Tariffs and Trade), which was signed in Marrakesh, Morocco, and by which the Agreement establishing the World Trade Organisation was adopted. The TRIPS brought intellectual property (including copyright and related rights) within the sphere of international trade. Further, an important feature of TRIPS as compared to other international conventions is that it is world-wide. Members to TRIPS have to comply with Articles 1-21 (except for Article 6^{bis}) of the Berne Convention. Additionally, TRIPS has some so called 'Berne-plus' features, meaning that certain aspects of copyright are applicable to works came into being due to new technologies, e.g. computer programs. TRIPS has three important implications.

First – it is administered by WTO, a consequence of which is that the text always refers to members and not member states. That way, entities other than states can be members, such as Taiwan, Hong Kong, Macao (special territories), and entities that are organisations or other formations like the European Communities[54]. As of 23 July 2008, the WTO has 153 members[55].

Second – one cannot be party to the WTO without being a contracting party to the TRIPS and *vica versa*. That is, to be able to be part of the WTO one has to swallow the pill: TRIPS. There's no real choice for countries not liking it. It is a package, take it or leave it.

Third – being administered by WTO, the compliance with TRIPS, and hence with Articles 1-21 of the Berne Convention, is considered by the WTO. The country that looses the case in a dispute settlement has to change its law. If not, the other members can ask for imposing trade sanctions. Accordingly, the violation of TRIPS may lead to trade sanctions. To put it another way, it is the TRIPS that gave teeth to the Berne Convention.[56]

---

[53] As it is explained in Copinger, p 1213, out of the three different phenomenon that is labelled as piracy, only the strictly speaking piracy and counterfeiting are covered by the Phonogram Convention, while bootlegging is not. (The strictly speaking piracy is the "unauthorised duplication of an original phonogram distributed to the public with labels, artwork, trade marks and packaging different from, although often similar to, those of the original legitimate phonogram; the legitimate producer's trade mark is not used." Counterfeiting is the "unauthorised duplication and distribution of an original phonogram and its packaging as a whole. The legitimate producer's original label, artwork, trade marks and packaging are copied as well as the sounds contained in the original legitimate recording." Bootlegging means the "unauthorised recording of an artist's performance.")

[54] The European Communities became party to TRIPS as of 1 January 1995. (Pursuant to Article 310 of the Treaty, the Community may conclude with one or more (non-Member) States and international organisations agreements establishing an association involving reciprocal rights and obligations, common actions and special procedure.) All the 27 Member States are members in their own right.

[55] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[56] It is important to note that the TRIPS does not have direct effect in Member States, as the WTO Agreement states it clearly that it (further Annexes 1 and 2) cannot be invoked.

4.2.6. WIPO

The World Intellectual Property Organisation (WIPO) is a specialized agency of the United Nations.[57] The origins of WIPO go back to the Paris and the Berne Conventions, which provided for the establishment of international secretariats. The originally two secretariats (one for the administration of the Paris and one for the Berne Convention) were united in 1893. The BIRPI (United International Bureau for the Protection of Intellectual Property), how it was called at that time after the French-version of the name, moved from Berne to Geneva.

WIPO was established at the 1967 diplomatic conference in Stockholm by the Convention Establishing the World Intellectual Property Organization, which entered into force in 1970. It was then – following some structural and organizational changes – that BIRPI become WIPO.[58] The Swiss Federal Government, which supervised the two treaties, was removed as a supervisory authority, and WIPO gained the status of an intergovernmental organization, and – like other intergovernmental organizations – became a specialized body of the United Nations in 1974.

Today 184 states are members[59] to the WIPO, which – like each specialized agency – has its own membership as compared to the United Nations. WIPO has its own constitution, governing bodies, budget, stuff, and programs.

The mission of WIPO – as it is worded in the WIPO Intellectual Property Handbook: Policy, Law and Use – is "to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind. Its effect is to contribute to a balance between the stimulation of creativity worldwide, by sufficiently protecting the moral and material interests of creators on the one hand, and providing access to the socio-economic and cultural benefits of such creativity worldwide on the other"[60].

The contracting parties to the Berne Convention were trying to respond timely to the changes in technology by revising the convention from time to time. While the revisions of the Berne Convention took place approximately in every twenty years (and while a substantive revision would have been very cumbersome), technological changes, such as the video and cassette technology (home taping), satellite broadcasting, and more importantly the computer technology were presenting a continuous challenge to the interested parties. Therefore, a strategy of recommendations, guiding principles and model provisions were followed in the course of adapting to the new environment. These attempts proved not to be efficient enough, thus binding international norms were sought after. The negotiations on such international treaties started within two fora, GATT and WIPO. First, as a result of the Uruguay Round negotiations, the TRIPS Agreement was adopted. Then, shortly after TRIPS, in 1996, the

[57] For a detailed description see http://www.wipo.int/about-ip/en/iprm/index.html.
[58] BIRPI started with only a staff of seven in 1893, today, its successor WIPO has stuff over 900 from more than 90 countries.
[59] See http://www.wipo.int/members/en/.
[60] WIPO Intellectual Property Handbook: Policy, Law and Use, p 5, available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf.

WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions adopted the WCT and the WPPT[61], which are addressed in the following.

4.2.7. WIPO Copyright Treaty (1996) – WCT

The WCT, on the one hand, addressed problems not dealt with by TRIPS, and on the other hand it repeated some of the articles of TRIPS, thus placing it under the supervision of WIPO. As to the relationship of the WCT to other international treaties, Article 1 regulates its relation to the Berne Convention. It says that the WCT is a special agreement within the meaning of Article 20 of the Berne Convention, which reads as follows. "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." This means that the WCT cannot lower the level of protection provided for in the Berne Convention. Further, the WCT says that "[t]his Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties."

A notable aspect of the substantive provision of the WCT is the so-called "digital agenda". It covers those issues that came up with the headway of the digital environment, such as digital storage and transmission, limitations on and exception to rights, technological protection measures and rights management information.

4.2.8. WIPO Performances and Phonograms Treaty (1996) – WPPT

When the question of the protection of producers of phonograms were discussed at the sessions of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms, it was opposed by many (civil law countries) to deal with producers' rights in a Protocol to the Berne Convention, as it would not have been appropriate. At the same time, the issues in connection to producers of phonograms were of high importance. Therefore, taking the classification of the Rome Convention as the basis, where both the rights of performers and producers of phonograms are looked upon as related rights, these two rights were bundled together in WPPT, out of the context of the Berne Convention.

The "digital agenda" is covered in the WPPT as well, by repeating the three following provisions of the WCT: the making available, the technological measures of protection, and the rights management information. Equally importantly, both the rights of performers and producers of phonograms are extended. Performers were given three extra rights: the right to control reproduction, distribution, rental, and the making available of copies of fixation; the right to receive a share in the remuneration; and the moral rights of attribution and integrity. Producers of phonogram were given the exclusive right to control the distribution, rental, and making available of copies of phonograms.

[61] In 1996, in the „basic proposals" of WIPO, three treaties were envisaged: two treaties that were eventually opened for signature, the WCT and the WPPT, and a third one on the *sui generis* intellectual property protection of databases. The latter one was postponed.

4.3. Copyright

Copyright, a branch of its own within the field of intellectual property, is characterised by features that are specific to this area of legal concept. In case of copyright it is the form of expression of an idea what is protected (as opposed to patent protection); the physical embodiment of artistic creations. While in the field of industrial property protection is granted upon application, copyright vests on the piece of art automatically. In what follows the most important characteristics will be touched upon.

4.3.1. Subject matter – musical works

When it comes to the subject matter of copyright law notable differences can be found depending on the legal systems. While in the United Kingdom the subject matter is called 'work'[62], in civil (continental) law countries, such as France, the law distinguishes between 'author's rights' (*droit d'auteur*) and 'neighbouring rights' or entrepreneurial works (*droit voisins*). While author's right cover literary, dramatic, musical, and artistic works, neighbouring rights are employed with sound recordings, broadcasts, and performers.

On the international level, the civil law distinction is mirrored in the Berne Convention (1886) which protects authors' rights, and in the Rome Convention (1961) protecting neighbouring rights.[63]

Under whichever jurisdiction one scrutinizes the subject matters of copyright law the conditions under which the rights are granted, the scope of the rights, the nature and the duration of them will differ considerably depending on the given work to be protected.

Another difference that should be noted when it comes to British copyright law, is that the 1988 Act has abandoned the formal distinction between authorial works (literary, dramatic, musical, and artistic works, and entrepreneurial works (sound recordings, films, broadcasts, and typographical works), while copyright treats these categories differently.[64] The reason for this is to keep clear distinction between authorial and entrepreneurial works. While the former require creativity, the latter remunerate the sweat of the brow.

As was mentioned above, one might encounter a great variety of categories of protected works, depending on the jurisdiction. For instance, the Hungarian Copyright Act[65] provides protection for literary, scientific and art creations, as a general rule. Thereafter, the act gives a non-exhaustive list of creations that are typically protected by copyright. These are literary works (for example fictional works, technical works, scientific works, journalistic works, etc.), speeches delivered in public, computer program, dramatic works, musico-dramatic works, ballets and mimes, musical works with or without words, radio and television plays, cinematographic creations and other audiovisual works, creations produced by drawing, painting, sculpturing, engraving, lithography or in other like manner, and designs thereof, artistic photographs, maps and other cartographic creations, architectural creations and plans thereof, and plans of building complexes and town planning projects, designs of engineering

[62] In the Copyright Designs and Patents Act 1988 (Part I, Chapter I) 'copyright work' is defined as a work on which copyright subsist, namely a) original literary, dramatic, musical or artistic works; b) sound recordings, films, broadcasts or cable programmes, and c) the typographical arrangement of published editions.
[63] In EC law, neighbouring rights are referred to as related rights.
[64] See Bently and Sherman, p 58.
[65] Act LXXVI of 1999 on Copyright.

structures, applied art creations and designs thereof, costume and scenery designs, industrial design creations, databases rated as collections of works. No doubt, the list could be continued for pages. For the present purposes, musical works and sound recordings are of particular relevance. The protection of musical works applies to tunes. That is, the lyrics (any words sung or performed with the music) are not part of a musical work. The lyrics are regarded as a literary works and protected as such. Sound recordings, or as defined in the Rome Convention, phonograms are "any exclusively aural fixation of sounds of a performance or of other sounds."[66]

4.3.2. Criteria for protection

For a work to be protected by copyright, it has to satisfy certain requirements. In most of the jurisdictions these requirements are the following.

a) originality

Originality is the most important of all requirements. The idea of originality focuses on the relationship between the author and the work. Although 'originality' is a central notion in the field of copyright, national laws do not define the term. It is the case law that elaborated the concept and put a limit to its application.

The originality requirement lies in the centre of copyright protection, despite the fact that the concept itself is highly ambiguous. What it means depends, first and foremost, on the cultural and artistic environment within which it comes into existence. The application of originality varies considerably between different jurisdictions. In Continental Europe, it is creativity that is meant by originality. It is the reflection of the mind; an imprint of the personality.[67] In the U.K., however, originality is the author's labour, skill, or effort. For the proper interpretation of the British concept of originality the case law has to be consulted. In the United States, following the *Feist* case in 1991[68], the investment of a "modicum of creativity" is necessary for a work to be considered original.[69]

Having said the above, there are still some characteristics that are common in every jurisdiction. For instance, contrary to patent law where the focus is on the relationship between the invention and the state of art, in copyright law what is of interest is the relationship between the creator and the work.[70]

The Berne Convention, the most important statutory instrument in the field of copyright, does not make mention of the term 'originality', but uses the expression, instead, 'intellectual creation'[71]. Through this requirement it is generally accepted that a work must be 'original' to qualify for protection.

[66] Article 3 (b).
[67] J.A.L. Sterling LL.B. *World Copyright Law*, Sweet & Maxwell, 1998, p 254.
[68] Feist Publications Inc. v Rural Telephone Service Co. Inc. 499 U.S. 340; 18 USPQ 2d 1275 (1991).
[69] J.A.L. Sterling LL.B. *World Copyright Law*, Sweet & Maxwell, 1998, p 265.
[70] Bently and Sherman, p 88.
[71] Article 2 (5).

b) expression

When copyright protection is given to literary, dramatic, musical and artistic works, it is the expression that is protected and not the ideas lying behind. That is, originality is to be found not in the idea or in the thought but in the execution of the work.[72] Copyright is infringed only if the expression is copied. The scope of protection of copyright law extends only to those works that are recorded in some material form. The same idea is phrased in another way in the Copyright, Designs and Patents Act 1988: copyright does not subsist in literary, dramatic, and musical works 'unless and until' the works are 'recorded in writing or otherwise'.[73] As it is aptly worded in Copinger: "copyright cannot prevent the copying of a general idea, where the idea has been worked out in detail in the form of writing, drawings, etc. it will be an infringement if the labour which went into the expression of the idea is appropriated. In such a case, it is not the idea which has been copied but its detailed expression. Thus the law of copyright is concerned not with originality of ideas but with the original expression of thought […]. The originality which is required, and thus the protection conferred, relates to the expression of thought."[74]

The expression, unlike with certain forms of art such as film, does not come along automatically with the creation of the piece of art. Music, for instance, can very well exist in a non-material form. Therefore, the requirement of fixation is necessary when it comes to music and the like. Furthermore, fixation carries with it the benefit of accessibility in the future and the possibility of serving as evidence.

As to the question of the scope of protection Article 2 (2) of the Berne Convention says "works shall not be protected unless they have been fixed in some material form".[75]

The WIPO Copyright Treaty 1996, like the TRIPS Agreement, refers back to the Berne Convention. What regards expression, it reads in Article 2 that "[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

c) excluded subject matters

Even if all the other requirements are met the work cannot gain protection if the subject matter is excluded from protection. Here again, the domain of excluded subject matters varies according to the jurisdiction in which the work is protected. It is mostly public policy that is behind the exclusion considerations. Mostly obscene or immoral works are excluded, but legal material, laws, and decisions are also common subject matters to be excluded.

4.3.3. Moral rights

In the event that a work qualifies for protection under copyright law, two separate rights arise as a consequence. Moral rights and economic rights – the latter being alienable, while the former inalienable. The economic rights are going to be discussed under the next point, moral rights are touched upon here.

[72] Copinger, p 118.
[73] Bently and Sherman, *Intellectual Property*, Oxford University Press, 2004, p 86.
[74] Copinger, p 372.
[75] It is noted, however, that this is the maximum criterion that works can be subject to. E.g. the Hungarian Copyright Act (Act No. LXXVI of 1999 on copyright) does not prescribe any criteria at all.

The moral right is rooted in the continental system, the name comes from the '*droit moral*'. It is said to mirror the romantic image of the bond between the author and her work. The first attempt to harmonise these rights was made in the Berne Convention. The provision, extended by the Brussels and the Stockholm Acts, is set forth in Article 6bis of the Berne Convention, which reads as follows.

"Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

As the quotation suggests, moral rights practically consist of three rights: the right of attribution, the right to object to false attribution, and the right of integrity.

The right of attribution (or the right of paternity as referred to in the UK) provides for the author to be *identified* as the author. The identification is more than a simple moral gesture, it has plenty of other functions. It helps to build a name and the interpretation of the oeuvre, the management of intellectual property rights, and the collection of royalties. Again, it must be repeated that in order for the right of attribution to arise no formalities are required; it is automatic. However, only the creators of original works are granted the said right.

The right to object to false attribution is the flipside of the right of attribution. This is a right that applies to everyone who is named falsely as an author of a work.

The right of integrity is strongly related to the right of attribution. As the author has the right to be identified as the author, he is identified not just by his name, but by the work as well. The author's name qualifies the work and *vica versa*, the work qualifies the author. Both infer the other. Modifications on either side would come to distort the picture of the author-work relationship. Therefore, the creator has the right to object any treatment of the work which would harm his or her integrity.

When looking at moral rights, the continental and common law approach is different. In the civil law tradition the protection is related in one form or another to the personality of the author. It is the author himself who is supposed to be protected for his intellectual creation. A direct link between author's right and human rights exists due to the inclusion of these kinds of creations within the framework of the Universal Declaration of Human Rights[76], hence national constitutions with civil law traditions usually contain the same provision on the matter. Similarly, on European level, the Charter of Fundamental Rights of the European Union provides expressly for that intellectual property shall be protected.[77]

In the common law tradition, the approach is very different. As Sterling puts it "[i]n the common law jurisdictions, however, the historical evolution of copyright indicates a more pragmatic approach, one linked to the concepts of advantages for society and reward for the

[76] Article 27(2) of the Universal Declaration of Human Rights provides that "[e]veryone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."
[77] Article 17.

author"[78]. Accordingly, it was not until 1988 that Article 6[bis] of the Berne Convention was given effect in the UK.

4.3.4. Economic rights

Once a work is made, copyright subsists on it automatically. The relationship between the right holder and everyone else is special, as only the right holder is denominated. He has been granted an exclusive right, by which everyone else is obliged automatically. The obligation is typically negative, that is those who are obliged are to refrain from doing something. Carrying out any of the activities that fall under the protection of copyright amounts to infringement – unless done with the consent of the right owner. (As opposed to the nature of exclusive right, the authorisation is a contractual relationship between the right holder and licensee.) It is clear from the nature of the exclusive right: from the side of the right holder it is a *right*, meaning that for the invasion of which she can get remedy, while from the side of any third parties, these acts amount to *infringement*. Consequently, when it comes to the rights and the infringements, these two viewpoints represent the two sides of the same coin.

The rights bestowed by law are depending on the type of work and national law. However, the typical exclusive rights are the following.

- reproduction right (copying or reproducing the work);
- recording right (making a sound recording of the work);
- distribution right (issuing copies of the work to the public);
- rental or lending right;
- public performance right (performing, showing or playing the work in public);
- communication to the public (broadcasting);
- right of adaptation, and
- right of translation.

When it comes to collective management of rights, it is necessary to understand what sorts of rights those are that are managed collectively. Therefore, in what follows a brief account of some of the rights will be given.

- reproduction right (copying or reproducing the work)

The most basic and well-known of all the rights (and historically the oldest) is the reproduction right. It is the right of the copyright owner to prevent others from making copies of her work. This is where the name 'copyright' derives from, the right to copy the work. The actual right varies depending on a number of circumstances. Besides national laws, of course, the subject matter of the work determines the scope of the reproduction right.

At the same time, the reproduction right is dealt with both on the international level and on the European level. The Berne Convention provides for the right of reproduction by saying that "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form"[79]. The wording of this provision is sufficiently wide to let national laws to be in concert with this Article without giving up the abundant jurisdiction on this matter. In the course of the European legislation, a number of directives have dealt with the reproduction right. The most

[78] Sterling J.A.L. "*World Copyright Law"*, Sweet & Maxwell, London, 1998, pp 54 and 55.
[79] Berne Convention, Article 9.

important of those is the InfoSoc Directive[80], which says that "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part"[81], which is, again, a broad definition in order to "ensure legal certainty within the internal market"[82].

Reproduction right exist in all the categories of copyright. Though it takes its own form within each of these categories, certain features are common.[83] These are:

- Reproduction is the right of copying, which is infringed only if two elements are established. One, a sufficient degree of objective similarity between the protected work and the infringing one. Two, this similarity is a result of copying.
- The protection persists not only on the work as a whole but on its part as well.
- Both direct and indirect unauthorised copyings qualify as infringement.
- Transient and incidental copies fall within the exclusivity of the right.84

Note should be made of the fact that the copy does not have to be an exact one. At the same time, copying a fraction of the work has never been an infringement. Infringement lies in between. The liability stands when a substantial part of the work has been copied. It is the rule of reason that balances the interests of both sides, that of the author and that of the third parties. By reducing the extent to which the copied work has to be analogous with the original one (not exact copy, but a substantial part) in order to be held liable for infringement the author is provided an adequate level of protection. On the other hand, some use of the work does not give ground to infringement; thereby copyright does not constitute a tool in the hands of the author to control the creative commons. The black and the white areas, the two ends of it – an exact copy v a copy of a fraction of the work – are clear. However, the grey area in between is more ambiguous. It is up to the jurisprudence to draw the line by applying the law to the facts of the case, and by taking into account all the circumstances relevant to the case at hand.

When it comes to the reproduction of musical works, it has to be noted that the words 'reproduction' and 'copying' were not always interchangeable. At the turn of the 19th century copyright subsisted on the sheet music and not on the music. Therefore, the reproduction of music (the sounds) by mechanical means did not constitute a copy. However, today copying and reproduction denote the same activity. The copying of a musical work can take virtually any form; let it be in analogue or digital form.[85]

[80] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p 10.
[81] Article 2.
[82] Preamble (21).
[83] See Copinger, pp 370-371.
[84] With the exception provided for in Article 5 of the InfoSoc Directive: „Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."
[85] As to the issue of substantiality, in the field of popular music the substantial part is usually the hook line which is a distinctive part of the original work. Here, the line between the 'any' part and the substantial part becomes ever more difficult to draw.

A copyright in a sound recording is infringed with copying as well. As the WPPT provides for "[p]roducers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form"[86].

– recording right (making a sound recording of the work)

The scope of the right mentioned above is rather thin when it comes to sound recordings. As Bently and Sherman describe it "the subject matter is defined as the 'recording of sounds from which the sounds may be reproduced'. Consequently, what is protected in relation to sound recordings is not the content *per se* – the song, storyline, plot, or language – or the music or lyrics (which are protected, if at all, as authorial works). Instead, the recording right protects the recording of these sounds."[87] That is, here, copyright protects the *act* of making a sound recording of work otherwise protected by copyright (the music, the lyrics, etc.). It means that the owner of copyright on the music and on the lyrics (there might very well be two separate owners for music and lyrics – more on the owner of the rights below) have a separate right to authorise the sound recording of the work. In certain jurisdictions, the maker of the sound recording has to obtain the authorization of the performer as well.

– distribution right (issuing copies of the work to the public)

Under some national laws the copyright owner has the right to authorise distribution. However, the distribution right is subject to exhaustion. This means that after the first sale of the work or the transfer of ownership, the owner of the work (or of the copy) may resell it without the copyright owner's permission. The copyright owner cannot control the resale of the work.

Exhaustion is of particular significance with regard to the European Economic Area (EEA). Under the principle of Community-wide exhaustion, once copies of the copyrighted work have been put into circulation on the market within the EEA, the owner of the copyright cannot prevent the resale of the work, thus the circulation of goods, within the EEA by using national law. This principle of Community-wide exhaustion has been put in place in order to meet the requirement of free circulation of goods – one of the basic principles of the EC. In practice, this means that once a copy of a work has been marketed in Hungary, it can be freely imported to other Member States of the EU, unless the copy placed on the market in Hungary was an infringing one.

Contrary to the European system, there is no exhaustion right on the international level. It follows that national laws can be utilised to prevent the importation of copies of a copyright protected work that has been placed on the market in some country. In that respect, on the international level, the EEA corresponds to a country on its own.

– rental or lending right

This exclusive right gives the copyright owner the possibility to control the rental and the lending of the work. The rental and lending rights in relation to literary, dramatic, musical or artistic works were included neither in the Berne nor in the Rome Conventions, as contracting parties to the conventions were not in compromise on the issue. However, these rights are

[86] Article 11.
[87] See Bently and Sherman on p 136.

harmonised within the EU by the Rental Rights Directive[88]. The distinction between rental and lending lies with the nature of the two actions. Rental involves commercial elements, while lending does not. As it is defined in the directive, rental means "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage" while lending means "making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public".[89] The protection means that both the rental and the lending of the copies of the (original) work are restricted acts. It should be noted that the rental or the lending has to be made to the public, for instance via libraries. Consequently, renting and lending in the private sphere are excluded. As to the excluded acts, the directive says, though only in the preamble, that certain forms of making available are desired to be excluded from rental and lending: making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use.

Article 5 of the directive provides for an unwaivable right to equitable remuneration in relation to rental right (but not to lending right). The right to obtain an equitable remuneration for rental cannot be waived by authors or performers. That is, the rental right and the remuneration are separate. This right is considered by some authors a *sui generis* right[90], as it is limited to the claim of remuneration only. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

The exhaustion does not apply to rental rights.

- public performance right (performing, showing or playing the work in public)

This sort of right of the owner of copyright is again provided for in the Berne Convention: "Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing the public performance of their works, including such public performance by any means or process."[91] This protection belongs to one of the earliest rights, as the exploitation of dramatic works took mostly the form of performance. Later on, the public performance right was extended to musical and literary works in general as well. The 'performance' is defined broadly; it includes lectures and speeches among other things. At the same time, what 'public' means is more ambiguous. Today, three different concepts are used in the course of defining this term.[92] According to the first one, the public nature of the performance is given by the character of the audience. Here, a group of people qualify as a general public, if their reason for being together is nothing else than the seeing of the performance. The second test lays emphasis on the financial motivations of the performance. And the third one focuses on the 'copyright owner's public'. All of the above tests have their shortcomings, therefore each of them is to be used on careful consideration of the circumstances.

[88] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p 61.
[89] *Ibid.* Article 2 (1) (a) and (b).
[90] See Copinger, p 432.
[91] Article 11.
[92] Bently and Sherman pp 141-143.

When it comes to music, especially, it has to be borne in mind that the playing of a CD in public would amount to a public performance of *both* the musical work *and* the sound recording of it.

- communication to the public (broadcasting)

Though the notions of communication to the public and broadcasting are not synonymous with each other, they are used to describe the act of receiving the work by any person by broadcasting or cables (with the equipment required). Further, the term covers the so-called on-demand services as well. The works concerned are literary, dramatic, musical, and artistic works, further sound recordings, films, and broadcasts. What is common in these communications to the public is that the public is "not present at the place where the communication originates"[93].

The Berne Convention protects the exclusive rights of the owners of copyright when it says "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing […] the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images"[94].

The Rome Convention gives the possibility to phonogram producers of a limited right to equitable remuneration, when it is "used directly for broadcasting or for any communication to the public"[95]. But the single equitable remuneration is provided for by the convention only in case of phonograms published for commercial purposes. It is not general broadcasting or communication to the public that is concerned. The WPPT speaks of an exclusive right of authorizing the making available to the public "by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them"[96]. This provision was "transferred" to the EU by the InfoSoc Directive. Regarding authors, the directive says that Member States shall provide them with "the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."[97] Authors are to be provided both a general broadcasting right and the on-demand right. On the other hand, regarding related rights, the directive only provides for an exclusive on-demand right.[98]

- right of adaptation

The Bern Convention says that "[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works."[99] As how the term 'adaptation' defined depends on the work that is at hand. In case of literary works, the making of a film based on a novel or the translation of it, for instance, would mean an adaptation. When it comes to musical works, a stage adaptation would qualify as adaptation.

[93] InfoSoc Directive Recital 23.
[94] Berne Convention Article 11bis.
[95] Article 12.
[96] Article 14.
[97] Article 3(1).
[98] Article 3(2).
[99] Article 12.

The copyright applies to the adapted work as well. Consequently, right on the adapted work includes all the other rights, even the right of adaptation.

4.3.5. Owner of the right

Having seen the types of rights that subsist on the works, it is of significance to come to terms with the (possible) owners of these rights in order to understand the relations that are maintained by collecting societies in the music business.

As a general rule, the owner of the right is the author, the person who created the work. Depending on the right in question and on the situation, other persons than the creator can be the owner. Moral rights are inalienable. Economic rights, on the other hand, can be assigned, or even can subsist on someone else than the author by the operation of law in an employer-employee relationship for instance. Even where the economic rights cannot be assigned, the licensing of it can amount to the same effect. However, what is of importance right here is the fact that the author of a work and the holder of the copyright thereto might not be one and the same person.

Regarding the ownership, again, the civil law and common law systems are in conflict with each other, though much of the conflicts have been (or will be) resolved owing to the harmonisation process within the European Union. The divergent approaches of the two systems are well mirrored in the way authors are looked upon. The civil law views the work as being part of the author's personality, or, to be more precise, it is his or her extension; it is born out of the author's creativity. This is reflected in the very existence of moral rights (see above). In relation to economic rights, the civil law system "cares" more about the author, than the common law system. Taking into account for the most part weak bargaining power of the author, he is protected by certain restrictions. Another point of contrast is the *droit de suite*, where the author has the right to a percentage share of the successive sales price of her work. The common law system, as compared to the civil law system, is characterised by a more commercial and pragmatic approach. The author is not provided any extra protection against the market forces.

4.4. Related rights

The terms 'related rights' or 'neighbouring rights' (the former according to the EC terminology, while the latter term is used in common law) refer to rights of performing artists, the rights of producers of phonograms and the rights of broadcasters. What is common in all three of them is that their works lack the level of originality that would qualify for copyright protection. At the same time, these works (performances, phonograms, and radio and television programs) are related to or neighbouring on copyright. These activities build on original copyrighted works, use them, and even add value to them (for instance a performing artist can considerably enhance the worth of a copyright work by their interpretation of the work). In addition to the above, the performer, the producer and the broadcaster help to disseminate the work, they convey the copyright work to the public.

Before technological development reached the point where sound-recording and broadcasting was possible, performances were ephemeral. Furthermore, performers' income (the reward for their interpretation) was secured, as the only channel through which their performances were communicated to the public was the stage (a limited space with audience). Thus, the entrance-fee secured their income. No protection was needed. However, with the invent of the

phonograph, the radio, the television, and the like, the fixing of the performance was made possible. Consequently, a performance, which used to be a one-shot event, became detached from the performer. The fixing of the performance made it reproducible and accessible to the public without having had to be present at the place and at the time of the performance. Obviously, the interests of the performers called for protection. However, performers were not protected by copyright law, and there was reluctance to do so, as they were looked upon as intermediaries between the author or composer, and the public; "they were considered to be subservient to the interests of the 'proper' rights-holders: namely, authors, composers, and dramatists. While authors and composers create primary works, performers were seen to merely translate or interpret these works."[100] At the same time, producers of phonograms were seeking protection as well against the unauthorised copying of their phonograms. Finally, the broadcasting organisations pursued protection for their programs. Eventually, these interests gained protection on international level by the adoption of the Rome Convention (see above).[101]

As to the rights available to protect performers, the Rome Convention provides for the possibility of preventing:

"(a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions."[102]

With regard to producers of phonograms, the Rome Convention provides for the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

The convention provides for equitable remuneration as well in connection to secondary uses of phonograms: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."[103]

Finally, broadcasting organisations are also given certain rights in the Rome Convention. Those are the right to authorize or prohibit the rebroadcasting and the fixation of their

[100] Bently and Sherman, p 291.

[101] After the Second World War a number of new forms of copyright related intellectual property instruments came into existence both in national laws and in international agreements. Besides those that are mentioned above, such new forms include the database right, the technological protection measures, the rights management information, the public lending right, and the *droit de suite*.

[102] Article 7.

[103] Article 12.

broadcasts, the reproduction of fixations of their broadcasts, and the communication to the public of their television broadcasts (in bars for instance).

Within the EU, several directives deal with the rights of performers. The above remuneration right is repeated, almost word-by-word in the Rental and Lending Right Directive. "Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them."[104] Further, Article 7 provides the exclusive right to authorise or prohibit the fixation of their performances. Article 9 deals with the distribution right of performers, while Article 3 provides the exclusive right of rental and lending. The rights provided for in the Rental and Lending Rights Directive are given to performers in relation to broadcasts in the Satellite Broadcasting and Cable Retransmission Directive. The WPPT (see above) was implemented in the EU by the InfoSoc Directive.

[104] Rental and Lending Right Directive, Article 8(2).

5. COLLECTING SOCIETIES

5.1. Management of rights

As we have seen, copyright is an exclusive right. Once a work has been fixed in some material form the protection is automatically subsists on the work. This exclusivity gives the power to the owner of the right (an author, a performer, a producer or a broadcasting organisation) to authorise or prohibit the exploitation of the right. The exploitation may take various forms, such as reproduction, public performance and communication to the public. These rights are independent of each other, meaning that the authorisation of the performance of one act does not confer a right upon the licensee (in case the right was licensed) to do the other acts protected by the exclusive right.

It must be added that in some cases the exclusive right of the owner is limited to the right of remuneration. This means a compulsory licence, where the author does not have the right to authorise (or prohibit) the use of the work. The only right he or she has is the right for equitable remuneration. Instead of having control over the work, the author is compensated financially.[105] An example for this can be seen in the so-called "Article 12 rights" of the Rome Convention which provides that "[i]f a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."[106]

Within the domain of EU law, Article 8 of the Rental and Lending Directive can be quoted here as an example: "a single equitable remuneration is paid by the user, if a phonogram publisher for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public".

On the international level, both the Berne and the Rome Conventions contain provisions on compulsory licenses. As the Berne Convention provides for under the Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto, "[e]ach country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."[107] Similarly, the Rome Convention states exceptions as well: "Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However,

[105] For possible policy considerations for allowing compulsory/non-voluntary licenses see Copinger, pp 1594–95.

[106] However, in certain countries (typically with common law tradition) producers of phonograms have been given an exclusive right, for instance in connection to broadcasting and/or public performance.

[107] Article 13(1).

compulsory licences may be provided for only to the extent to which they are compatible with this Convention."[108]

All the acts of authorisation or prohibition qualify as an exercise of the right.[109] The exercise of rights usually takes one of the two following forms: individual exercise or collective exercise.[110] Individual exercise is the neutrally inherent way, as it is the author who is the source of the protected work, and whose rights are at stake. It should be in his or her power to decide whether to authorise a particular form of exploitation of his or her work, and under what conditions. The reasons for different ways of administration of rights lie mostly with the characteristics of the works and their exploitation. For example, in the field of literary works, where the writer and the publisher (or a theatre company) enter into an agreement regarding the conditions of publication, it is (still) the individual management of rights what is common. Other fields where individual management is the usual way of managing rights are computer programs and cinematographic works. However, in respect of certain works the collective management of rights is traditionally more common or even compulsory (for instance, where the right owner has only remuneration right). An area within which the utilisation of collective rights management is particularly typical is the music industry.

5.2. Collective management of rights

5.2.1. Rational behind collective rights management

When rights are administered collectively, it is usually referred to as collective management of rights. The institutions set up for this purpose are generally called collecting societies. A definition for the term – borrowed from EU law – is found in Article 4 of the Satellite and Cable Directive, which says that a collecting society means "any organization which manages or administers copyrights or rights related to copyright as its sole purpose or as one of its main purposes".

The status of these societies within the EU are non-governmental (established and controlled by the rights' owners), though the governments usually exercise some sort of control over these bodies for the public interest.

When one takes a look at the purposes of collective management of rights, it is worth remembering that these rights are exclusive rights. The exclusive rights' "genuine purpose is not just that, on the basis of them, owners of rights may exclude others from the exploitation of works […]. The owner of an exclusive right may do so, but the real value of such a right is that it ensures that works are exploited in a way that corresponds to the intentions and interests of the owner of the right. The objective of collective management, as well as other systems of joint exercise of rights is to offer ways and means to achieve this in certain situations."[111] Though these societies were brought into being primarily for the benefit of right holders, there was another purpose for their existence, namely, to provide a one-stop-shop access to protected works for users. That is, these societies play the role of intermediaries between right holders and users. Both right holders and users are many, which

[108] Article 15(2).

[109] This fact bears with special significance when it comes to the competition law approach of drawing a distinction between the existence and exercise of rights. See point 8.5.2. on p 79. and fn. 221.

[110] When an author or a performer sings a contract with a producer, it is the producer who manages these rights, as it is a presumption that the author and the performer assign his or her rights.

[111] Ficsor, pp 15-16.

makes it extremely difficult, if not downright impossible (both in practical and economical terms), to users to find the right holder to get a license, and to right holders to negotiate the terms of the license to monitor the uses of the works, and to collect royalties. This mechanism has proved to provide clear advantage for both sides in the off-line world.

Furthermore, due to the fact that users cannot go around collective societies, there are economies of scale and scope when license terms are negotiated. The bargaining power of these societies to negotiate favourable licensing conditions is advantageous from a public interest point of view as well. Without this mechanism the appropriate protection of the interests of right holders, and thus their capability to actually exercise their rights (that is to materialise the aim of the legislator / to assert the very aim of the legal instrument), could not have been accomplished. Besides that, collecting societies play an important role in the dissemination of works.

5.2.2. History

The establishment of the first collecting society was stemming from the recognition of the difficulties associated with the administration of rights. The first collecting society that music authors, composers and publishers established in 1851 was SACEM (*Société des Auteurs, Compositeurs et Editeurs de Musique*). However, the establishment of SACEM was preceded by considerable fights in order to recognise authors' rights. First, in 1777, the *Bureau de legislation dramatiques* was created in order to fulfil the collecting management of authors' rights. In the field of literature, in 1837, the *Société des gens de letters* was created by French writers. In the field of music, the events that opened the door for the creation of SACEM in 1851 took place in 1847. Then, two composers and a writer brought a lawsuit before the Tribunal de Commerce de la Seine against *"Les Ambassadeurs"* in the Avenue des Champs-Elysées in Paris. They refused to pay for the services saying that the *"Les Ambassadeurs"* did not pay either for playing their music. The court ruled in favour of the right holders. The establishment of the first collecting society in the field of music was followed by many other collecting societies across Europe. Developments in the field led to the foundation of the International Confederation of Societies of Authors and Composers (Confédération Internationale des Sociétés d'Auteurs et Compositeurs – CISAC) in 1926. As it is stated on its website, the founding of CISAC was "[i]nspired by the ideas of universal peace and co-operation, which arose after World War I, the founders' wish was to unite authors and composers from around the world. They intended to co-ordinate the work of their societies, to improve national and international copyright law, to foster the diffusion of creative works and, in general, to attend to all common problems of creation in its widest sense." During the past eighty years, the structure of CISAC has changed considerably. As of June 2009, the 225 member societies are from118 countries[112].

In the field of mechanical rights, the international organisation equivalent to CISAC is BIEM – Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique. It was formed three years after CISAC, in 1929, and as of today represents 51 societies operating in 54 countries.[113] BIEM negotiates standard contracts with the representatives of the phonographic industry, mainly with the International Federation of the Phonographic Industry (IFPI)[114]. In these contracts the conditions for the use of the repertoire of its member organisations are fixed.

[112] Go to http://www.cisac.org/CisacPortal/afficherArticles.do?menu=main&item=tab2&store=true.
[113] Go to http://www.biem.org/SocietyShow.aspx.
[114] Go to http://www.ifpi.org/.

Whose rights are managed?

As was mentioned above, collective management of rights was first introduced in connection to playwriting. Up to this day, the far most successful collective management of rights is pursued in the field of the musical works ("small rights"[115]).

Besides musical works, rights are administered collectively in several other fields[116], such as rights of performers and producers of phonograms; rights in dramatic works, resale right, reprographic reproduction rights, film rights, rights in respect of cable retransmission of broadcast programs, and rights in respect of private copying of phonograms and audiovisual works.

5.2.3. The rights that are managed in a collective way in relation to musical works

In the field of musical works, the collective way of managing rights has developed in relation to two groups of rights: performing rights and mechanical rights.

Performing rights

When it comes to the rights managed by collecting societies it is to be remembered that these societies collect royalties along the means and ways of exploitation and not along the categories of rights. This can be very well observed in the CISAC "Model Contract of Reciprocal Representation between Public Performance Rights Societies". There, the expression 'public' is defined as to include "all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. 'Public performance' includes, in particular, performances provided by live means, instrumental or vocal; by mechanical means such as phonographic record, wires, tapes and sound tracks (magnetic and otherwise); by processes of projection (sound film), of diffusion and transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted etc…) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc., and similar means and devices, etc…)."

This definition covers various rights, such the right of public performance, the right of broadcasting, and the rights of communication to the public. It is worded in such a way as to be as flexible and as broad as possible. The phrasing "by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered" and the non-exhaustive list of public performances render a very wide area of operation.

[115] See point 5.2.3. on p 53.

[116] To illustrate this, let me quote here Article 85 of the Hungarian Copyright Act. „The collective administration of rights shall mean the exercise of authors' rights and neighbouring rights as well as database creators' rights respectively related to authorial works, productions of performers, sound recordings, and programmes broadcast or transmitted by cable as well as the creation of films and databases which are individually non-exercisable due to the character or circumstances of utilization and therefore exercised through organizations of rightholders established to this end whether it is legally prescribed or based on the resolution of rightholders."

Performing rights are sometimes also referred to as 'small rights'. The term 'small rights' is the counterpart of 'grand rights'. The grand rights refer to rights on dramatico-musical works (usually performed on stage).[117] These rights are, mostly, administered individually. The term 'small rights', on the other hand, refers to rights associated with works that are non-dramatic musical works. These rights are administered collectively.

Mechanical rights

The term 'mechanical rights' refers to the rights to authorize the recording, manufacture and distribution of music protected by copyright. A record company, for instance, has to pay royalties after each and every CD it produces to the society managing mechanical rights, which subsequently distributes the royalties to the right holders. These rights are not managed individually.

Rights of performers and producers of phonograms

Of the other fields where it is common to manage rights collectively, the remuneration rights of performers and producers of phonograms are to be mentioned here. And not only because this area is closely related to music, but also because these rights, from a practical point of view, are very similar to the 'performing rights' of the authors. Accordingly, their exercise is best administered in a collective way.[118]

In Article 12 of the Rome Convention on secondary uses of phonograms, it reads that "[i]f a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." However, Article 16 provides for the possibility of making reservations in connection to Article 12. Contracting states may declare that they do not apply Article 12 or only upon certain conditions.

In connection to performers and producers of phonograms, in Article 15, the WPPT provides for an instrumental right: "Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public." From the wording, it is clear that the right is to be given to *both* performers *and* producers of phonograms.[119]

5.2.4. Tasks

The tasks and roles of collecting societies have changed with time. This change is mirrored in the name that is used. In the beginning, the term 'authors' society', then, 'copyright society' was used. Recently, the 'administration society' is used widely. The change of vocabulary

[117] Opera, operetta, musical play, etc.
[118] See Ficsor, p 81.
[119] Further, as it is explained in Ficsor, p 80, the right of remuneration has been indirectly extended by the WPPT by widening three definitions. First, the concept of 'phonograms published for commercial purposes' is to be understand as such including on-line making-available. Second, those who perform expressions of folklore are to be regarded as 'performers'. Third, a 'phonogram' means not only the fixation of sounds but also the fixation of representation of sounds, and accordingly, the definition of the 'producer of a phonogram' has been widened as well.

reflects the difference in the approach: instead of authors (individuals), it is business what is in the centre.[120] Lately, the collective management organisation is used.

Collecting societies provide various types of services in legal, economic, social and political spheres. These activities entail tasks such as the granting of licenses, monitoring of uses, enforcing the rights, and collecting and distributing royalties.

Beyond these core activities, colleting societies take up other tasks. As it is summarised on the CISAC homepage[121], the activities of collective societies are quite broad[122]:

- collecting of royalties and distributing it to authors;
- providing legal support, such as drawing up of model contracts, issuing licences and authorising uses; negotiating rates and terms of use with users;
- taking political action in favour of the effective protection of author's rights; such action can be undertaken before national or international bodies representing the author's right community, be it governmental or non-governmental;
- taking social and cultural actions, such as promoting author's interests and safeguarding their well being.

As can be seen, on the one hand, the basic activities of these societies have become more sophisticated: e.g. by drawing up model contracts; on the other hand, new tasks are carried out, which serve the interests of authors in a broader sense: political, social and cultural actions. The latter ones are especially important, and supported by governments in Continental Europe. This is not surprising taking into account the continental approach in copyright law: it is the personality of the artist, and the manifestation of his or her creativity embodied in the work what is important as opposed to the more material and opportunistic approach of the common law countries. The difference in the approach is reflected in the terminology: authors' rights versus copyright.

5.2.5. Licensing

The licensing itself is usually done in blanket licenses. This means that users are granted a license to use the whole repertoire available in accordance with terms of the licensing agreements, which are usually negotiated with associations of users. These conditions may be subject to individual negotiations with users that have enough bargaining power to do so (e.g. broadcasting organizations). When it comes to the rate of remuneration, societies categorises the types of exploitation. The rate is higher when the music is a must have (e.g. in discotheques), while if it falls into the nice to have category (e.g. in shops where it serves as background music) than the rate is lower.

5.2.6. Monitoring and collection of royalties

As users, with a few exceptions, do not approach the collecting societies to pay royalties, the collecting societies have to find them (since this is a duty of the societies toward their authors). Besides the identification of the users, monitoring and collecting of royalties take considerable resources, effort, time and expertise as well. And last but not least these activities, and their organisation, require familiarity with the place, language and culture.

[120] See Schepens (UNICEF Guide), p 16.
[121] Go to http://www.cisac.org/CisacPortal/afficherArticles.do?numRubrique=82.
[122] It must be mentioned, however, that authors' rights organisations usually do not administer the rights of phonogram producers or broadcasting organizations in order to avoid conflict of interests.

Concomitantly, the administration (including updating) of all these data puts heavy workload on these societies.

5.2.7. Distribution of royalties

Documentation is required on both sides. Besides users, the documentation has to be comprehensive on authors as well. Despite their names, *collecting* societies, the work they do is far from being limited to the collection of royalties. Distribution is an equally important and complex task. It is common to have works with more than one author. Taking into account the thousands of works, and the international repertoire used by users, the work associated with distribution might seem very well immense.

The distribution of royalties requires two sorts of information. One of them is the data on the repertoire. The enormous amount of information, and the need of standardization called into being various lists and systems, such as CAE (list of copyright owners), WWL (world wide list of the most frequently used works) and the GAF (general agreement file) used for the identification of works. CISAC's own information system, the Common Information System (CIS), is under development that is aimed to be a "world-wide digital rights management system, based on standard identification of creative works and linked networks of information between the CISAC societies"[123]. The other information what is needed in order to effectively distribute royalties, is the actual use of a given work. While it is fairly simple to monitor broadcasting, in other cases it is almost impossible even to guess what works and how many times have been used – in places such as bars, restaurants, discotheques, etc. Therefore, rates are established on estimated data. The rules on the distribution itself are also quite complex. The value of remuneration is greatly influenced by the evaluation point system and the timing of the transferring of royalties.

5.2.8. Administrative costs

The percentage of administrative costs depends on a number of factors. With certain collecting societies the percentage can be above 30%. The efficiency of the society is of high importance in connection to this question.

In the *Simulcasting* decision[124], the Commission considered the question of administrative cost as central in assessing the case. It did not hold justifiable a system where the services of royalty and licence fee were amalgamated. These are separate services of the collecting societies, and should be distinguished from each other. The Commission held that even if within the copyright royalty service no competition exists, in the service of administrative fees a considerable level of competition could be introduced between national collecting societies. The Commission said that "[t]he amalgamation of copyright royalty and administrative fee that results in an undifferentiated global license fee to be charged to a user cannot be considered as directly related to the notified agreement or objectively necessary for the existence of the Reciprocal Agreement."[125] As it was argued, first, "[t]here is no logical link that can be established between the reciprocal representation service between collecting societies envisaged in the notified agreement and the practice of confusing two distinct elements of a license fee to be charged downstream to a user"[126], second, "the service

[123] Go to http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=ACT-CIS.
[124] See point 10.2.2. on p 141.
[125] *Ibid.* paragraph 71.
[126] *Ibid.*

provided by a collecting society to a right-holder member and the service provided by the same society to a (prospective) licensee are different services"[127]. In order to resolve the concerns of the Commission, the parties notified a second amendment to the agreement by which they separated copyright royalty from administration fee.

5.2.9. Legal status and structure

The legal status and structure of collecting societies greatly vary from one country to another. Beyond the legal framework, traditions count a lot.

In certain countries performing rights and mechanical rights are administered by one and the same society (such as GEMA in Germany), while in other countries these rights are administered by two separate societies (as in France, where SACEM administers performing rights and SDRM mechanical rights; or in the United Kingdom, where performing rights are administered by PRS, while the mechanical rights are managed by MCPS). A further particularity is the number of societies dealing with a particular right. In some countries only one collecting society may operate by law (such as the ARTISJUS in Hungary[128]), while in others more than one society operate (in the United States there are three such societies: ASCAP, BMI and SESAC).

Further, the societies' relationship with the government is of importance. For instance in Hungary ARTISJUS used to be a semi-public organisation before 1989. Today, it is an authors' society, independent of the government, at least regarding its functions.

There is a significant difference in the management of rights when it comes to mechanical rights collecting societies. Compulsory licenses (or non-voluntary licenses) are central to these rights. The Berne Convention leaves it for the countries to grant such licenses or not.[129] The Rome Convention contains similar provisions in connection to performers, producers of phonograms and broadcasters.[130] In accordance with these provisions, in countries which apply compulsory licenses (e.g. Hungary, Denmark and Austria), licenses are fixed by law or by the collecting societies.

5.2.10. Control

Collecting societies – with a few exceptions – are in a monopoly-like position in a given country, representing the right holders of that country. Further, the rights they administer are of high significance not only from the right holders' point of view but also from a public interest point of view given the cultural and economical significance of these rights and their administration. Therefore, in order to maximise the benefit of these societies to the public, and

---

[127] *Ibid.*

[128] The Hungarian Copyright Act provides for in Article 86 that "[o]nly one society may be registered nation-wide for the collective administration of authors' rights and neighbouring rights related to each of the following types of work and product: a) literary works and musical compositions, b) other works of the fine art, c) film productions, d) performances, e) sound recordings." (The Commission started infringement proceedings against Hungary on the grounds of the obstacles to the freedom of establishment and to the freedom to provide services as a result of the monopolies granted to national rights management companies. See Press Release IP/08/1786, 27 November 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1786&.)

[129] Article 13(1), see point 5.1. on p 50.

[130] Article 15(2), see point 5.1. on p 50.

at the same time to minimize the potential negative effects associated with abuse of dominant position, a certain amount of state control is exercised in various forms.

This supervision takes usually two forms: governmental approval of licensing agreements (for instance in Hungary the determination of royalties and other conditions are subject to the minister's approval) or special tribunal supervision (such as the Copyright Tribunal in the United Kingdom, which supervises the licenses and licensing schemes operated by MCPS and PRS). Besides the above, in some countries, law regulates even the establishment of such societies.

5.3. Cooperation between collecting societies – the present system

As was described above, collecting societies typically hold a monopolistic position constrained by national borders. The cooperation regime between these national societies has been developed under many years, and the present structure basically dominated the whole 20th century. The two most important principles upon which this regime rests are the principles of reciprocity and solidarity.[131]

5.3.1. National treatment / reciprocity

Reciprocity, or to put it in another way: national treatment is a core principle in international conventions. What the principle says is that all countries (party to the given convention) shall provide for foreign authors the same protection as is provided for the nationals of that particular country. International conventions and treaties employ this principle. The Berne Convention provides for in Article 5(1) that "[a]uthors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." This principle was already included in the text when it was drafted in 1886. Similarly, the UCC, in Article II reads as follows: „Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention." In relation to related rights, the Rome Convention also provides for protection in Article 2: "For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory; (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory." Still in connection to the producers of phonograms, the Phonograms Convention says in Article 2, that "[e]ach Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public." The WCT refers back to the Berne Convention, while the WPPT provides for that „[e]ach Contracting Party shall accord to nationals of other Contracting Parties […] the treatment it accords to its own nationals with regard to the exclusive rights specifically

[131] Wallis *et al.*

granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty."

As it can be very well seen, the implementation of national treatment requires international cooperation. It cannot be done in other way but by the mutual application of the principle in the exercise of the rights. Following the establishment of performing rights collecting societies in Europe, in 1926, CISAC, the international confederation of these societies was established. The cooperation among collecting societies takes the form of the so-called "reciprocal representation agreements" applied on bilateral basis. To achieve the highest possible uniformity, CISAC has developed the "Model Contract of Reciprocal Representation between Public Performance Rights Societies". In Article 3(I), the model contract reads as follows. "Each of the contracting parties undertakes to enforce, within the territory in which it operates, the rights of the members of the other party in the same way and to the same extent as it does for its own members, and to do this within the limits of the legal protection offered to a foreign work in the country where protection is claimed, unless, in virtue of the present contract, such protection not being specifically provided in law, it is possible to ensure an equivalent protection."

What concerns mechanical rights collecting societies, between their international umbrella organisation BIEM, and IFPI, similar standard contracts are applied as well. "It lays down the general terms and conditions under which record producers can use the repertoire of BIEM Member Societies on releases of audio-only recordings."[132] As it is stated on the BIEM website, in one form or another, the contract is implemented in most countries.

In connection to performers' rights (not to be confused to performing rights), an umbrella organisation was founded relatively recently in 2001. The events preceding and leading up to the foundation of the Societies' Council for the Collective Management of Performers' Rights (SCAPR)[133] in Oslo go back to the first meeting held in Vienna in 1986. It was agreed that informal meetings should be held with the aim of developing bilateral relations between performers' collecting societies, which eventually materialised in standardised reciprocal agreements. International non-governmental organisations are present in this field as well, notably, the International Federation of Musicians[134] (FIM) and the International Federation of Actors[135] (FIA).

In practice, the term "territoriality" means that each collecting society represents the world repertoire within its own territory. In each territory the world repertoire is made up of two repertoires. On the one hand, the society represents its own national / domestic repertoire, since authors usually join the collecting society in their home country. On the other hand, by

[132] Go to http://www.biem.org/content.aspx?PageId=429&CountryId=0&SocietyId=0. As it is stated on the website, the Standard Contract expired on 30th June 2000. Negotiations on a new Standard Contract are not yet finalised. However, Societies and records producers are still operating under the provisions of the most recent version of the Standard Contract.

[133] Go to www.scapr.org.

[134] The FIM was established in 1948, and with its two regional groups (in Africa and Latin America) it has about 65national organisations as members in 57 countries. It represents and helps to protect the musicians' social and economic interest. It works closely together with performers' rights collecting societies. See www.fim-musicians.com.

[135] Since its foundation in 1952, FIA represents not only actors, but performers as well. It is a non-governmental organisation representing performers' trade unions. FIA works closely together with performers' rights collecting societies. Its membership is above 100 organisations in more than 70 countries. See www.fia-actors.com.

way of the network of bilateral agreements, each collecting society represents all the other collecting societies' domestic repertoire. In that respect, all of them are affiliated societies to the other ones. As a result of these bilateral reciprocal representation agreements, each collecting society represents the world repertoire, that is the domestic and the non-domestic repertoires together. This network of representation agreements makes possible the use of blanket licenses, by which users are authorised to use (almost) any musical work from the world repertoire.

In order for this system to work, the licenses are valid only on the territory belonging to the collecting society giving the license. Therefore, for an international company willing to use a particular musical work anywhere within the EU, it has to obtain a licence in each and every territory.

5.3.2. Solidarity

Solidarity is to be understood in two ways.[136] On the one hand, solidarity exists between collecting societies, and, on the other, between copyright holders. The solidarity between societies is well reflected in Article 3 of the CISAC Modal Contract, where it says that "the contracting parties undertake to uphold to the greatest possible extent, by way of appropriate measures and rules, applied in the field of royalty distribution, the principle of solidarity, as between the members of both Societies, even where, by the effect of local law, foreign works are subject to discrimination. In particular, each society shall apply to works in the repertoire of the other society the same tariffs, methods and means of collection and distribution of royalties as those which it applies to works in its own repertoire." Solidarity is closely related to, and builds upon, the national treatment. Solidarity is embodied in the application of national rates regarding the whole world repertoire (more or less).

[136] See Wallis *et al.*, p 15.

6. MUSIC INDUSTRY

Although many reject to use the word "industry" in connection to music, a significant part of the activities related to music are to be found in the sphere of business. The commercial exploitation of music is, in fact, an industry. Therefore, it is apt to use the term music industry when it comes to an overview of the aspect of the utilisation of music. Before turning to the on-going events within the EU, especially to the Commission's recommendation and to the Parliament's viewpoints, and to the CISAC-case, the complexity of the music industry makes it inevitable to have a good grasp of the music industry: the players, their relationship with each other, and their interests.

The players of the music business are many. Obviously, to starts with, there are the composers and lyricists, and then those who convey it to the public, namely the singers and musicians, and all their unions and collecting societies, further the publishers, the record labels, and managers. Far from being complete, this list contains the most important players. Since some of them have been dealt with in the previous chapters, here only the publishing and the recording business will be touched upon.

Music publishers are business entities dealing with the commercialisation of music, that is, the marketing and the commercial exploitation of music. In exchange for exclusive right, or to translate it to business, for a certain share in royalties, the publishers provide various services for the artists. Typically, these companies are the link between authors/composers and consumers. On the one hand, they record artists and make recordings, and on the other, they sell them to their customers. To put it in another way, they create content (identifying new artists, signing them, building repertoires), produce and manufacture recordings, and then do the marketing and sales, including distribution.[137] "[T]he main activities of a music publisher comprise the discovery and identification of new talented songwriters with a view to acquiring and commercially exploiting their intellectual property rights and the provision of financial and promotional support to authors, arranging for music recording and supporting their dissemination."[138] "The activities of a publisher are thus twofold: on the one hand, the downstream activity of exploiting the works of authors under contract, inter alia by means of licensing the rights through the collecting societies, and on the other hand an upstream activity of signing authors and providing them with financial and marketing support as a counterpart to the transfer of their musical works."[139]

The recording business always used to be a high-risk business, and it increasingly is with the advent of digitisation and the Internet. As Barney Wragg, the then vice president of Universal Music International put it "Record companies translate artistic productions into consumer products. They invest in artists to develop and market their works. This usually necessitates large cash investments in the artist and in marketing the artist's work. The more unknown an artist is, the riskier is the investment. A record company is doing extremely well if one in ten of the artists invested in is profitable."[140]

---

[137] OECD Report, Digital Broadband Content: Music, DSTI/ICCP/IE (2004) 12/FINAL, Working Party on the Information Economy, 13 December 2005. Available at http://www.oecd.org/dataoecd/13/2/34995041.pdf.

[138] Commission Decision of 22 May 2002 (COMP/M.4404 – Universal/BMG Music Publishing), point 11.

[139] *Ibid.* point 14.

[140] Presentation of Mr Barney Wragg, Vice President, eLabs, Universal Music International (UMI) during the OECD Digital Broadband Content Panel. OECD Working Party on the Information Economy, Digital Broadband Content, Panel and government session: Summary and Directions for Work, Meeting of 3 June

The process through which a piece of music reaches the end-customers is fairly complicated. What is of foremost importance for the recording company in the process of making a recording is that all the rights that are attached to the works have to be cleared in order to be able to create the product – a CD for example. A record company usually signs an artist exclusively either for a period of time or for a number of records. It is not seldom that more than one right holder have an interest in the underlying work: composer(s), publisher(s), writer(s) of the lyrics, and performer(s) hold their respective rights. The clearing of rights means that the recording company (the producer in most cases) has to contact the right owners (publisher) or his/her representative (a collecting society) in order to get the licence required for the recording company's purposes.

Labels traditionally are divided up to majors and independents. Majors are big international media groups, which are present through their affiliates in all the countries where exploitation takes place, and have significant financial background. Majors, as a comparison to independents, own their own distribution channels, which give them a competitive advantage in promotion, product positioning and pricing. The most well-known artists are signed with majors. Accordingly, these publishers are in a position to offer higher royalty shares to artist, and (higher) advances. Currently, there are four majors: Sony BMG, EMI, Universal, and Warner (the "big four"). The rest of the publishers are called independents.

There are thousands of independents in the EU alone. With the dramatic fall in the cost of recording and manufacturing music, the number of released records is significantly increased. These independents are much better in finding new trends and talents (e.g. Bob Marley, Elvis Presley and U2). They are specialised in niche music. However, independents tend to rely on majors in numerous respects. The deals between independents and majors are beneficial to both. While majors can provide support in financial aspects (manufacturing, promotion and distribution) independents can widen and refresh the artist roaster of majors.[141]

For the publishers the most important question lies with the rights. That ensures their profitability. However, the legislative environment sets out the means by which the aims of the publishers can be met. The difference between continental (authors' rights) and common law (copyright) traditions is quite apparent and is of significance when it comes to music publishing. As it was demonstrated above in the chapter on copyright, the right holder has various rights, the two main categories of which are moral rights and economic rights. Under the term economic rights various rights are meant, such as the rights for reproduction, recording, distribution, rental, public performance, and communication to the public. These rights, in most cases, vest with the author. However, again depending on the given national legislation in place, these rights can be assigned or licensed (albeit with a similar effect). The transfer of rights (related to the forms of exploitation) may be subject to limitations by national law.[142] As a consequence, the rights – or certain rights – can be owned, controlled and administered by the author, the publisher, and the collecting society to various extents.

2004, Internal Working Document, Paris: Organisation for Economic Co-operation and Development, p 17, panel agenda and presentations can be found at http://www.oecd.org/dataoecd/53/39/34579763.pdf.

[141] See How and Why Major Labels and Independent Labels Work Together, Indie-Music.com, 11 September 2004. http://www.indie-music.com/modules.php?name=News&file=article&sid=3235.

[142] E.g. in Austria, which follows the monist approach, the transfer of right is not permitted (except for testamentary disposition).

The three most important of the economic rights, at least in respect to the present topic, are the reproduction rights, the public performance, and the communication to the public. The licensing of these rights to users in order to exploit the works accordingly is done by collecting societies. The rights of public performance and the communication to the public are licensed by performing rights societies, while the reproduction right is managed by the mechanical rights societies. (Though in some countries the same society manages both the performing and the mechanical rights, e.g. in Belgium, the Czech Republic, Germany, Greece, Hungary and Italy.)

The status of the author and the publisher in relation to the abovementioned rights can vary considerably, depending on the legal regime in force and on the publishing agreement between the author and the publisher.

When it comes to publishing agreements, the first issue to be touched upon is the distinction between a licence and an assignment. A licence gives the user the right to exploit the work according to the licence without making it unlawful. The licence exempts the user from infringing copyright law, which is applicable to all third parties. Briefly, a licence is permission for the licensee to do certain restricted acts.[143] The scope of these acts is wide, ranging from exploitation, which is limited to a certain use (e.g. public performance), to exclusive licence, where the licensee might even have the right to sue infringers in her own name. At the same time, a licence does not confer proprietary interest. In contrast to licensing, in case of an assignment the property right is transferred. That is, the acts of a licensee are constrained by contract. Whatever he or she wants to do, let it be perfectly legitimate, it is subject to the terms of the licence, whereas the acts of the proprietor (an assignee) are subject only to copyright law. Consequently, a significant difference exists between the position of a licensee and an assignee. The licensee must act within the scope of the licence, while the assignee / proprietor is bind only by the law.

However, this significant difference between the position of a licensee and an assignee is sometimes rather formal or theoretical to put it that way. If the terms of the licence are formulated broad enough, the licensee can have a position which is in practical terms might very well be amount to a proprietary right.

Artists benefit from publishing agreements in various ways. Composers are typically required by the publishing agreement to deliver songs, the exploitation of which is the task of the publisher. The work associated with exploitation is too cumbersome and difficult for an individual artist to deal with, and especially so when it is done on an international market. Furthermore, all the business relations and expertise that a publisher can offer would be out of reach for an author who is in the beginning of his or her career.

Though the big international labels have their own publishing arms, they are record companies. With the recording, the record company holds its own rights, separate from those that have to be cleared in the process of making the recording. On the international level, the Rome Convention is rather short on the rights of producers of phonograms. In Article 10, it provides for that producers of phonograms have the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Further, the "Article 12 rights" provides that "[i]f a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable

[143] In case of compulsory licence, it is not in the power of the author (e.g. producers of phonograms) to decide whether or not to grant a licence.

remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."[144] This, apparently, is not an exclusive right.[145] Here, the right owner is provided only with a right for equitable remuneration, but not with the right to authorize the exploitation of the work. That is, the producers of phonograms have a narrower right as compared to authors.[146]

The WPPT, on the other hand, is more detailed on the available rights. It provides the following rights to the producers of phonograms: right of reproduction; right of distribution; right of rental, and right of making available of phonograms.

The right of reproduction (Article 11) and the right of rental (Article 13) are provided in the TRIPS Agreement as well. In 14.2, the TRIPS reads that producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms; in 14.4 it provides that the producers of phonograms have the right to authorize or to prohibit the commercial rental to the public. With regard to the making available right, the WIPO Handbook on Intellectual Property says that "[t]aking into account the freedom of Contracting Parties to choose differing legal characterization of acts covered by certain rights provided for in the treaties, it is clear that, also in this case, Contracting Parties may implement the relevant provisions not only by applying such a specific right but also by applying some other rights such as the right of distribution or the right of communication to the public — providing their obligations to grant an exclusive right of authorization concerning the acts described are fully respected."[147]

Consequently, in national legislations, the rights of producers of phonograms may include the right of the manufacture for distribution and sale to the public of physical copies of the recordings, the right of communication and making available, and the right of synchronisation[148].

As was mentioned earlier, record publishers tend to licence their rights in a collective way, though the individual exercise of rights is also a well-established practice. As Ficsor aptly notes, "there is, however, one *specific* area of related rights where joint management is indispensable, namely, the rights of performers and phonogram producers in respect of broadcasting and communication to the public of phonograms."[149] These rights, from a practical point of view, are very similar to the "performing rights" of the authors (composers and lyricists). Accordingly, the management of these rights can be very well pursued in a collective way, just as it is done with authors. However, it is to be remembered that these rights, being neighbouring or related rights, concern (with certain differences) both performers and producers of phonograms. Therefore, the collective administration of these rights are organised in various ways. In certain countries, the producers of phonograms have

[144] However, Article 16 provides for the possibility that any state party to the Convention may make various reservations in connection to "Article 12 rights". They may not apply it at all, or make it conditional.
[145] However, in some countries – mainly with common law traditions – producers of phonograms have been given exclusive rights in respect to certain uses, e.g. broadcasting or public performance.
[146] See point 4.3.4. on p 42.
[147] Chapter 5, 5.566.
[148] By illustration, a producer of a film has to clear the rights that are hold by the music publisher or by the author (in the latter case the author is represented by a collecting society), and that which is hold by the record company.
[149] Ficsor, p 78.

set up their own collective management body, while in other countries performers and producers of phonograms have a joint organisation.

7. DIGITISATION

There is nothing new about technology having an impact on music. The same way as it has an impact on just about everything (just to mention a neighbouring area: book publishing). Without going into details about the past influences, it is worth mentioning some of the most important technological advances that had an overall impact on music. Changes affected various aspects of music: new instruments, the transmission of music, the recording of sounds, etc. However, the changes in the analogue world affected these aspects sometimes independent of each other, but definitely on a relative slow pace – irrespective of how profound the change happened to be. The challenges imposed by the most recent development are substantially different from the previous ones, and they are so in at least three aspects. First, digitisation affected the whole spectrum of the music industry: from the making of music (composing music), through the process of recording and distribution, to the listening to it. Second, the speed of the development. Third, the scale of availability of these technologies to practically anyone.

Digitisation has triggered an extraordinary change in the field of intellectual property. The works of intellectual property (text, image, audio, video, virtually everything that can be turned into 1s and 0s) now can be stored in any memory irrespective of its form. Techniques such as MP3 enable the compression of size of digital music recording. And doing so that the quality (fidelity) of music remains basically the same.

Though the digitisation in itself would have been enough to challenge the copyright regime, the new ways of distribution that the Internet has brought about, combined with the digitisation, proved to have a profound and unprecedented effect on the music industry.

What made this effect possible is not just the dramatic fall in transaction costs, but the mere ease and speed with which the content can be transferred through the Internet. Just to mention but one example, peer-to-peer networks.[150] "Napster is an "ah-ha" technology: you don't quite get its significance until you use it. The experience of opening a Napster search window, rummaging through your memories for songs you'd like to hear, and then, within a few seconds, finding and hearing those songs is extraordinary. […] [Y]ou can easily find what is almost impossible to locate; […] you can then hear what you want almost immediately. Music exchanged on Napster is free – in the sense of costing nothing. And at any particular moment, literally thousands of songs are available."[151]

The expensive hardware, the lengthy and costly process of producing an end product provided protection both against competitors and consumers. The high entry barrier meant a relative safe market environment; on the one hand, while on the other hand, these circumstances prevented (to a large extent) consumers of getting the desired products (music) from anyone else then the established market players. However, the new developments are threatening the *status quo*. The large investments are sunk costs, which – up to a certain but continuously decreasing level – are not prerequisites for market entry anymore. Anyone having a computer, the appropriate software (which itself are widely available), and Internet connection can produce and deliver music to the public. On the other end of the spectrum, consumers do not

[150] As to what extent these sites are responsible to the pecuniary loss of the music industry is heavily controversial. What is sure right now is that this industry would like to rebuild the constrains existed before the Internet to protect themselves from the competitive threat imposed by these new technologies.

[151] See Lessig, p 130.

rely exclusively on the conventional market players of the music industry to get hold of the desired music.

Nevertheless the market has not collapsed, and there are numerous attempts to establish new and lucrative business models in the online world. And it is to be added that digitisation gave rise to a number of new market players on the demand side, e.g. CDs and ringtones for mobile phones. Mobile phone operators constitute increasingly significant market players. CISAC released findings form a study anticipating that "[w]ith a projected 4.2 billion mobile subscribers worldwide by 2010 (from 3.3bn in 2007), the global market value of the mobile consumption of digital music content is expected to reach $6bn while online delivery will reach $5bn."[152]

The response from the side of the industry was, and to a large extent is still, hostile. The most obvious (and scenic – as that is the primary aim) form of attack is legal action. These legal actions are taken in three directions: 1) against the file-sharing platforms, 2) against the internet service providers, and 3) against individuals using these networks. At the same time, the role of file-sharing in respect of the drop in music sales in the last few years is not clear. Albeit casual relationship between the two phenomena can be established, it is very difficult to give even a ballpark figure.[153] Besides, file-sharing may have a number of positive effects as well, not to mention the copyright neutral aspects of it. Thus, litigation might be an abortive effort, which only increases the frustration of the majors (and the annoyance of the consumers).

Similarly, digital rights management (DRM) – a technology to identify and describe digital content on the Internet – seems to be an ill-fated attempt in controlling music consumption (so far). Though the technology in itself is neutral, the use of it can cause concerns, such as the limitation of usage rights.

At the same time, efforts to establish legitimate exploitation schemes are in their way. Though no groundbreaking business model has turned up yet, there are entrepreneurs who try to establish themselves on the market amidst the turmoil.[154]

Collecting societies themselves tried to come up with a solution in vein. The Commission upset their plans, hence their own initiative, the Simulcasting Agreement was never really applied in practice.[155]

---

[152] CISAC press release: "CISAC anticipates digital market shifts and new business scenarios to adapt licensing practices" COM08-1892, 24/01/2008. Available at http://www.cisac.org/CisacPortal/consulterDocument.do?id=12534.

[153] OECD Report, Digital Broadband Content: Music, DSTI/ICCP/IE (2004) 12/FINAL, Working Party on the Information Economy, 13 December 2005, pp 76-77. http://www.oecd.org/dataoecd/13/2/34995041.pdf.

[154] To take as an example, SpiralFrog was a download service that offered (in the literal sense) free and legal music. It was an ad-supported website; royalties were covered from advertisement revenues. Launched in September 2007, it growed rapidly: in May 2008, the service reached more than 3.8 million unique monthly visitors and more than 1.1 million registered users. In March 2009, when it ceased operation, it had more than 3 000 000 songs and 5 000 music videos available, and had 6 000 000 monthly visitors.

[155] See 10.2.2.

8. EC LAW

The relationship between the European Community and copyright is quite comprehensive and complex. The issue of copyright comprises only one part of the larger picture that is called intellectual property. It was not until the 1990s that the Community started to see into copyright matters, while other areas of intellectual property such as patents and trade marks had by then an extensive history of Community involvement. In order to understand the intercourse between copyright and the *acquis communautaire*, a short overview will be given on how intellectual property is established within European Community Law.

8.1. The European Community and its objectives

Following the trauma of the Second World War, it was obvious (at least it is today from a retrospective angle) that the countries of Europe had no other choice than to unite in as many ways as possible if they really meant to live in peace. The first step toward this goal was the Treaty of Rome. The continuously deepening integration was to be built upon economic and political cooperation. Among the first goals that the original six countries set, was the creation of a common market. With a number of treaties and 27 Member States, as of 2009, under the name European Union, the European cooperation has proved to be successful, so far. Obviously, it is out of the scope of this work to expound on general EC matters, however, some of the principles of the Community have to be touched upon.

The attainment of a common market was the principle aim of the Community from the outset. However, the realisation of a common market (which eventually became internal market) is a tool in order to achieve the goals set out in the Treaty. In Article 2, under the Principles, the Treaty reads that the "Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." The way how the realisation of a common market helps in achieving these goals is to assure the fundamental freedoms: the free movement of goods, persons, services and capital within the common market. Thus, by letting the goods, persons, services and capital to move freely, the boundaries along traditional national borders become less and less important. Accordingly, the Treaty, in Article 3, among other things, provides for that for the purposes set out in Article 2, the activities of the Community shall include

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(m) the strengthening of the competitiveness of Community industry.

8.2. The European Community and intellectual property

As was demonstrated earlier, intellectual property rights are exclusive by their nature, and the legislation is territorial. All the European countries have developed their own body of laws on intellectual property, reflecting both economic and social differences. International instruments of overriding importance, such as the Berne Convention, set out territoriality as the basic principle upon which copyright law rests even today. As a result of the lack of European wide harmonisation within the field of intellectual property law, the Community had to cope with the problem of exclusivity and territorial intellectual property laws, on the one hand, and a unified market, on the other. In certain instances (e.g. a licence dividing the market along national borders), the instruments of intellectual property clearly run against the principles of the common market, which was to be achieved in order to reach the goals set out in Article 2 of the Treaty.

Accordingly, the Community was, and still is, fighting this problem in two fronts. First, the Commission and the Court started to apply the rules of the Treaty on intellectual property. Second, the Community started to harmonise national laws via Community legal instruments. The importance of this field got even more emphatic with its growing economic importance. The twofold, judicial and legislative, approach is very characteristic in the way how the Community struggles for the attainment of the aims of the Treaty. In line with this two-sided approach, in what follows, first the case law related to IP in general, and to copyright and collecting societies in particular, will be touched upon. Then, the relevant legislation will be addressed up to the point where the case law and the legislation have direct relevance to the actual situation in connection to collecting societies. The latter will be analysed in detail in the next chapter.

The Community provisions that apply to intellectual property are many; here only the most important ones are mentioned:[156]

- Community legislation;
- Article 12;
- Articles 28, 29 and 30;
- Articles 81 and 82;
- International agreements between the Community (and/or Member States) and third countries;
- Article 17(2) of the Charter of Fundamental Rights of the European Union.

For the present purposes the international agreements concluded between the Community and third parties, and Article 17(2) of the Charter of Fundamental Rights of the European Union are not relevant. Therefore, in what follows, first, the Community legislation will be touched upon, and then the case law on the application of Treaty to intellectual property will be looked into.

8.3. Community legislation on patent and trade mark

As was shown above, the territoriality of intellectual property rights have resulted in a divers landscape, where the Member States have their own more or less unique set of rules. Concomitantly, the lack of homogenous rules within the field of intellectual property can hardly be accommodated to the aims of the Community. There is no such thing as a common

[156] Oliver, p 324.

market divided up along national borders. Therefore, besides the judicial approach, which cannot provide a long term solution, the desired harmonisation of national rules was to be reached by legislation.

In the various fields of intellectual property law the level of harmonisation is different. Both the national and international environment affect the legislative process. While legislation regarding patents goes back to the seventies, in the field of copyright it was not until the nineties that the Community started to use the legislative process in coping with the partitioned landscape.

The Community legislation in connection to intellectual property can be divided into four stages.[157] The first stage concerned patents in the seventies. Then, in the eighties, trade mark law was in the centre of attention. At the end of the eighties began the copyright harmonization. The fourth stage, in the nineties, related to *sui generis* rights (such as plant variety protection).

8.3.1. Patent

In the field of patents the aim was to create rules that cover the whole territory of the Community, and thereby to have a common body of rules applicable to patents. This would have been solved the problem of territorial segmentation of the common market along national borders.

Therefore, in 1975, the Community Patent Convention was signed by the Member States (nine at the time). It would have introduced a Community-wide exhaustion of rights to patents by establishing a Community patent system. However, the Convention was not ratified by the Member States, hence it never entered into force. This result was brought about, amongst other things[158], by the fact that in parallel with it, in 1973, the European Patent Convention[159] (EPC) was adopted, which made the efforts of proceeding with the Community Patent Convention less appealing. Thus the legislative activity of the Community slowed down, and the Community involvement narrowed down (the two results to be mentioned here are the introduction of Supplementary Protection Certificates[160] and the Biotechnology Directive[161]).

However, the EPC did not introduce a Community patent (it hardly could have done so, as it was not a Community legal instrument), but only a procedure by which a single application and search can be done at the European Patent Office which grants a single patent. But it is only the granting procedure that is single, the patents are national. That is, "while the EPC is concerned with the validity of European patents, matters of infringement, enforcement, revocation, renewal, and litigation are exclusively dealt with by national law."[162]

Difficulties with the EPC became more and more apparent. On the one hand, the EPC did not provide incentive to the Member States to proceed with the Community legislation, while on the other hand, as non EU members were also party to the EPC, any change in the EPC would require all the EPC members' consent. The unsolved issue of a European patent induced the

[157] See Bently and Sherman, pp 18-20.
[158] Litigation and languages were major problems.
[159] Signed in Munich, thus called also Munich Convention, and came into force in 1978.
[160] Council Regulation (EEC) No. 1768/2 of 18 June 1992.
[161] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998.
[162] Bently and Sherman, p 330.

Commission to come forward with a proposal for a Community patent in 2000. This system would run in parallel with the national systems. Further, the Regulation would incorporate the EPC. But again, the language issue stands as an obstacle before the adoption of the Regulation.

8.3.2. Trade mark

In the field of trade mark, the Community chose both the harmonization of national laws on trade mark, and the establishment of a Community instrument. The harmonization process was launched by the Trade Mark Directive[163], which aimed at ensuring that registered trade marks enjoy the same protection in all the Member States. The goal was set with a view to ensure the proper functioning of the common market.

The Community trade mark was introduced by a Council Regulation[164]. The Community trade mark is awarded by the Office for Harmonisation in the Internal Market[165] (OHIM), upon a single application.

8.4. Community legislation on copyright

8.4.1. The early developments

As has been said before, the Community involvement in copyright legislation goes back only to the nineties. However, policy papers from earlier years touched upon the subject. The Parliament Resolution of 13 May 1974 on the protection of the European cultural heritage[166] addressed the approximation of the national laws on the protection of the cultural heritage, royalties and other related intellectual property rights.

The Commission, in its Communication to the Council titled Community Action in the Cultural Sector[167] (1977) already identified some of the problems related to copyright. These findings were based on a series of consultations with representatives of rights management societies and the two sides of the industries concerned. The harmonisation was envisaged in connection to non-discrimination regarding nationality, distribution and technical progress. Some of the problems, which became later addressed in directives, were specified in the document, such as the duration of copyright and public lending.

In its next Communication, titled Stronger Community Action[168] (1982), the Commission reaffirmed its plans to harmonise the law on copyright and related rights. The issuing of a Green Paper to open a wide-ranging debate was mentioned in the document.[169]

In parallel with the events preceding and leading up to the Green Paper and the Directives to be adopted afterwards, the judicial side was applying the Treaty to the field of intellectual

---

[163] Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. The proposal for the Regulation dates back to 1980, and it was adopted in 1994.
[164] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.
[165] Established in Alicante, Spain in 1996. It is a Community body, and has legal personality.
[166] OJ C 62, 30.05.1974, p 5.
[167] Community action in the cultural sector, Commission Communication to the Council, sent on 22 November 1977, COM(77) 560, 2 December 1977.
[168] Stronger Community Action in the Cultural Sector, Commission Communication to Parliament and to the Council, COM(82) 590 final, Brussels, 16 October 1982.
[169] *Ibid.* Annex II.

property. The case law (see for instance the *GEMA* case), even though progress had been made, could not provide a long-standing solution to these problems. This fact catalysed the legislative side. As a result of the Community's increasing attention to intellectual property, on the one hand, and the judicial activity, on the other, a more emphatic approach appeared in the legislation.

Consequently, a more precisely outspelled declaration of policy intentions of the Commission was found in the White Paper on Completing the Internal Market[170] (1985). In it, the Commission summarized the problems as follows. "Differences in intellectual property laws have a direct and negative impact on intra-Community trade and on the ability of enterprises to treat the common market as a single environment for their economic activities."[171] The focus was on trade mark and patent, thus copyright appeared in the document only by referring to the fact that problems in the field of copyright and related rights were to be examined with a view to establishing priorities.

The 1988 Green Paper on Copyright and the Challenge of Technology[172] addressed the challenges that copyright faced at the time. The Commission's concerns were four-fold. First, with a view to the proper functioning of the common market (i.e. to have a single internal market[173]) the obstacles and legal differences that distort trade between Member States had to be eliminated. The Commission noted that significant differences existed in the protection available to particular classes of copyright works, which could fragment the internal market; and that this situation asked for action at Community level in order to remove differences in national laws and procedures. (The judicial approach with regard to exhaustion was not enough to do away with the differences in national laws.) Secondly, the Commission argued that the Community would have needed to develop policies that would improve the competitiveness of its economy in a global environment. Thirdly, the Commission had concerns regarding misappropriation of the creative effort and substantial investment made within the Community by others outside the Community. Fourthly, in connection to certain newly developed areas, such as industrial design and computer software, the copyright protection risked to be excessively restrictive on legitimate competition. This approach showed a rather minimalist approach, meaning that only certain issues were to be addressed at a Community level.

Accordingly, the Commission dealt with the following issues in the Green Paper: piracy, home copying of sound and audio-visual material[174], distribution and rental rights for certain classes of work (e.g. sound and video recordings), the protection available to computer programs and databases, and the role of the Community in multilateral and bilateral external relations.

In searching for the appropriate legislative measure on the Community level, the Commission stated that any action was to be based on the following considerations. The intellectual and artistic creativity needed to be protected, to be given a higher status, and to be stimulated. The Commission aptly observed that many issues did not require Community action, as all the

[170] White Paper on completing the Internal Market, from the Commission to the European Council, COM(85) 310 final, Brussels, 14 June 1985.
[171] *Ibid*. paragraph 145.
[172] Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Communication from the Commission, COM(88) 172 final, Brussels, 7 June 1988.
[173] The political decision to complete the internal market was made in the Single European Act of 1 July 1987.
[174] Having been highly controversial, no legislation was adopted on this issue in the first generation of legislation.

Member States were party to international conventions, such as the Berne Convention and the Universal Copyright Convention, the result of which was a certain fundamental convergence of their laws. Accordingly, the Commission stated that the Community legislation was to be restricted to what was needed to carry out the tasks of the Community, therefore the approach was to address Community problems. This approach is in line with the activities comprised in Article 3 of the Treaty, one of which says that the activities of the Community shall include the approximation of the laws of Member States to the extent required for the functioning of the common market. For these purposes the Commission relied on Article 94 (ex Article 100) of the Treaty to propose the issuing of directives on the copyright fields identified as such where harmonisation was necessary.

In the follow-up to the Green Paper[175] (1990) the Commission reaffirmed its approach, and complemented its proposal with new elements. With the aim to consolidate copyright and neighbouring rights inside the Community, the Commission considered it vital that all the Member States adhere to the multilateral conventions administered by WIPO. Thereby a common foundation in all the Member States would be achieved. Therefore, the Commission proposed to the Council to decide to require all the Member States to adhere to and comply with the provisions of the Berne Convention and that of the Rome Convention.[176] Further, the Commission outlined some areas for action that were not discussed in the Green Paper. These areas concerned the duration of protection, authors' moral rights, reprography, and resale rights. In addition to this, the Commission also intended to carry out a study on the collective management of copyright and neighbouring rights and collecting societies. The proposal to adopt directives has led to a series of directives that are usually clustered into generations.

8.4.2. The first generation of legislation

The "first generation" of directives concerns specific subject matters. A strange mixture of rather unrelated areas characterizes these legislative measures. This generation comprises the following six directives: the Computer Programs Directive[177] (1991), the Rental and Lending Rights Directive[178] (1992), the Satellite and Cable Directive[179] (1993), the Term Directive[180] (1993), the Databases Directive[181] (1996), and the Resale Right Directive[182] (2001).

Before providing an overview of these directives, some general remarks worth to be made.[183] First, the directives distinguish between two categories of works. On the one hand, works

[175] Follow-up to the Green Paper, Working programme of the Commission in the field of copyright and neighbouring rights, COM(90) 584 final, 17 January 1991.

[176] The proposal of the Commission was rejected in December 1991. The reason behind the rejection was that by incorporating the conventions into the *acquis communautaire*, the Commission would have gained negotiating authority on behalf of the Member States. Instead, a Council Resolution was adopted in May 1992, in which the Member States undertook to adhere to the conventions by January 1, 1995.

[177] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

[178] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, pp 61–66.

[179] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

[180] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, pp 9–13.

[181] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27/03/1996 pp 20-28.

[182] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

[183] See Bently and Sherman, pp 44-46.

protected by copyright, that is works of authors – these are covered by the Berne Convention. On the other hand, works protected by related rights (explicitly not neighbouring rights), that is rights of performers, producers of phonograms, broadcasting organization, etc. Secondly, the differences between the copyright and the *droit d'auteur* legal regimes are handled in a special way. The issues addressed in the directives are of a mixed nature from this respect. For instance, on the one hand equitable remuneration for authors in case of rental and lending is provided for by the Rental and Lending Rights Directive, the computer programs are recognised as literary works. Another notable trend is the upward harmonization[184], which is an easy way of increasing copyright protection. The Term Directive is an excellent illustration to this. The term of protection was increased to the term of life plus seventy, the term existed in Germany, instead of reducing the seventy to the term of life plus fifty, which was used in many other Member States.[185] The fourth phenomenon is that the directives have a limited harmonizing effect. Member States are allowed to confer greater rights than those found in the directives or to derogate from those. Lastly, it is worth pointing out that the Community develops its 'own' concepts, which cannot be found in national laws. A good example for this is the "author's own intellectual creation"[186].

Computer Programs Directive[187] (1991)
The Directive aimed at harmonizing the Member States' legislation regarding computer programs. The central question in connection to computer programs was whether the protection should be given under copyright or patent or else, alternatively, a *sui generis* protection would be appropriate. At the end, the copyright protection was chosen, to a great extent for the reason that the European Union's competitiveness on the global scale, especially in relation to the United States of America, would have been lessened if other means would have been chosen. Thus, computer programs were to be protected in the same way within the Community. The above-cited Community concept of "author's own intellectual creation" is applied to computer programs in assessing the program's originality.

Rental and Lending Rights Directive[188] (1992)
The Directive requires Member States to provide for authors, performers, phonogram producers and producers of films the exclusive right to control the rental[189] and the lending[190] in respect of the copies of their works. At the same time, the Directive offered flexible implementation for the Member States, allowing them to promote their own cultural objectives. Therefore, Member States were left with a considerable discretion in determining the level of the remuneration. Furthermore, the Directive harmonized certain neighbouring rights, such as the right of fixation, reproduction, broadcasting and communication to the public and distribution.

[184] Though the higher originality standard with regard to the protection of original databases might be looked upon as a compensation to this. It serves as a check against copyright's undesirable expansion into fields outside the scope of the envisaged protection.
[185] The official reasoning, unsurprisingly, was that the average lifespan in the Community has grown longer, up to the point where this term is no longer sufficient to cover two generations.
[186] See the Computer Programs Directive.
[187] See fn. 177.
[188] The Directive has been repealed and replaced by Directive 2006/115/EC.
[189] Direct or indirect economic or commercial advantage is involved.
[190] Direct or indirect economic or commercial advantage is not involved.

Satellite and Cable Directive[191] (1993)
The Directive was adopted as a complement to the Television without Frontiers Directive[192], which did not contain provisions on copyright. In relation to broadcasts, responsibility arises in the country where the broadcast originates. The Directive defines the place where the communication takes place: the act of communication to the public occurs solely in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. Accordingly, the rights must be acquired where the communication to the public takes place. However, when it comes to the amount payable for the rights, the Directive says that the parties should "take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version."[193] With regard to cable retransmission, the Directive does not harmonize the rights, instead requires Member States to "ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators."[194]

Term Directive[195] (1993)
The Directive harmonized the terms of protection of copyright and neighbouring rights. Divergent terms applied in the Member States. In Germany the term of protection was the life of the author plus 70 years, while in other Member States, it was the life of the author plus 60 or 50 years.[196] As was mentioned above, the upward harmonization resulted in a unified seventy-year *post mortem* term. With regard to related rights (performers, producers of phonograms, producers of the first fixation of a film and broadcasting organizations), the rights expire after 50 years. The Directive also introduced a new right: previously unpublished works, in which copyright has expired, are to be protected for 25 years from the time of the first lawful publication or communication to the public.

Databases Directive[197] (1996)
The Directive introduced a new *sui generis* right, which gives 15 years of protection for non-original databases, both electronic and paper-based. Thereby, the Directive intends to protect the creator's investment of time, money and effort. By this step, the Directive was to strike a balance between the interest of manufacturers of databases and that of the users. The clear and well-defined level of protection was necessary to be guaranteed in the Information Society. At the same time, databases which constitute the author's own intellectual creation are conferred copyright protection by the Directive.

Resale Right Directive[198] (2001)
The Directive was to ensure that the European Union's modern and contemporary art market works well. It is offered to artists (and their heirs) to receive a percentage of the selling price of a work of art when it is resold and when the price exceeds a certain threshold. The sale has

[191] See fn. 179.
[192] Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC) OJ L 298, 17.10.1989, p 23.
[193] Recital 17 of the Satellite and Cable Directive.
[194] Article 8.
[195] Directive 93/98/EEC has been repealed and replaced by Directive 2006/116/EC.
[196] In the beginning of the eighties, there were five different periods in the ten Member States.
[197] See fn. 181.
[198] See fn. 182.

to be done by an art-market professional such as an auctioneer, a gallery or any other art dealer. The idea behind resale right (*droit de suite*) is to provide the artist with the possibility to gain a fair percentage of the profit that the seller makes on the increased value of his or her work.

8.4.3. The second generation of legislation

Building upon the findings of the Commission's White Paper on the effects of technological innovation on society[199] (1993), further upon the conclusions of the Bangemann Report[200] (1994), which emphasised the need for a higher level of protection of intellectual property, the Commission's 1994 action plan published in Europe's Way to the Information Society[201], identified intellectual property as a key issue. The full support of the Commission with regard to the findings of the Bangemann Report was asserted in the areas identified by the Commission as where response was to be given; one of them being intellectual property rights. "IPR measures […] in the field of copyright and neighbouring rights will have to be reviewed, and the possible need for additional measures examined. A Green Paper on IPRs in the information society will be prepared in the coming months and give the opportunity for extensive consultations with interested parties."[202]

Therefore, the Commission was of the view that steps needed to be taken as copyright was heavily involved in the field. Accordingly, laws were to be adapted in order to respond to the new and varied requirements. Having this in mind, the Commission issued a Green Paper[203] in 1995. In this document, instead of specific subject matters, it took a broader grip. The goal was to have a European copyright. In the Green Paper, with regard to the internal market, the Commission came to the conclusion that "[t]he information society will facilitate creation, access, distribution, use and similar activities, and consequently increase the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services. The position is aggravated by the fact that in the information society works will increasingly be circulated in non-material form. This means that the rules which apply will very often be those on freedom to provide services. While respecting the principle of subsidiarity, therefore, the Community has an obligation to take measures in respect of copyright and related rights in order to guarantee the free movement of goods and the freedom to provide services. This will involve harmonization of legislation, and mutual recognition too, in order to avoid creating distortions of competition which would confer an advantage on firms located in particular Member States."[204]

The Green Paper identified nine areas, grouped into three parts, where harmonisation was foreseen as necessary. Within the first general part, two questions were discussed: 1) the applicable law, and 2) exhaustion of rights and parallel imports. The second part focused on five issues concerning contents of certain specific rights: 3) reproduction right, 4)

---

[199] White Paper on growth, competitiveness, employment. The challenges and ways forward into the 21st century, COM(93) 700,5 December 1993.

[200] Europe and the global information society. Recommendations of the high-level group on the information society to the Corfu European Council. Bulletin of the European Communities, Supplement 2/94.

[201] Action Plan on Europe's Way to the Information Society. Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions. COM(94) final, Brussels, 19.07.1994.

[202] *Ibid.* p 5.

[203] Green Paper on Copyright and Related Rights in the Information Society, COM(95) 382 final, Brussels 19.07.1995.

[204] Green Paper, paragraph 12.

communication to the public, 5) digital dissemination or transmission right, 6) broadcasting right, and 7) moral rights. The third part dealt with the exploitation of rights: 8) acquisition and management of rights, and 9) technical systems of identification and protection.

In the follow-up to the Green Paper[205] (1996), based on the results of the consultation following the Green Paper, the Commission set out its Single Market policy in the area of copyright and related rights in the Information Society. It observed, that the interested parties had confirmed during the consultation the need for further harmonisation. Regarding harmonisation, it concluded that "[t]he use of computer technology, digitisation and the convergence of communication and telecommunication networks are already having an enormous impact on the transborder-wide exploitation of literary, musical or audio-visual works and other protected subject matter such as phonograms or fixed performances. Such impact will undoubtedly greatly increase in the near future. Moreover, given the investment involved, the marketing of new products and services can only be fully viable in a genuine Single Market. Where necessary for the functioning of the Single Market and the creation of a favourable environment which protects and stimulates creativity and innovative activities across Member States, the existing legal framework will need readjustment. In so doing, the traditionally high level of copyright protection in Europe must be maintained and further developed at European and international level, reflecting that the subject matter is property and is, as such, guaranteed by the constitution in many countries. At the same time, a fair balance of rights and interests between the different categories of rightholders, as well as between rightholders and rightusers, must be safeguarded. New legislative action at Community level must meet the needs and practises of copyright markets and be consistent with and accommodate, existing concepts and tradition. Such action should not imply radical changes to the existing Single Market regulatory framework. It is the environment in which works and other protected matter will be created and exploited which has changed - not the basic copyright concepts."[206]

The follow-up identified four priority issues for legislative action: 1) reproduction right, 2) communication to the public, 3) legal protection of the integrity of technical identification and protection schemes, and 4) distribution right, including the principle of exhaustion.
At the same time other issues were identified as ones that require further considerations: 1) broadcasting right, 2) applicable law and law enforcement, 3) management of rights, and 4) moral rights.

So far, the two directives adopted under the second generation legislation triggered by the second Green Paper from 1995 are the InfoSoc Directive[207] and the Enforcement Directive[208].

InfoSoc Directive (2001)
The outcome of the Green Paper was what proved to be the most significant initiative within the Community in connection to copyright so far: the InfoSoc Directive. In line with the priorities set in the follow-up to the 1995 Green Paper, the Directive covers the four prioritised issues. The main objective was to harmonise national laws and to implement the

[205] Follow-up on the Green Paper on Copyright and Related Rights in the Information Society, Communication from the Commission, Brussels, 20.11.1996.
[206] *Ibid.* Chapter 1, 3. p 8.
[207] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, p 10, 22.6.2001.
[208] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, p 45, 30.4.2004.

two WIPO Treaties, the WCT and the WPPT. The Directive took a very ambitious approach, which is reflected in Recital 5. "Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation." In this spirit, the Directive introduced a "making available right", worded as follows. "Making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."[209] This phrasing is to cover the communication to the public via the Internet. Furthermore, the Directive provided for protection of technological measures and right-management information. This is a legal protection for anti-copying devices. This was the most fiercely debated topic in the process of adoption. The debate centred around the question of exceptions for legitimate uses.

Enforcement Directive (2004)

The follow-up to the 1995 Green Paper considered the issue of enforcement as such that requires further consideration. Therefore, in 1998, the Commission issued a Green Paper on Combating Counterfeiting and Piracy in the Internal Market[210]. The Commission came to the conclusion that the economic impact of counterfeiting and piracy, and their impact on the Internal Marked, i.e. by distorting competition, asked for legislative solution. Following the hearing of the interested parties, the Commission issued its follow-up on the Green Paper[211] in 2000. As it is stated in the preamble, the follow-up announced, in the form of an action plan, the various measures and initiatives that the Commission intended to take in order to improve and strengthen the fight against counterfeiting and piracy in the single market. The action plan identified the activities that were to be carried out as a matter of urgency, medium-term activities, and other recommendations. The activities regarding the means of enforcement of intellectual property rights were identified as a matter of urgency. Thus the commission submitted a proposal. The aim of the Directive was to achieve a level playing field within the Community. As it is stated in the preamble, "[t]he disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market or create an environment conducive to healthy competition."[212] Therefore, in order to avoid the fragmentation of the Internal Market, the Commission concluded that the approximation of the legislation of the Member States was an essential prerequisite. Thereby a high, equivalent and homogeneous level of protection in the Internal Market could be ensured.

[209] Article 3 (2) of the InfoSoc Directive.
[210] Green Paper on Combating Counterfeiting and Piracy in the Internal Market, COM(98) 569 final, 15 October 1998.
[211] Follow-up to the Green Paper on combating counterfeiting and piracy in the single market. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. COM(2000) 789 final, Brussels, 30.11.2000.
[212] Paragraph 8.

8.5. Case-law

8.5.1. Article 12 (ex Article 6)

Article 12 of the Treaty says that "[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions." This Article bears significant importance with regard to intellectual property. Here, the seminal case is the *Phil Collins* case[213], where the Court held that Article 12 "must be interpreted as precluding legislation of a Member State from denying, in certain circumstances, to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation the nationals of that State, to prohibit the marketing, in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory."[214] Further, Article 12 of the Treaty "should be interpreted as meaning that the principle of non-discrimination which it lays down may be directly relied upon before a national court by an author or performer from another Member State, or by those claiming under them, in order to claim the benefit of protection reserved to national authors and performers."[215] That is, the Court held, on the one hand, that copyright and neighbouring rights fall within the scope of the Treaty, and, on the other hand, national laws on copyright and neighbouring rights shall not discriminate between nationals of Member States.

8.5.2. Articles 28, 29, 30 and 295 (ex Articles 30, 34, 36 and 222)

To see how the Community addressed the problem spelled out just above, it is inevitable to take a closer look at these articles. In the quest for a unified market[216], the free movement of goods was a central element. This freedom was to be achieved not only by eliminating customs duties, but by the prohibition of quantitative restrictions between Member States. In Article 28 (ex Article 30), the Treaty provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." And Article 29 (ex Article 34) reads that "[q]uantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States." These articles are to ensure that Member States do not restrict trade between Member States by using quotas. When quotas are placed Member States discriminate against non-domestic goods either directly or indirectly. Even more, all measures "having equivalent effect" are caught by Article 28. This expression was unfolded in the *Dassonville* case[217], where the Court said that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[218]

---

[213] Joined cases C-92/92 and C326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH.* 20 October 1993, [1993] ECR I-5145.

[214] *Ibid.* paragraph 33.

[215] *Ibid.* paragraph 35.

[216] The degree of integration is aptly described by Swann (in. Craig & de Búrca, p 580): 1) free trade area, where customs duties are removed, but national import policies remain, 2) customs union, where tariffs and quotas on trade between members are removed, with a common customs in place 3) common market, where the free movement of goods are accompanied by the other three of the 'four freedoms', 4) economic union with a unification of monetary and fiscal policy.

[217] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

[218] *Ibid.* paragraph 5.

However, under certain circumstances, the discrimination with an effect on trade between Member States can be justified under Article 30 (ex Article 36), which says that "[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." As it is reflected in the last sentence, the exception of Article 30 is subject to a proportionality test. All the measures taken under this article have to be justified and proportionate to the ends included in the article. The Court of Justice pointed this out in the *Simmenthal*[219] case. "Article 36 of the EEC Treaty is not designed to reserve certain matters for the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article."[220]

Another important aspect of Article 30 is that the Treaty uses the expression "industrial and commercial property". This phrasing had an important implication since 'property' as such was concerned. Article 295 (ex Article 222) explicitly says that "[t]his Treaty shall in no way prejudice the rules in Member States governing the system of property ownership". In order to reconcile the antagonistic notions – the very task of achieving an integrated market, on the one hand, and the wording of Article 295, on the other – the Court came up with a solution that is undoubtedly unique to the Community. It drew a distinction between the *existence* and the *exercise* of intellectual property rights.[221] While the existence of intellectual property is left untouched by the Court, the exercise comes under scrutiny when trade between Member States is affected. Accordingly, the precise definition of the specific subject-matter is of crucial importance in all intellectual property cases. In the *Deutshce Grammophon* case[222] the Court held that "Article 36 only admits derogations from the free movement of products in order to protect industrial and commercial property to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific matter of such property."[223]

a) Patents and trade marks

It was in the *Centrafarm* case[224] where the Court spelled out that the exercise of rights is limited by the doctrine of exhaustion. That is, once a product has been placed on the market by or with the consent of the right owner, then the subsequent trading with the product within the Community cannot be hold up by relying on the patent.

[219] Case 35/76 *Simmenthal SpA v Ministère des finances italien* [1976] ECR 1871.
[220] Paragraph 4.
[221] It is worth quoting here Craig & de Búrca for a short summary on the questionable nature of the existence/exercise dichotomy: "It is generally accepted that property as a legal concept is made up of a bundle of rights, powers, privileges, and duties. These constitute the very meaning of property. To say therefore that the Treaty serves to protect only the existence of a property right and not its exercise should not delude us into thinking that the bundle of rights, etc., which would normally comprise this type of property has survived unscathed. The licensee of an intellectual property right would normally be able to use the right to prevent imports from outside the territory. If the ECJ states that this is no longer possible, the effect is to diminish the sum total of rights possessed by both the licensor and licensee of the right." p 1089.
[222] Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Gfomärkte GmbH & Co. KG.* 8 June 1971, [1971] ECR 487.
[223] Paragraph 11.
[224] Case 15/74 *Centrafarm BV v Sterling Drug Inc.* [1974] ECR 1147.

In paragraph 11, the Court says that "[w]hereas an obstacle to the free movement of goods of this kind may be justified on the ground of protection of industrial property where such protection is invoked against a product coming from a Member State where it is not patentable and has been manufactured by third parties without the consent of the patentee and in cases where patents exist, the original proprietors of which are legally and economically independent, a derogation from the principle of the free movement of goods is not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the Member State from which it has been imported, in particular in the case of a proprietor of parallel patents."

In connection to the same factual circumstances, in the case *Centrafarm v Sterling Drug*[225] the Court held that "the exercise, by the owner of a trade mark, of the right which he enjoys under the legislation of a Member State to prohibit the sale, in that state, of a product which has been marketed under the trade mark in another Member State by the trade mark owner or with his consent is incompatible with the rules or the EEC Treaty concerning the free movement of goods within the common market."[226] Here again, the Court concluded that the placing of a product on the market by the holder of the trade mark, or with his consent, would exhaust his right to prevent the free movement of goods between Member States.

The jurisprudence of the Court in both patents and trade marks is of course more elaborated and comprehend numerous practical problems that emerged during the last thirty years. However, for the present purposes, it is enough to indicate the major approach spelled out in the case law of the Court.

b) Copyright

The specific subject matter of a patent and a trade mark, which Community law does not affect, is relatively well defined. However, when it comes to copyright – given the wide range of artistic works concerned – the specific subject matter is more difficult to define. It is, consequently, ambiguous in certain instances where the Community law is applicable.

Before going into detail with regard to the specific subject matter in connection to copyright, it is important to remember the initial doubts whether copyright was intended to be covered by the expression "industrial and commercial property" found in the Treaty. It was in the fourth *GEMA*[227] decision where the Court established without any doubt that copyright meant to be covered by the Treaty.[228]

In the decision, the Court explicitly stated that the expression industrial and commercial property "includes the protection conferred by copyright, especially when exploited commercially in the form of licences capable of affecting distribution in the various Member

[225] Case 16/74 *Centrafarm BV v Winthrop BV* [1974] ECR 1183.
[226] *Ibid.* paragraph 12.
[227] Joined cases 55/80 and 57/80 *Musik-Vertrieb membran GmbH et K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* [1981] ECR 147.
[228] It is to be noted here, that in its Green Paper from 1988 on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, the Commission stated that the effect of the provisions of the Treaty on free circulation of goods may be said to apply broadly, mutatis mutandis, to goods subject to copyright; and, in particular, recourse to copyright law as a means of artificially partitioning the market is as effectively prohibited, being equivalent in effect to a quantitative restriction, as recourse to patent or trade mark law.

States of goods incorporating the protected literary or artistic work."[229] The Court argues that copyright, besides comprising moral rights, it also comprises "the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties."[230] With regard to this economic aspect of copyright, "in the application of article 36 of the Treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights."[231] Further, the Court added that copyright, besides being a source of remuneration, constitutes a form of control on marketing, and "from this point of view commercial exploitation of copyright raises the same issues as that of any other industrial or commercial property right."[232] Furthermore, an important part of the reasoning of the Court states that "[t]he argument […] that in the absence of harmonization in this sector the principle of the territoriality of copyright laws always prevails over the principle of freedom of movement of goods within the common market cannot be accepted. Indeed, the essential purpose of the Treaty, which is to unite national markets into a single market, could not be attained if, under the various legal systems of the Member States, nationals of those Member States were able to partition the market and bring about arbitrary discrimination or disguised restriction on trade between Member States."[233]

Harking back to the question of free movement of goods, it is worth referring back to a case from 1971. The case *Deutsche Grammophon v Metro* case[234] was referred to the Court for preliminary ruling. In the case, the Deutsche Grammophon supplied sound recordings to its French subsidiary, which marketed the products in France, where Metro upon buying these records imported them to (the Federal Republic of) Germany, and sold them for lower price than the prevailing price in Germany. Deutsche Grammophon wanted to rely on its exclusive right of distribution – provided by German law – to prohibit the marketing of its recordings in Germany. The question in the case, as was summarised by the Court, was "whether the exclusive right of distributing the protected articles which is conferred by a national law on the manufacturer of sound recordings may, without infringing Community provision, prevent the marketing on national territory of products lawfully distributed by such manufacturer or with his consent on the territory of another member State."[235] Here, what was of importance was whether the products had been placed on the market by him or with his consent in another Member State. This rendered the prohibition isolating the national markets to be in conflict with the principle of free movements of goods.

In looking into the conflict between national laws on copyright and Community law, the *GEMA* decision is of high importance. It concerned the distribution of records as well. In the case, GEMA, the German collecting society, gave its consent to manufacture and to place on the market of records. The royalties were calculated with a view to the given Member State where the records were to be marketed. However, the records were reimported to Germany. Therefore, GEMA claimed that the royalties had to be adjusted in order to satisfy its members. Here again, the Court confirmed its view that once the products in which the copyright was embedded were placed on the market with consent, than the proprietor of the right cannot rely on a national legislation to prevent importation by charging an extra royalty

[229] Paragraph 9.
[230] Paragraph 12.
[231] Paragraph 12.
[232] Paragraph 13.
[233] Paragraph 14.
[234] Case 78/70 [1971] ECR 487.
[235] Paragraph 4.

on imported records. "[N]o provision of national legislation may permit an undertaking […] to charge a levy on products imported from another Member State where they were put into circulation by or with the consent of the copyright owner and thereby cause the common market to be partitioned."[236]

Consequently, the Court held, in line with what was said in patent and trade mark cases, that the right of the holder of a copyright is exhausted upon marketing the product, which has the copyrighted work in it. Following the *GEMA* case, the application of Community law on national copyright regimes has been addressed in several cases, where various conflicts both between national and Community law, and even between Court decisions have emerged. The detailed analysis of the relevant case law falls outside the scope of the present work.

8.5.3. Article 81 (ex Article 85)

Article 81 of the Treaty provides for that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the common market. These agreements are automatically void. At the same time, under certain circumstances the first paragraph is inapplicable (Article 81(3)).

When intellectual property is reviewed under Articles 81 and 82, the existence / exercise dichotomy applies as well. This was held in the *Parke, Davis & Co. v Probel and Centrafarm* case[237], which concerned the exercise of rights on patents on medicinal products in the Netherlands. The rights were attached to the patent by national law. The right holder wanted to prevent an importer to import to the Netherlands a similar product manufactured in another Member State (Italy) where no patent protection was available for the product. Therefore, the right holder applied for an injunction to stop the infringement.

The Court said that "a patent taken by itself and independently of any agreement of which it may be the subject, is unrelated to any of these categories [of agreements], but is the expression of a legal status granted by a state to products meeting certain criteria, and thus exhibits none of the elements of contract or concerted practice required by Article [81(1)]. Nevertheless it is possible that the provisions of this Article may apply if the use of one or more patents, in concert between undertakings, should lead to the creation of a situation which may come within the concepts of agreements between undertakings, decisions of associations of undertakings or concerted practices within the meaning of Article [81(1)]."[238] Similarly, in connection to Article 82 (ex Article 86), the Court held that "the existence of patent rights is at present a matter solely of national law, the use made of them can only come within the ambit of Community Law where such use contributes to a dominant position, the abuse of which may affect trade between Member States."[239] Consequently, the Court said that "the existence of the rights granted by a member State to the holder of a patent is not affected by the prohibitions contained in Articles [81(1)] and [82] of the Treaty" and that "the exercise of such rights cannot of itself fall either under Article [81(1)], in the absence of any

[236] Paragraph 18.
[237] Case 24/67 *Parke Davis & Co. v Probel and Centrafarm* [1968] ECR 55.
[238] *Ibid.*
[239] *Ibid.*

agreement, decision or concerted practice prohibited by that provision, or under Article [82], in the absence of any abuse of a dominant position."[240]

Having seen that intellectual property cases, as far as the exercise of the right is concerned, can come under the ambit of Articles 81 and 82, it is worth mentioning briefly some cases where the competition provisions were applied. In the *Sirena* case[241] the question was the application of Article [81] with regard to trade mark. The case concerned a trade mark that had been given to two companies in two Member States, Germany and Italy. As the Italian company imported the product bearing the same trade mark to Germany with a lower price, the German company relied on its right to prevent the import. However, the Court held that "Article 36 […] is based on a principle equally applicable to the question of competition, in the sense that even if the rights recognized by the legislation of a member States on the subject of industrial and commercial property are not affected, so far as their existence is concerned, by Articles [81] and [82] of the Treaty, their exercise may still fall under the prohibition imposed by those provision."[242] Accordingly, the Court said that "the exercise of a trade-mark right is particularly apt to lead to a partitioning of markets, and thus to impair the free movement of goods between states which is essential to the common market."[243]

Article 81 has been applied to licences in several occasions, resulting in a number of important decisions, such as those in the *Consten and Grundig*[244], *Pronuptia*[245] and *Windsurfing*[246] cases. Here again, the existence of the right did not fall under the articles on competition, while the exercise of the right could be caught by the articles.

8.5.4. Article 82 (ex Article 86)

Article 82 of the Treaty sets forth that any abuse by one or more undertakings in a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

When it comes to Article 82, the starting-point is the same, as was seen in the *Parke, Davis & Co. v Probel and Centrafarm* case: it is only the exercise what can be caught by the competition provisions of the Treaty. The landmark decision of the Court of *RTE*[247] is a good example to this. There, a company, Magill, wanted to publish a weekly programme magazine for all the TV channels, instead of having to buy the various channels own weekly schedule. Thereby, Magill was to introduce a new product to the market. RTE prevented Magill in doing so relying on the copyright on its own programmes. The Court held this was an exercise of the right and that it was an abuse in the sense of Article 82 (ex Article 86) as it prevented a new product (a general guide) to be introduced to the market.

When one takes a look at the direction to which the application of competition law within the Community is about to develop, it is hard not to see how the institution of intellectual property law is under fire. The broadening of the application of competition law to intellectual property matters is quite obvious. The Commission tries to diminish the tenor and scope of

[240] *Ibid.*
[241] Case 40/70 *Sirena Srl v Eda Srl* [1971] ECR 69.
[242] Paragraph 5.
[243] Paragraph 7.
[244] Cases 56 &58/64 *Consten and Grundig v Commission* [1966] ECR 299.
[245] Case 161/84 *Pronuptioa de paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.
[246] Case 193/83 *Windsurfing International Inc. v Commission* [1986] ECR 611.
[247] Case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485.

intellectual property, and tries to bring as much as possible of the “safe harbour” of intellectual property under the ambit of competition law.

9. EC LEGISLATION ON COLLECTIVE RIGHTS MANAGEMENT

9.1. Early Community actions

Before the Commission took on the first steps to initiate legislative solution regarding collective rights' management, several papers addressed the issue, though only to a limited extent.

Prior to the publication of the 1977 Community Action in the Cultural Sector[248], the Commission undertook a series of consultations with representatives of rights management societies and the two sides of the industries: cultural workers (writers, composers, performers, etc.) and intermediaries (publishers, producers of records, etc.). In this document, the issue of collective management was touched upon only briefly. With regard to distribution, the Communication said that the proceeds of royalties and related rights could be distributed on an individual basis by the rights management societies. There is an important statement in the document in connection to the allocation of a certain part of the individual royalties to a social fund or cultural foundation. "This practice gives good results, particularly in the financing of supplementary retirement schemes. The partial self-financing of the promotion of dissemination, which directly concerns every cultural profession (cultural foundation) would, to some extent, make up for the inadequacy of the subsidies granted by the public authorities – subsidies which should obviously be continued and even increased as far as possible – and help to guarantee the independence of culture."[249]

In its Communication from 1982 – Stronger Community Action in the Cultural Sector[250] – the Commission revealed a coming Green Paper on the subject of copyright. The will to examine the problems in the field of copyright and related rights was confirmed in the 1985 White Paper on completing the Internal Market[251].

9.2. The first Green Paper

In accordance with the declaration of opening a wide-ranging debate, the first Green Paper[252] was issued in 1988. This document launched the first generation of legislation, which comprised of six directives on specific matters. Thereby, the Community involvement in the copyright and related rights field materialised in legislative action. However, the document focused on specific copyright subjects, and the issue of collective management of rights was not on the agenda at that time.

The follow-up to the Green Paper[253] (1991) discussed the planned Community actions and supplemented other initiatives in the field of copyright and neighbouring rights. In the Annex to the follow-up, as a proposed action, a study was to be carried out on collective management of copyright and neighbouring rights and collecting societies.

---

[248] See fn. 167.

[249] *Ibid.* point 23.

[250] Stronger Community Action in the Cultural Sector, Communication to Parliament and to the Council COM(82) 590 final, 16 October 1982.

[251] Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985) COM(85) 310 final, 14 June 1985.

[252] Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, Communication from the Commission COM(88) 172 final, 7 June 1988.

[253] Follow-Up to the Green Paper, Working programme of the Commission in the field of copyright and neighbouring rights, Communication from the Commission COM(90) 584 final, 17 January 1991.

As was mentioned above[254] the Commission's action plan published in 1994, Europe's Way to the Information Society[255] identified intellectual property as a key issue. It endorsed the conclusions of the Bangemann Report[256] (1994), emphasising the need for a higher level of protection of intellectual property. The Report argued that "[c]reativity and innovation are two of the Union's most important assets. Their protection must continue to be a high priority, on the basis of balanced solutions which do not impede the operation of market forces."[257] It put forward that "intellectual property protection must rise to the new challenges of globalisation and multimedia and must continue to have a high priority at both European and international levels."[258] "Meanwhile, in order to stimulate the development of new multimedia products and services, existing legal regimes – both national and Union – will have to be re-examined to see whether they are appropriate to the new information society. Where necessary, adjustments will have to be made."[259] In line with the above, the Commission concluded in its action plan that copyright and neighbouring rights had to be reviewed, and that a Green Paper on IPRs in the information society was to be prepared.

9.3. The second Green Paper

The 1995 Green Paper[260] launched the second generation of legislation, which aimed at harmonising more general issues. As it has already been said[261], in the 1995 Green Paper, among the nine areas identified as such where harmonisation was foreseen as necessary, the Commission included the exploitation of rights. With regard to collective management of rights, the Commission held that collecting societies play a particularly important role in the music industry. However, technology has its implication on the system.

The technical development's impacts on society are many. As one of the consequences, information society[262] has significant bearings on the system of copyright. As it is worded in the document, "[t]he history of copyright and related rights consists of a succession of reactions in which the law was adapted to technical developments, sometimes in great bounds. The present system is the outcome of thinking and experience accumulated over years of analogue technology. It also derives from a time when national markets were partitioned off from one another, and there was relatively little in the way of cross-border distribution of certain types of works; this provided a solid foundation for the idea that the protection of copyright and related rights could be territorial in scope as could the resulting rules and mechanisms governing exploitation."[263] Therefore, the Commission was of the view that "the establishment of the information society will necessarily bring about a review of the place of

[254] See point 8.4.3. on p 76.
[255] See fn. 201.
[256] See fn. 200.
[257] P 17.
[258] P 17.
[259] P 18.
[260] Green Paper Copyright and Related Rights in the Information Society COM(95) 382 final, 19.07.1995.
[261] See point 9.2. on p 86.
[262] The term "information society" was first used in the 1993 White Paper on growth, competitiveness, employment (see fn. 199), where, on page 92, it said that "[t]his decade is witnessing the forging of a link of unprecedented magnitude and significance between the technological innovation process and economic and social organization. Countless innovations are combining to bring about a major upheaval in the organization of activities and relationships within society. A new 'information society' is emerging in which the services provided by information and communications technologies (ICTs) underpin human activities. It constitutes an upheaval but can also offer new job prospects."
[263] Paragraph 58.

collecting societies, whose role, organization and operation may need to be adapted. The role and functions of the collecting societies will probably have to be adapted in order to better deal with the new possibilities and ways to exploit rights offered by the information society"[264].

With regard to the legal context the 1995 Green Paper summarised the situation as follows. On the international level (Berne Convention) there are very few clear indications regarding the management of copyright and related rights. In the Community law, the term appears in various contexts. The Rental and Lending Rights Directive, for instance, in Article 5(3) provides for that the administration of the right to obtain equitable remuneration may be entrusted to collecting societies representing authors or performers. The Satellite and Cable Directive even contains a definition of a collecting society. It says in Article 1(4) that a collecting society means "any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes." At the same time, other directives do not deal with collecting societies, instead, they leave it for the laws of the Member States to regulate the activities of collecting societies.

The Commission asked the interested parties whether the role of collecting societies needed to be reviewed in the context of the information society. Based on the reactions, the Commission came to the conclusion that "[i]n general it does not seem that intervention on the part of the Community authorities is regarded as desirable at this stage."[265]

The Commission put questions regarding the "introduction of automatic schemes of management or compulsory recourse to a collecting society in order to facilitate management in the case of multimedia products."[266] The interested parties strongly opposed the introduction of a compulsory licence system, which stand was backed by the Commission. "The Commission fully shares this point view. Not only does it see no valid grounds for the general imposition of compulsory licenses for the creation of multimedia works, or for circulating protected works and other protected matter on the information superhighway, but it would argue that compulsory licences, if introduced on a national basis, would necessarily cause difficulty with the circulation of works and other protected matter."[267] At the same time, the Commission added that there was nothing to prevent it to oblige collecting societies under Article 86 (now Article 82) of the Treaty to grant licences.

The interested parties did not reject the idea of establishing centres for right management, but with the reservation that these should be voluntary. The Commission encouraged the setting up of joint, centralised bodies that were to allow a simplified management of rights in connection to multimedia products. By bringing together the repertoires, the Commission argued, a "one stop shop" was to provide authors, performers and editor-producers a tool to identify the origin of works. The unification of information was to bring about increased transparency and efficiency.

As a consequence of the file identification, clearing houses could have been set up. The centralised management seemed to be a viable alternative for multimedia products. Here again, the Commission was of the view that the decision to move towards such a centralised system could only come from the professionals themselves. Further, the Commission

[264] Paragraph 63.
[265] Paragraph 75.
[266] Paragraph 75.
[267] Paragraph 77.

observed that "both the agreements establishing such links and the actual administration of the rights will have to comply with the competition rules of the EC Treaty. A major consideration here will be the extent of the territory for which the joint bodies grant licences, and especially the management itself of the rights. The competition rules are fundamental, but there is no reason why they should be in contradiction with the idea of centralized schemes, at least so far as the creation of "one stop shops" are concerned."[268]

In connection to the Green Paper, a Member of the European Parliament, Klaus-Heiner Lehne (PPE), on 9 August 1996, submitted a written question to the Commission[269]. In one of the questions Mr Lehne asked what the arguments were against the introduction of competition between the various collecting societies. The answers given by Mr Mario Monti[270] on behalf of the Commission are very important and should be remembered, especially today. Among other things, Mr Monti said that collective management is "generally considered appropriate for literary and artistic works since it enables a satisfactory balance to be struck between the interests of rightholders and the culture industry, on the one hand, and those exploiting the works, on the other. Accordingly, the Commission has always taken the important role played by collective management into account when preparing legislation. The specific characteristics of collective management therefore generally justify a position of exclusivity for management societies *vis-à-vis* users, so that rightholders and users alike can derive maximum benefit. Although management societies thus often find themselves in a *de facto* dominant position, there are in fact no rules precluding the establishment of rival management societies."

Parallel with these events, conferences were organised on the same issues in order to have a broader discussion, and a clearer understanding as regards the views of the different stakeholders. One of the first such conferences was held in Florence, Italy on 2-4 June 1996 under the title "Copyright and Related Rights on the Threshold of the XXIst Century". The event, which was organised by the Commission together with the Italian Presidency and the Tuscany Region, formed part of the consultation process, which began in July 1995 with the adoption of the Green Paper. The aim of the conference was to discuss the conclusion of the consultation process and the prospect for future EC action. The conclusions of the conference – as it was summarised by Mr Heinz Zourek, the then Deputy Director General of DG XV[271] – regarding collective administration of rights are worth to invoke. The management of rights was considered as an issue that deserves particular attention. The panel that dealt with the management of rights concluded that the issue was, in principle, to be left to the market, also in the multimedia environment. Therefore, rights management by centralised or other schemes was to be voluntary. At the same time, the usefulness of collective management, where appropriate, was not called into question. In this context, the possibility to harmonise control over collecting societies and to clarify the application of competition law to them were evoked.

[268] Paragraph 77.
[269] Written Question E-2255/96 by Klaus-Heiner Lehne (PEE) to the Commission (9 August 1996) OJ C105 Volume 403, 3 April 1997.
[270] Answer given by Mr Monti on behalf of the Commission (12 November 1996) OJ C105 Volume 403, 3 April 1997.
[271] See http://ec.europa.eu/internal_market/copyright/docs/conference/1996-06-florence-conclusions_en.pdf.

9.4. The follow-up to the second Green Paper

In the follow-up to the Green Paper[272] (1996) the Commission set out its Single Market policy in the area of copyright and related rights in the Information Society. Within this frame, the issue of management of rights was identified as a policy that required further considerations. The rights management was not included in the priority issues, thus no action was recommended at the time.

However, as opposed to the phrasing in the Green Paper where the Commission said that "the role and functions of the collecting societies will probably have to be adapted"[273] in compliance with the information society, in the follow-up a more definite thinking emerged: "[w]ith the development of the Information Society, currently adequate means of administering rights must be re-assessed. In particular, the question must be addressed of whether and how copyright administration needs to be rationalised in view of the possibilities created by digital technology for creating complex works or other protected matter, such as multimedia products or services. In fact, the creation and exploitation of multimedia products and services may imply that the individual exercise of rights will become even less practicable than it is today due to the great number of new or pre-existing works, productions and uses involved. This may call for new forms of centralised administration which facilitate rights management or, in some cases, for more collective management."[274]

With regard to the single market, the Commission concluded: "The ways of licensing as well as the structure, competences and size of collecting societies vary to a large extent from one Member State to another. Whereas a particular work may be managed individually in one Member State, it may be subject to collective management in another. Substantial differences between Member States also exist with respect to the licensing conditions as such, monitoring and enforcement of licenses, the collection of remuneration and its distribution to right owners. The consequences of the existence of a wide variety of different regimes within as well as between Member States will have to be analysed further in the light of further developments of the Information Society, with a view avoiding the existence and/or development to barriers to trade which would impede the effective exploitation of rights across Member States. Such barriers could exist in particular in a situation where special arrangements have been made mandatory in some Member States such as compulsory collective or assigned administration, whereas this would be rejected by other Member States. It seems essential that the Single Market provides both rightholders and users with similar and transparent conditions (level playing field) for the exploitation management of rights, both with respect to individual and collective licensing conditions."[275]

The Green Paper formulated certain question on rights management. Would a "one-stop-shop" system be desirable or indeed sufficient to deal with the demands of the information society? What form should be taken by centralized schemes set up by rightholders and managers? Do you think that alongside the existing competition rules the Community legislation should lay down guidelines for collecting societies or centralized management schemes? If so, what sorts of rules are needed: a code of conduct regulating competition

[272] Follow-Up to the Green Paper on copyright and related rights in the Information Society, Communication from the Commission, 20 November 1996.
[273] 1995 Green Paper, paragraph 63.
[274] 1996 Follow-up, p 24.
[275] 1996 Follow-up, p 26.

between societies or schemes, rules governing relations between societies or schemes and their members, or both?

In response to the Green Paper, the Commission received more than 350 submissions from interested parties. Most of the interested parties were of the view that the management of rights was to be left to the market, irrespective of digitisation. Many interested parties favoured the "one-stop-shop" solution, while the structure and competence of such centralised bodies invoked differing views. A number of interested parties called for harmonised rules for collecting societies.

The Commission concluded that the development of collective licensing was to be left to the market, at least for that time. However, the Commission had the intent to continue to study the issue.

The topic of management of rights was discussed at another conference organised by the Commission in Vienna on 12-14 July 1998. The Conference aptly bore the title "Creativity & Intellectual Property Rights: Evolving Scenarios and Perspectives". The panel that dealt with the administration of rights concluded that both individual and centralised administrations were to be workable solutions in the digital environment. The solutions should be voluntary. A shared view of the interested parties was that a common ground was to be found in the field. The then commissioner Mario Monti made a corresponding comment in his opening speech when he pointed out that it was important to "carefully strike a balance of the various right holders and interest involved."[276]

With the aim of gaining a deeper understanding of this complex area, the Commission's Internal Market DG commissioned a study from Deloitte & Touche. The Study on collective management of copyright in the European Union[277] was made accessible on 11 May 2000.

In the series of international meetings on copyright and neighbouring rights, the Internal Market DG organised another conference on the „Management and legitimate use of intellectual property" in Strasbourg on 9-11 July 2000. It was concluded at the conference with regard to collecting societies that "[t]he evolution of the technological environment increases the role of collecting societies but at the same time also confers on them a greater responsibility of good management, efficiency and transparency. A lot of effort has already been put into modernizing and rationalizing collecting societies and this effort should be pursued."[278] It was recognised that the area of collective management of copyright and neighbouring rights is a complex one, and that the multiplicity of the interests are at stake.

As a follow-up to the conference held in Strasbourg, the Commission organised a hearing on 13-14 November 2000. The participants expressed their wish to apply the term "exclusive position" to the dominant position of collecting societies as it reflects more accurately the role of collecting societies. Besides that the beneficial role of collecting societies was confirmed, the participants expressed their views that the societies should keep pace with the changes in technology. More importantly, all participants agreed that certain rights have to be licensed at Community level, while some participants were of the view that the territorial licensing could

[276] Available at http://ec.europa.eu/internal_market/copyright/conferences/1998-07-conference-vienna-opening_en.htm.
[277] Reference number: ETD/98/B5-3000/E/79. Available at http://ec.europa.eu/internal_market/copyright/studies/studies_fr.htm.
[278] See http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-conclusions_en.pdf.

be in part overcome. Further, most participants considered it important for the functioning of the Internal Market to reach a higher degree of efficiency and convergence. In connection to this, it was pointed out that particular attention was to be paid to the interface between control based on competition rules and other rules.

The subsequent conference on the subject was held in Santiago de Compostela, on 16-18 June 2002, with a title "European Copyright Revisited". Here again, the opinion was expressed by the participants that it was to be more appropriate for all aspects of rights management to be tackled by those responsible for the policy framework in the area of copyright and related rights. This view was shared as well by Professor Thomas Dreier in his speech. "In view of the discrepancies of […] national rules, however, the EU might feel called upon to harmonize in this area in order to create a level playing field, and provide more detailed guidelines than there are at present by way of the case law handed down by the ECJ.

In this regard, one point merits special attention: if legislative action is taken at the EU-level regarding collective licensing, such action should be initiated by the copyright experts rather than by the antitrust division. The reason for this is relatively simple: due to the nature of rights in copyrighted subject matter, collective licensing is in many respects different from collaborative behaviour in other market sectors and with regard to other goods and services. True, collective licensing should be guided by a framework inspired by competition law concerns, but this framework should be tailored to the particularities of copyrighted works and the special needs of authors, rightholders, commercial and non-commercial end-users alike."[279]

9.5. The Echerer Report and the Resolution of the European Parliament

In the light of the above events with regard to collective management of copyright and neighbouring rights, the European Parliament, on 16 January 2003, authorised the Committee on Legal Affairs and the Internal Market to draw up an own-initiative report on a Community framework for collecting societies for authors' rights. As a rapporteur, Raina A. Mercedes Echerer was appointed in May 2003. The Echerer Report[280] was tabled on 11 December 2003. The Commission had promised in 2002 to issue a Communication, however, despite the consultations on the issue since 1995, there was no approximation of national laws in the field of exercise of rights. Therefore, the Parliament took the initiative with the report.

The attitude of the Parliament shows well in the explanatory statements. In the centre of the approach is the author. Through the provided protection, copyright and neighbouring rights safeguard creativity, investment, growth, jobs, cultural diversity and access to quality products. That is, they are not just an end in themselves, but are also in the public interest. In safeguarding the authors' interests, the dominant position of collecting societies is necessary to counterbalance the financially more powerful users. To that end, the report even suggests a possible exception under competition law. As a justification, it basically calls into question the existence / exercise dichotomy by asking: "What use is a position that is recognised and safeguarded by law, if it cannot be exploited because of the need to protect competition?"[281] It even projects the Parliament's position on the present situation, when it says that a misguided

[279] See http://ec.europa.eu/internal_market/copyright/conferences/2002-06-conference-speech-dreier_en.htm.
[280] Report by the European Parliament on a Community framework for collecting societies for authors' rights (2002/2274(INI)), 11 December 2003.
[281] P 16.

insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification of rights and dumping tariffs.

The report is of the opinion that the basic principles of copyright law provide the foundation for all forward-looking notions on rights management in the EU. Therefore, to complete the internal market in copyright, a conceptual approach is required. In line with this approach, the heterogeneous and complex national rights management systems have to be simplified and to undergo a reform thereby accomplish comparable parameters. With regard to these parameters, the report identifies the essential points: organisational form, conditions for authorisation, areas of activity, internal structure, reciprocal agreements, cultural/social operations and functions in the public interest, supervision/control over collecting societies and their activities, arbitration mechanisms, and transparency. The report identifies several problematic issues that need to be solved. With regard to the internal structure of collecting societies, frequently a democratic deficit can be observed since right holders are not in a position to decide for themselves the substantial issues. Sometimes they are without voting rights, or at least, they have no influence on the decisions taken. In the boards, the right holders do not have enough power to represent their interests in the body, which were to protect their interests. As to the reciprocal agreements, unfair practices such as discriminating between nationals of right holders were mentioned. Further, the report favours A-agreements over B-agreements.[282] Supervision and control are crucial questions, as they are non-existent in certain countries, though they are of high importance in the proper functioning of collecting societies. Access to arbitration mechanisms is to be made possible. Finally, transparency is of primary concern in the publication of tariffs, allocation formulas, annual accounts, information on reciprocal agreements, and on management costs, with regard to coding standards and the exchange of information between collecting societies.

The Committee on Economic and Monetary Affairs gave an opinion from a more competition policy standpoint. It suggested, *inter alia*, the following.

"[C]ompetition must be the fundamental rule in the internal market and that monopolies may be tolerated only by way of justified and clearly regulated exceptions."[283]

"[H]aving regard to experience in the film industry, […] competition also to be strengthened wherever possible in other areas of copyright and neighbouring rights."[284]

"[E]xisting territorial monopoly structures to be reviewed and if appropriate confined to those sectors in which it can be shown that the necessary protection of authors' interests allows no alternative."[285]

"Considers it necessary to introduce, as soon as possible, full transparency on the part of collective management societies; this includes showing administrative and licence costs separately in the accounts, creating clearer, more comprehensible structures in connection with the exercise of rights, taking into account economic effects when setting tariffs,

[282] A-agreements: exchange of data and licences, and reciprocal payment. B-agreements: no data or licence exchange, and no reciprocal payment, monies remain in the country of licensing.
[283] Point 1.
[284] Point 2.
[285] Point 4.

introducing transparency in respect of the flow of fees between collective management societies and establishing more effective supervision."[286]

Not surprisingly, the Committee on Culture, Youth, Education, the Media and Sport gave a more author / culture centred opinion. Some of the suggestions are presented here.

The Committee emphasized the important role of collective management in stimulating cultural creativity and influencing the growth of cultural and linguistic diversity. The importance of finding a balance between the interests of artists and right holders, and the need to ensure optimal dissemination cannot be overestimated.

The Committee "[r]ecognises the important role of collective management societies which are an indispensable link between creators and users of copyrighted works because they ensure that artists and right-holders receive payment for the use of their works since technological developments have led to new forms of protected works, especially in the multimedia sector, and have increased the possibilities for international exploitation of intellectual property rights and individual artists and right-holders find it impossible to track the new difficulties by themselves."[287]

Further, it was emphasized that due account must be taken of the cultural dimension. Accordingly, the pursuit of profit is at odds with the character of the collective management societies as trustees of other people's property.

The Committee also stressed that "collective management societies are the most significant option for the efficient protection of the copyright of the artist and must operate according to the principles of transparency, democracy and the participation of creators."[288]

Based on the Echerer Report, on 15 January 2004, the Parliament issued a resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights[289]. The resolution endorsed the opinion of the Committee on Economic and Monetary Affairs only to a limited extent, e.g. the suggestion that where collective societies perform public functions from a position of monopoly, they have to be appropriately regulated in order to ensure the transparency required under competition law. At the same time, more than two thirds of the suggestions of the Committee on Culture, Youth, Education, the Media and Sport were incorporated into the text almost word by word.[290]

The Parliament pointed out that the exercise and management of rights is based on the principle of territoriality and international treaties. In connection with this, it expressed its view that a Community approach in this area "must be pursued while respecting and complying with the principles of copyright and competition law and in accordance with the principles of subsidiarity and proportionality"[291], and their functions as trustees and their responsibilities for cultural and social aspects and society have to be taken into account.

[286] Point 7.
[287] Point 5.
[288] Point 13.
[289] European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI)), 15 January 2004.
[290] Points 2, 3, 4, 5, 6, 7, 10, 11, 13, 14 and 15.
[291] Paragraph 12.

Regarding competition issues, the Parliament noted that the mere fact that collecting societies hold *de jure* and *de facto* monopolies does not pose any competition issues. However, unreasonable restrictions on members and on access are to be avoided. Competition law plays an important role in detecting and eliminating possible abuses of dominant position in individual cases. The Parliament was concerned with the increasing vertical concentration of the media, therefore called the Commission to monitor these concentrations and their effects. Besides, the Parliament added that "a Community approach should take full account of the specific features of the ownership and exercise of copyright and neighbouring rights in order to avoid both economic and cultural misallocations."[292] Accordingly, the Parliament was of the view that competition law approach should be limited to cases of abuse. The Parliament called for "the restriction of competition law to cases of abuse, subject to introduction and supervision of the necessary transparency, so as to safeguard rights management effectively both now and in the future."[293]

The Parliament observed that national rules on collecting societies varied too much. Therefore, the creation of common tools and of comparable parameters and the coordination of collective management societies' areas of activity is of high priority. In fact, the harmonisation of almost all the aspects of the management of rights was a major theme in the document. Accordingly, the Parliament called for the establishment of minimum standards for organisational structures, transparency, accounting and legal remedies. This would provide the appropriate level of legitimacy for the activity of the collecting societies since the internal democratic structures are instrumental in this regard. As a practical matter, this would be achieved, inter alia, by enabling those entitled to exercise rights to send representatives of their choice with voting rights to members' meetings, and, being similarly important, right holders' interests should be represented with effect in the management bodies. As an adjunct matter, the Parliament called for an end to the conflicts of interest (e.g. right holders being users at the same time) in the operation of collecting societies.

With regard to reciprocal agreements between collective management societies, the Parliament noted that these agreements had been explicitly recognised as admissible by case law, provided that no competition harm was done. At the same time, the B agreements were called to an end by the Parliament.

The control mechanisms, where such exist at all, differ significantly between Member States. Accordingly, the Parliament called for "efficient, independent, regular, transparent and expert control mechanisms in all Member States, which take into account all the legal, social, financial and cultural aspects."[294] Comparable and compatible arbitration mechanism and affordable access to them was considered vital, further appropriate procedures for cross-border settlement of conflicting decisions in the Member States were to be sought, the Parliament said.

The transparency and the control mechanisms would be supported if societies were to make public appropriate information, such as tariffs, distribution keys, annual accounts and information on reciprocal agreements. In this regard, the Parliament considered it necessary "to establish, in the event of a Community approach, a framework for minimum standards for the calculation of tariffs, thereby contributing to introducing the transparency required in

[292] Paragraph 16.
[293] Paragraph 17.
[294] Paragraph 48.

accordance with competition law."[295] Further, a framework for minimum standards for the calculation of tariffs, and the listing of appropriate management costs were considered necessary by the Parliament.

As to the information exchange between societies, access were to given to each other's economic data. Even more, the Parliament supported the call for a central pooling of the necessary information about right holder represented by them and the rights granted by the latter.

As can be seen from the resolution, the Parliament's approach can be summarised as follows. The author and the European culture are of central concern for the Parliament. In the maintenance of cultural diversity, and the protection of authors' rights, collecting societies play a vital role, which should be kept in place for reasons spelled out above. Therefore, competition law is to be confined to areas where abuse of dominant position takes place in particular cases. However, the Parliament acknowledges the disparities regarding the national rules and provisions, and the structures and practices of collecting societies within the Community, which hinder the attainment of internal market and the full realisation of the information society. Therefore, a wide harmonisation is desired covering both structural and procedural issues, such as representation, control, procedures for the settlement of cross-border conflicts, exchange of information, standards, etc. Transparency and uniformity are, therefore, to be achieved, which would ease competition concerns at the same time.

9.6. The Communication of the Commission

The consultation process, initiated by the Commission, began in 1995 with the Green Paper. Up till 2002, an extensive consultation took place including hearings and conferences. As the Commission summarized it, the general conclusions of these consultations were threefold.

"Firstly, there was overall consensus that an Internal Market in rights and exceptions could not be achieved without sufficient common ground on how the rights are exercised. Secondly, collective management is, in several sectors of the market, in the interest of both rightholders and users. Most stakeholders agree upon the economic, cultural and social functions of collecting societies. Thirdly, there is a widespread call for a higher degree of convergence of the conditions under which collecting societies operate with a view to increasing their efficiency and achieving more accessible licensing especially at Community level."[296]

The Commission observed that both users and right holders gave voice to criticism regarding collecting societies. Users were critical on the tariffs, supervision of collecting societies and access to courts or arbitration, administrative fees charged by the societies, the length of negotiations, and the lack of transparency regarding the pricing policy. From the right holders' side, those with significant bargaining power formulated the intention to be more independent from collecting societies. At the same time, smaller right holders or related rights were critical to the system of the so-called "B" contracts.

[295] Paragraph 51.
[296] Communication p 16.

Concluding the consultation process, the Commission issued a Communication[297] on 16 April 2004, which deals with the management of rights (both individual and collective). In the document, the Commission sees into whether the current methods of management hinder the functioning of the Internal Market, taking into account the Information Society. The two issues in connection to collective management of rights, around which the Communication has been drawn up, are Community-wide licensing and good governance of collecting societies.

9.6.1) Community-wide licensing

The Commission noted that a recurrent theme of the consultation had been the issue of Community-wide licensing. This was propagated, not surprisingly, by international commercial users. In posing the question whether the development of Community-wide licensing should be left to the market or to the Community legislator, the Commission drew up six alternative options.[298]

1. A most effective option would be to provide through Community legislation that any licence regarding the rights of communication to the public or making available, at least as regards activities with a cross-border reach, authorises by definition acts of use in the entire Community. The Commission noted, however, that this option would amount to a partial removal of the principle of territoriality.

2. A less radical option would be to adopt the model chosen for satellite broadcasting under Directive 93/83/EEC, where the relevant act of communication to the public occurs solely in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. However, the desired result of multi-territorial licensing most probably would not realise, without limiting the contractual freedom of the parties.

3. The exclusive communication to the public and making available rights could be reduced to a remuneration right subject to mandatory collective management. However, this solution would go against both the InfoSoc Directive and the WIPO WCT and WPPT Treaties. Therefore, this was not a real option.

4. Granting commercial users the freedom of choice as to the collecting society in the EEA granting the required licence. Such a model was put in place by the Simulcasting agreement[299].

5. Collecting societies could be mandated, under certain conditions, to offer Community-wide licences. This solution, too, would require efficient and accountable collective rights management across the Community, including the existence of the necessary reciprocal agreements between collecting societies, which put them in a position to clear rights also for territories other than their own.

[297] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market COM(2004) 261 final, 16.04.2004.
[298] Communication, p 9.
[299] See point 10.2.2. on p 141.

6. At the less interventionist end, another model would be to focus exclusively on the modalities of collective management by collecting societies, as they are mostly in charge of the management of those rights for which the claim for Community-wide licensing has been strongest. At the same time, centralised licensing arrangements, like the ones described above, could be fostered by eliminating further any disparities in Member States' laws regarding the conditions of collective management and introducing at EU level good governance rules for the functioning of collecting societies.

9.6.2) Good governance of collecting societies

The Commission took the view that besides the application of competition law, an Internal Market in the collective management of rights could be best achieved if a legislative framework on good governance were established. Consequently, in this Communication the Commission explicitly settled on the choice that the development of Community-wide licensing should be left to the Community legislator. The Commission presented four features of collective rights management where common grounds are required in order to achieve a level playing field. These features are the following.

1. The establishment and status of collecting societies

Though their efficiency is not linked to their legal form, collecting societies, in their role as right holders' trustees, have particular responsibilities due to the economic, cultural and social functions they fulfil. Therefore, argues the Commission, the establishment of a collecting society should be subject to similar conditions in all Member States. "In order to promote good governance, common ground appears to be required at Community level in relation to the persons that may establish a society, the status of the latter, the necessary proof of efficiency, operability, accounting obligations, and a sufficient number of represented rightholders."[300]

2. The relation of collecting societies to users

With regard to the tariffs and the licensing conditions, the Commission is of the view that societies should be obliged to publish their tariffs and grant a licence on reasonable conditions. Furthermore, users should be provided with the possibility to contest the tariffs. With respect to the licensing conditions, common principles should be established, for instance, on the obligation of collecting societies to grant licences, and under appropriate or reasonable conditions.

3. The relation of collecting societies to right holders

Taking into account their monopoly-like position, the principles of good governance, non-discrimination, transparency and accountability of the collecting society in relation to right holders are of particular importance. The Commission adds that "[t]hese principles should apply to the acquisition of rights (the mandate), the conditions of membership (including the end of that membership), of representation, and to the position of rightholders within the society (rightholders' access to internal documents and financial records in relation to distribution and licensing revenue and deductions, genuine influence of rightholders on the

[300] Communication, p 18.

decision-making process as well as on the social and cultural policy of their society). Regarding the mandate, it should offer rightholders a reasonable degree of flexibility on its duration and scope. Furthermore, in the light of the deployment of Digital Rights Management (DRM) systems, rightholders should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually."[301]

4. The external control of collecting societies

When it comes to the external control of collecting societies, the establishment of common ground on certain parameters is of high importance, as the differences between national rules is against the interest of right holders.

The reasons for harmonising and achieving a common ground for these features are summarised in the following way. "The efficiency, transparency and accountability of collecting societies are crucial for the functioning of the Internal Market as regards the cross-border marketing of goods and provision of services based on copyright and related rights. A better functioning of the Internal Market in collective rights management can only be achieved if there is greater common ground which includes the establishment and status of collecting societies; their functioning and accountability subject to rules of good governance; as well as their internal and external control, including dispute settlement mechanisms. Defining general conditions for these features through a Community framework instrument would achieve the objectives outlined in this Communication."[302]

As it can be gathered from the various documents throughout the consultation process, the position of the Commission has gradually changed. While in the beginning the adaptation of the regime of collecting rights management to the digital environment was to be left to the market, later on the matter was to be subject to studies, and various consultations took place. By the end of the consultation period the Commission's view in the Communication shifted from non-legislation to legislation; and it concluded that abstaining from any legislative action did not seem to be an option any longer. "To rely on soft law, such as codes of conduct agreed upon by the market place, appears to be no appropriate option. The conclusions of the consultation process have confirmed the need for complementary action on those aspects of collective management, which affect cross-border trade and have been identified as impeding the full potential of the Internal Market. […] In order to achieve the objectives outlined in this Communication, the Commission intends to propose a legislative instrument on certain aspects of collective management and good governance of the collecting societies."[303]

9.7. Consultation on the Communication

Having declared the intent on legislating on the issue of collective rights management, the Commission, on 21 April 2004, launched a supplementary **consultation**[304] to allow further discussion for the interested parties. The timeframe for the consultation was very short, allowing only two months for submitting comments.

---

[301] *Ibid.* p 19.
[302] *Ibid.* p 4.
[303] *Ibid.* p 19.
[304] MARKT/E4/AA/D(2004) 6036, available at http://ec.europa.eu/internal_market/copyright/docs/management/consulation-letter_en.pdf.

Over one hundred comments were received from various stakeholders: collecting societies, right holders, users, and other interested parties. The views expressed in written submissions can be fairly well gathered into groups that correspond to interests of those making the comments. Accordingly, the main points of the interest groups will be arranged so as to follow the structure of the Commission's Communication.

9.7.1. Community-wide licensing

This issue, by its very nature, is in the interest of nearly all users. They see Community-wide licensing as the key issue to the realisation of the Internal Market, where users are free to shop around in the whole territory of the Community and can purchase rights across borders. This, amongst other things, would help to make collecting societies more transparent regarding costs. As it is argued, global activities need global licensing solutions.[305]

Some argue that on-line technologies make territorial restrictions no longer justified.[306] Others take reciprocal representation agreements between collecting societies as territorial restrictions, whereby customers are allocated, and which is contrary to the Internal Market.[307]

Broadcasters are of the opinion that the clearance of rights on the country-of-destination principle in the digital environment would do little on efficiency to them, as they would still obtain all the licences from the territories affected. Instead, taking the Satellite and Cable Directive as a workable example, the country of uplink should be implemented. Therefore, licensing should be based on a country-of-origin basis.[308] In connection to this, it is argued that the "mere *reception* in other countries of cross-border broadcasts is not, and has never been, a separate act under copyright law."[309] And that "there is no compelling reason why the Internet simulcasting of broadcasts in Europe should be treated differently from satellite broadcasts."[310]

While most of the stakeholders are of the view that Community-wide licensing should be left to the market, some are of the opinion that a legislative framework would be necessary.[311] "While the initial presumption of the Communication is that cross-border licensing should be market-led, the readiness of the Commission to consider, as necessary, the whole range of possible legislative options (including the most radical) clearly demonstrates the vital importance which the Commission attaches to this issue."[312]

---

[305] BBC, p 4.
[306] Telecom Italia Group, p 1.
[307] Bertelsmann, p 1.
[308] BBC, p 5.
[309] EBU, p 1.
[310] EBU, p 2. Therefore, EBU provides the following clarifying definition: „The act of communication to the public by streaming, for simultaneous reception by the public, on the Internet or other communications networks occurs solely in the Member State where protected material is introduced, under the control and responsibility of the transmitting organization, into the network."
[311] For instance Footprint Music Limited would prefer a legislative approach as it would provide a more comprehensive solution. „In light of the Modernisation of EC competition law, a legislative approach would reduce the uncertainty as to whether ad-hoc agreements between societies for extra-territorial licensing are in fact permissible and would provide a level playing field for Community-wide licensing that would encourage competition between collecting societies for the provision of licences to users.", p 4.
[312] EBU, p 1.

Record producers – being both users and right holders – are of the view that "[a] forced intervention in the form of compulsory licenses, or similar mechanisms would not only be incompatible with the copyright system but would also constitute a major interference with the functioning of the industry, with its contractual practice and business models."[313]

Collecting societies argue that territoriality is an essential feature of not just collective rights management, but copyright law as such. This principle is enshrined in international law and is recognised by the Community. "Rights management, whether individual or collective, is based on this principle. The development of the Internet cannot be used as a pretext to undermine this principle, unless the very philosophy behind intellectual property is denied, which would be unacceptable. The adaptations that are necessary as a result of the exploitation of works without frontiers do not, furthermore, mean that the territoriality of rights must be denied."[314] Further, it is added that competition law and the principle of freedom of movement serve as a sufficient framework.

In addition to the above, it is argued that the fast-moving nature of the on-line market and the still developing business models make it an inappropriate target for legislative approach. Therefore, it should be left to the market to come up with the solution that is acceptable for all the stakeholders. "[T]here is a danger that an alternative interventionist approach will either inhibit the market or artificially reduce the market value of the creative product. Exhaustion of the communication right would, for example, lead to pricing for the whole European Economic Area being set at the lowest level in a single territory. Applying country of origin would produce a similar result as large businesses move to the territory with the lowest rate. The result of this forum shopping on tariffs would be to devalue the creative product, ultimately to zero."[315] One suggested possible way of upholding the value of music could be the principle of paying a licence fee at the tariff in the country of destination of the on-line delivery.[316]

Publishers expressed their views with regard to Community-wide licensing. They argue that European Central Licensing Agreements have proved to be working efficiently, providing users a one-stop-shop solution, thus these agreements should not be replaced, but should be applied to the on-line environment.[317] Other publishers argue similarly: "[I]t is important to stress that EEA-wide licensing should not lead to the value of copyright in the national territories being eroded in a "race to the bottom" in terms of the value of copyright. Therefore, although such EEA-wide licensing should give rise to efficiencies regarding the costs associated with managing the rights and collecting the royalties, it should not affect the value of the copyright or detract from the collecting societies' primary function of maximising the remuneration paid for a writer's effort. Therefore, the value of copyright should be set in accordance with the principle of "country of destination" and should not be set in the so-called "country of origin" where the EEA-wide licensing agreement is entered into. Competition between collecting societies should be based on efficiency and not price in this regard."[318]

[313] ifpi, p 3.
[314] GESAC, p 14.
[315] PPL & VPL, p 3.
[316] musi©publishersassociation, p 10.
[317] musi©publishersassociation, p 10.
[318] IMPA, p 12.

Regarding the competition on efficient administration that the Commission would like to see by introducing a Community-wide licensing, collecting societies oppose to this arguing that efficiency would mean a reduction in quality. "The system of free competition which the Commission Competition authorities seem to be willing to impose, would be highly dangerous if applied in a general way, as it would result in putting smaller CMS out of business and consequently in the reduction of performers' revenues. The same system cannot be necessarily applied to all the rightholders' categories and to all the rights."[319]

9.7.2. Good governance of collecting societies

The institution of collective management of rights is for the most part recognised by users. For instance, the BBC regards collecting societies as such that have a key economic function. Even more, it says that "[t]he only practical system for licensing, collecting, allocating and distributing on digital uses will be the collecting societies."[320] At the same time, users share the Commission's opinion that there should be a level playing field for the establishment of collecting societies.

As to the question of efficiency, it was observed that the obligation to give very detailed reports to collecting societies on the exploitation is very time-consuming. Further, some societies still work on paper based reporting, and even the electronic reporting procedures are not compatible with each other.[321] Accounting requirements are also different in the various Member States.

Transparency is a central question as well. Most users would like to see transparency in almost all activities of the societies. "For users, this transparency shall be materialised in a right to be informed on different aspects such as (i) tariffs; (ii) standard agreements; (iii) financial terms agreed with other users; (iv) rules governing the distribution of the collected amounts; (v) the administration costs level as to the rights and uses; (vi) the scope of the repertoire; (vii) the reciprocal agreements in force."[322]

Collecting societies, on the other hand, argue that the Commission could not demonstrate that legislative action is needed in connection to collecting societies. National legislation deals adequately with the specialities and the emerging problems.[323]

As a more general point, it is argued that "[a]s regards the users, they will use any possibility to press the prices of the rights of the creative artists, and this points in the direction that the users unilaterally are interested in an EU harmonization of the area to be used as a tool to lower the prices in accordance with the lowest European common denominator."[324] Or, as it is phrased in another way, "[t]he main voices that call for a European legislative intervention in the field of collective management are those who consider intellectual property as an obstacle for their commercial activity. Their objective is not to favour the establishment of an internal market, which is not in our opinion endangered by the disparity of collecting societies' status."[325]

[319] GIART, p 2.
[320] BBC, p 3.
[321] Association of Commercial Television, p 6.
[322] The representatives of Spanish cable operators: AOC, ONO and AUNA, p 8.
[323] E.g. GESAC and the Finnish collecting societies.
[324] KODA, pp 2-3.
[325] AEPO, p 5.

At the same time, performers' societies put forward somewhat different views. As neighbouring rights and their enforcement are less developed than copyright, representatives of performers favour harmonisation. As an illustration to this, GIART proposed the following amendment to be introduced to the Echerer Report: "Calls for harmonisation of distribution systems based on proportionality in respect of rights to use a right-holder's repertoire. In practical terms, there should be transparent, separate and precise distribution of the sums obtained collectively, in proportion to the use made of each of the works of a right-holder. Right-holders must enjoy national treatment free of any restrictions within the EU."[326]

When it comes to efficiency, most of the collecting societies stressed that efficiency, meaning lower administration cost, as users see it, could and would mean the reduction of quality in the services, for instance poorer distribution. The most efficient does not mean the cheapest. It is also pointed out, that collective rights management results in enormous savings for the users. And to this respect, users and the societies bear their respective costs.[327]

Transparency is in general supported by collecting societies, however, it is also to be remembered that the information remains subject to normal trade and personal data protection rules, and confidentiality clauses. As a transparency matter, according to some, the cultural and social functions are to be separated as well.[328]

1. The establishment and status of collecting societies

As to the question of establishment and status of collecting societies, it is argued that there does not appear to be a link between the conditions for incorporation and the operational management. Furthermore, a number of codes of conducts are in place. However, certain stakeholders would favour the association model "as it assures the greatest level of participation of the right holders in the management and the adoption of clear and transparent criteria for rights collection and distribution."[329]

Regarding their role, certain stakeholders were of the view that the commercial and profit making functions (marketing, organising and selling of tickets to performances, recording artists' works and selling the recorded works on CDs and phonograms) should not fall within the scope of the roles of collecting societies or at least be strictly limited and be separate from the administrative function.[330]

2. The relation of collecting societies to users

Users' concerns regarding collecting societies are attached to the tariffs and the terms of licensing.

A typical complaint is that users do not have the choice from which society they choose to buy their rights.[331] Accordingly, users' freedom as to choose a society would be welcomed.

[326] GIART, p 4.
[327] KODA, p 4.
[328] ifrro, p 4.
[329] A.F.I. p 8.
[330] IMPA, pp 5-6.
[331] Association of Commercial Television, p 9.

Further, the setting of tariffs and licensing terms are regarded as not transparent and not reasonable. With this regard, collecting societies are looked upon as monopolies, which abuse their dominant position, and no independent control is in place. "In practice, collecting societies fix their tariffs independently. As a result, cable operators are not given the possibility to know neither the criteria applied for the determination of the tariffs nor the specific rights remunerated through the payment of the tariff."[332] To rectify this problem, it is recommended that the Commission should set objective criteria as to the determination of the tariffs, which should be based on the actual use. These factors should reflect the true value of the intellectual property right being exploited.[333]

In some Member States the rates are calculated on the receipts while in other Member States a flat rate is applied. Users would prefer rates that are negotiated instead of set arbitrary by collecting societies, and rates that are based not on their income.

It is also proposed that "copyright blanket agreements or licences, wherever and with whoever they are negotiated, should cover only the needs of the applicant broadcaster and nothing beyond that. In other words, the broadcaster should be able to buy the content he needs and not be obliged to buy more."[334]

Further, the differences in the Member States regarding the calculation of payments give some broadcasters in certain countries a competitive disadvantage. Therefore, harmonisation is strongly advocated by the users. It is argued that while "it is difficult to harmonise the tariffs across Europe due to inter alia differences in copyright law, national traditions, market size and other elements, but the criteria for setting them could very well be similar throughout Europe. A large variation in tariff, for the same piece of music or other work, constitutes an unfair situation in the Internal Market, for example broadcasters in Northern Europe usually pay a lot more for the same piece of a work than the ones in Southern Europe."[335]

Regarding commercial broadcasters, comments were submitted that they are being discriminated by collecting societies against their publicly-funded competitors.[336]

Administrative costs are often not justified and the lack of transparency is a problem. There are many who would like to see a division between administrative fees and copyright fees.[337] Some believe that the Commission does not go far enough, and the breakdown of tariffs should include the amount payable to cultural funds.[338]

In general, all users would like to see competition between collecting societies with regard to pricing and services. Whereas right holders warn that "the competition based on the administrative costs can be unfair if the different CMS have different functioning and do not do work with the same standards (for example a society who does not distribute the money collected in a proportional and individual way has lower administrative costs than a society who distributes nationally and internationally in a precise, individual and proportional

[332] The representatives of Spanish cable operators: AOC, ONO and AUNA, p 10.
[333] Footprint Music Limited, p 3.
[334] Association Européenne des Radios, p 3.
[335] Association of Commercial Television, p 11.
[336] Association of Commercial Television, p 10.
[337] For instance the Association of Commercial Television, the representatives of Spanish cable operators: AOC, ONO and AUNA.
[338] EICTA, p 5.

way)."[339] This opinion was affirmed by the independents as well: "By weakening collecting societies the EC antitrust services are comforting business models that marginalize the SMEs that form the bulk of the music industry. Collective management should be defended by antitrust authorities as the best means to ensure that production and distribution of cultural goods and services are not left to a few communication oligopolies."[340]

As opposed to users, collecting societies experience quite different problems in connection to their relationship with users. Contrary to the arbitrary tariff-setting referred to by the users, collecting societies submit that they are "often faced with powerful, well-organised users, making the contractual bargaining power economically unfavourable to societies and not allowing the latter, in some cases, to obtain decent remuneration. Moreover, users do not always pay the royalties even thought they are exploiting the works."[341] Further, as the Communication does not differentiate between copyright and neighbouring right collecting societies, it is to be added that in the performers sector it is the collecting society which is in the weaker position.[342]

As counterarguments to the allegations of users, GESAC puts forward the following:

"Societies should be obliged to publish their tariffs: this obligation leads one to think that the societies have pre-determined tariffs which they set unilaterally and impose on users, which does not correspond to the reality. Apart from private copying and reprography in some cases, where rates are fixed by legislation or regulations and not by the societies, the royalties collected are negotiated with users or their representatives. While the same rules apply to all users in the same category, this does not mean that they are "tariffs" properly speaking. Moreover, in some fields of exploitation (for example radio and TV broadcasting), societies often negotiate individual and specific agreements; here again, remunerations are clearly and freely negotiated, and are not imposed by societies.

Societies should be obliged to grant licences under appropriate or reasonable conditions: any system obliging societies to grant licences would be tantamount to a compulsory licence and would be quite contrary to national, international and Community law. Moreover, the obligation of complying with *appropriate and reasonable conditions* is quite pointless given that competition law in fact is intended to prevent and penalise abuses of rights.

Users must be in a position to contest the tariffs: experience in countries where bodies are set up specifically to receive users' complaints shows that while these bodies are intended to settle disputes on a completely objective basis, they often revise righholders' requests for payment downwards, through often very costly procedures, arousing mistrust on the part of rightholders and reluctance to allow them to be generally established."[343]

It is also underlined by many that users should be subject to certain obligations as well. On several occasions users fail to disclose vital information during negotiations.

Phonograph producers have their own problems. "[T]he collecting societies of related rights do not represent the "repertoire" of individual works but instead represent the record labels.

[339] GIART, p 5.
[340] IMPALA, p 3.
[341] GESAC, p 17.
[342] British Equity Collecting Society, p 4.
[343] GESAC, p 17.

Therefore the identification of the ownership of the work requested by the user as well as the indication of the relative licensing conditions are currently impossible. In order to enable collecting societies of related rights to make licensing conditions and tariffs available to users, a system based on the identification of the single work should be provided as in the system for copyright collecting societies. This is possible only if phonographic producers are required to register each of their works with the collecting society of related rights."[344]

3. The relation of collecting societies to right holders

Collecting societies argue that rules on good governance with regard to their relationship with right holders are already in place.

Collecting societies are to represent their members as a whole. Therefore, some argue that the withdrawal of certain rights, the management of which is the easiest and least costly, and leaving those rights with the societies that are the most difficult to manage is a practice that goes against the interest of the members.[345]

Publishers lay significant emphasis on their entitlement of being represented on the boards of collecting societies. Their ratio on the board should be proportional to their economic importance, they say.[346] As IMPA suggests, the membership on the board should consist of the right to approve motions concerning rules on terms of licensing agreements, grant of licenses, collection of royalties, distribution of royalties, further concerning annual accounts, changes to the collecting society's constitutional documents (memorandum and articles of association), budget for the forthcoming year, and any extraordinary expenses above a stated threshold.[347]

They consider it important to have the possibility to entrust the rights on a non-exclusive basis. "[T]here should be no obligation upon Rightholders to assign the management of all the rights to one collecting society in a given territory; Rightholders should have complete freedom to choose how each category of rights should be managed."[348]

4. The external control of collecting societies

This issue is strongly supported by many users. Collecting societies should be subject to regulatory scrutiny, both from competition and financial authorities.

For instance, some are for a system where users would be provided guarantees against claims of other collecting societies. For instance, Vodafone argues that it often confronts legal uncertainty: "we cannot always be certain that dealing with a rightholder directly is sufficient to clear all the various rights such that we will not be faced with a claim from a collecting society once a service is launched."[349] Therefore, EBU favours the Nordic system of "extended collective agreements", whereby "agreements freely negotiated between users and

[344] A.F.I. p 8.
[345] GESAC, p 18.
[346] musi©publishersassociation, p 8.
[347] IMPA, p 7.
[348] IMPA, p 4.
[349] Vodafone, p 2.

collecting societies of rightowners are extended by law to non-represented rightowners in the same category."[350]

As a concluding observation on the Commission's Communication it is worth quoting KODA here. "It is worrying that the Communication reflects a general imbalance, where the mentioned regulation areas without exception will improve the position of the users, whereas the important cultural and social tasks carried out by the collective societies are not taken into consideration or focused on. The rightholders receive an important part of their income from the collective societies, and a user-oriented regulation – naturally caused by the user-oriented viewpoints of the Communication – will result in an income reduction."[351]

In particular, it is a problem that the Communication seems to be based upon the exploitation and distribution possibilities created due to digital networks although this area is only of minor importance to right holders as well as to users (at least for the time being). Further, experience has taught us that global Internet services in reality are local, as they follow the cultural and economic diversity of the world. This holds true for the European Union as well.

Finally, there is a lack of a precise and adequate description of the circumstances characterising various forms of collective management. It is problematic that the description of collective management in the Communication is apparently a description, which neither is in compliance with actual or legal circumstances, nor does it include the different circumstances reflected in collective management of authors' rights and related rights.

Held at the same time when the comments to the Commission's Communication on the management of copyright and related rights in the Internal Market were due, on 20-22 June 2004, the Commission organised a conference in Dublin, titled "Copyright for creativity in the enlarged European Union".

Not surprisingly, the issues of collecting management of rights were high on the agenda. Stakeholders presented the views corresponding to those that were outlined just above. Users were advocating Community-wide licensing and competition between collecting societies. Right holders were defending their rights and the present system of collective management of rights. In its opening speech, Professor Dr. Reinhold Kreile, the then President of GESAC, argued that "[i]n the Commission's current general considerations about applying solutions from other sectors to the licensing of copyright exploitation rights in the Single Market, it is therefore essential not to forget in whose interest the collective administration of rights was created in the first place, namely in the interests of the authors in actually receiving the remuneration for use of their works, to which they are entitled by law, and not in the interests of the users in gaining as easy access as possible to copyright licences. The European Commission will undoubtedly take this into consideration when discussed further."[352]

The Commission was rather laconic on the issue by not saying any specificity, but at the same time it was implying its intention to move forward. "A proper functioning of collective management should therefore be ensured, bearing in mind its basic features such as the trustee role of collecting societies, their exclusive position (*ie, their de facto or de jure monopoly or at least their dominant position*) in the market, their cultural and social functions and the role

[350] EBU, p 5.
[351] KODA, p 7.
[352] Go to http://ec.europa.eu/internal_market/copyright/docs/conference/2004-dublin/kreile_en.pdf.

of societies in answering the call for more Community-wide licensing for the use of certain rights."[353]

9.8. Study – Commission Staff Working Document

The Commission took stock of the opinions and on 7 July 2005 issued a Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright.

The Communication of 16 April 2004 was to conclude the consultation process, and to "consider whether current methods of rights management are hindering the functioning of the Internal Market, especially with the advent of the Information Society."[354] It was to open a consultation involving all stakeholders from the music industry, thus the document was to draw up an objective picture on rights management. Notwithstanding, the Commission's intentions as to what way it already had chosen could be caught. On the one hand, while the Commission was still of the opinion that a Community-wide licensing should be left to the market, it presented various options as how it could be introduced – quite many elaboration on the subject when it was declared at the outset that a legislative measure could amount to a compulsory license. On the other hand, with regard to good governance, it downright concluded that "[a]bstaining from any legislative action does not seem to be an option anymore"[355], and the part 3.5 bears the title "The Issues that *require* (bold is mine) a legislative approach".

The Study is a policy paper, which presents options on the cross-border collective management of rights. Here, the Commission's approach, the traces of which were present in its Communication, is presented in its entirety. Community-wide licensing is not an issue to be left to the market anymore, but one that requires legislative approach.

How the Commission backs up its position, and verifies its turnaround, further, equally importantly, what options it offers are summarised in the following.

It is worth pointing out at the outset that the Communication was covering both individual and collective management of rights, further both copyright and related rights. The Study, however, narrows the scope to collective management of copyright with regard online music services.

9.8.1. Problem definition

The point of departure for the Commission is that there is a significant revenue gap between the US and EU when it comes to legitimate online music services. Besides acknowledging that the reasons for this could be many, the Commission concludes that the lack of innovative and dynamic structures for the cross-border collective management of legitimate online music services is one of them. And the Commission is satisfied with this *one* alleged reason, and does with the others in one sentence: "It is of little value to speculate as to the different reasons for this revenue gap…"[356] All in all, the Commission concludes that action is required

[353] Closing Speech by Thierry Stoll, Deputy Director General, DG Internal Market, go to http://ec.europa.eu/internal_market/copyright/docs/conference/2004-dublin/stoll_en.pdf.
[354] Communication, p 4.
[355] Communication, p 19.
[356] Study, p 6.

to narrow this gap. It is time to leave the system built in the analogue area, and innovative licensing solutions are required.

The Commission summarises the system of collective management of rights by highlighting some points. Collecting societies have to conclude bilateral agreements with each other, the number of which would amount to 300 (counting with 25 Member States), however some societies do not concluded such agreements with each other. Besides this, the umbrella organisations of these collecting societies issue so-called model agreements. The Commission concludes that these agreements apply a series of restrictions which are contrary to the fundamental EU principle according to which services (such as the collective management of rights) should be provided across national borders without restriction based on nationality, residence, place of establishment. "The Study has found that the core service elements "cross-border grant of licences to commercial users"[357] and "cross-border distribution of royalties" do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services."[358]

As a consequence of the current cross-border cooperation in collective management, the Commission identified the following main problems:

a) territorial restriction to copyright licensing;
b) discrimination in cross-border distribution of royalties;
c) membership rules restrict cross-border provision of services.

Ad a) territorial restriction to copyright licensing

Each collecting society is restricted to license in its territory, and by the representation agreements, it licenses the whole world repertoire. A member of a collecting society in a Member States cannot authorise another collecting society in another Member State to license his or her rights in that territory. According to the Commission these provisions of the CISAC model contracts account for territorial protection for all collecting societies.

Further, the Commission identifies problems related to territoriality with respect to mechanical rights management. It observes that the initiatives for putting in place multi-territorial licensing have failed.

Ad b) discrimination in cross-border distribution of royalties

Two main problems were identified. First, the lack of non-discriminatory distribution of royalties. Second, the incoherence in the distribution of royalties caused by the existence of types A, B and C agreements.

Ad c) membership rules restrict cross-border provision of services

Right holders are prevented to join a collecting society in another territory, which has the effect of "locking in members with the respective management societies which are in turn locked in to the network of reciprocal arrangements."[359]

[357] It is worth noting that collecting societies provide services only to their members, not to users.
[358] Study, p 9.
[359] Study, p 12.

The Commission has identified underlying drivers for the above problems. First, as a result of new technologies a new generation of international content provider emerged. Second, digitisation has a profound effect on the way how collective management of copyright works. Third, the Community has introduced the right of making available with the aim of facilitating cross-border exploitation. Fourth, international content providers are seeking licensing solutions that are better suited for their needs.

The Commission concludes that these drivers "create demand for new models for cross-border collective management services"[360], where a collecting society may grant a license to a territory determined by it, and where right holders have the freedom to join whichever collecting society.

The Commission found that the market had failed to put in place effective cross-border licensing structures and distribution of royalties. Having been identified these failures, the Commission set out its objectives.

9.8.2. Objectives

Considering the above problems, the Commission outlined the following general, specific, and operational objectives.

There are two general objectives. First, the opening up of Europe's large and mainly underexploited potential in legitimate online services, and thereby stimulating growth. Second, the strengthening of the confidence of right holders that the pan European use of their works will be rewarded.

Based on the general objectives, two specific objectives are presented by the Commission, which are further elaborated into operational objectives.

The first specific objective and its adjunct operational objectives are the following. The specific objective is to improve the accessibility of creative output, especially to online content providers, that is to "radically" improve the cross-border right clearance. The attached operational objectives are i) a licensing policy that satisfy to the needs of content providers, ii) the freedom of users to choose a collecting society, which in turn would bring about transparency, accountability, royalty distribution and the quality of enforcement, iii) the freedom of right holders to choose a collecting society, thereby collecting societies would compete with each other for the right holders, and iv) a significant increase in the number of multi-territorial licences.

The second specific objective is to foster a more efficient cross-border exploitation of copyright by strengthening the confidence of artists in that the pan European use of their works will be financially rewarded. The operational objectives thereto are i) the freedom of right holders to choose a collecting society and to switch between them, ii) putting in place structures that enhance transparency, accountability, equitable royalty distribution and enforcement of rights, and iv) the distribution of royalties to all right holders across Europe without discrimination.

[360] Study, p 25.

9.8.3. Policy options

For the attainment of the above objectives the Commission draws up three policy options.

Option 1 – do nothing

The Commission concludes that under this option only a limited form of multi-territorial licensing would be achieved. Furthermore, territoriality would continue to hinder the provision of cross-border management services.

Option 2 – eliminate territorial restrictions and discriminatory provision in the reciprocal representation agreements concluded between collecting societies

This option would open up the possibilities for users to choose freely any collecting society. At the same time, right holders would not have the possibility to choose. That is, under this option, collecting societies would compete for users. However, the Commission observes, this situation would not create competing repertoires as collecting societies would offer identical repertoires.

Option 3 – give right holders the choice to authorise collecting societies of their choice to online rights for the entire EU

By giving right holders the choice to authorise the collecting society of his or her (or its) choice, collecting societies would be forced to compete with each other for right holders. Combined with the possibility of giving Community-wide licences, this option would eliminate territoriality, as there would be no need of collecting societies representing each other. Each collecting society would then have its own repertoire to license for the whole territory of the EU. According to the Commission, this option would make collecting societies to compete on management services, which would be interesting to both well-known and small right holders. Additionally, this option would allow collecting societies to build up genre-specific repertoires.

9.8.4. Analysis of impacts

In all the analysed respects the Commission concludes that, on the one hand, the "do nothing" option would hamper the development on the market by keeping in place the present structure, while Option 2 would do little to improve the services of collecting societies, and on the other hand, Option 3 would provide the solution to the problems outlined above, and all the stakeholders would be better off. Besides, the Commission points out that Option 2 would be an incomplete solution.

Legal certainty – Doing nothing would preserve the legal uncertainty with regard to distribution of royalties and licensing for online exploitation of rights. While Option 2 would provide some degree of legal certainty for commercial users, it would still bear the risk that certain rights and/or right holders are not covered by the reciprocal agreements. Option 3 would create a much higher legal certainty, as the exact scope of the repertoire would be guaranteed by the collecting societies, and, with the lack of reciprocal agreements, the licence would provide immunity against infringement in the whole territory of the EU.

Transparency / Governance – The "do nothing" option would preserve the present system, which is unsatisfactory. Under Option 2 only a certain degree of transparency could be provided to right holders and users. By Option 3, on the other hand, collecting societies would have to compete for the right holders, and this would force collecting societies to be transparent and to adopt rules of good governance by themselves.

Culture / Creativity – By doing nothing, the present system of promoting national cultures would remain, while collecting societies will provide services for an increasing number of non-domestic right holders. Both Option 2 and 3 would enlarge the pie for the benefit of all right holders.

Trade flows – With the "do nothing" option the *status quo* would remain. Option 2 would eliminate territorial licensing and the customer allocation clause. Option 3, in contrast, would provide a competitive cross-border environment.

Innovation and growth – Doing nothing would not provide any incentive for developing new business models for the online environment. Option 2 would foster new models, however reciprocity would make the system very expensive. Option 3 would also stimulate new online services, however no single access point would be available.

Competition – While Option 2 would introduce competition between collecting societies as they would need to attract users, Option 3 would introduce competition between collecting societies vis-à-vis right holders, making it the "right-holders option".

Vertical integration of media – The increasing threat of the media industry could not be counterbalanced either by doing nothing or by Option 2 as bargaining power of collecting societies would not be increased. However, under Option 3 powerful collecting societies would emerge, which could effectively counterbalance the media industry.

Employment – Option 1 would hinder the introduction of new business models in the on-line media, which in turn would have its impact on employment. Both Option 2 and 3, on the other hand, would create employment opportunities by bringing about a lucrative Community-wide on-line environment for music licensing.

Consumers / Prices – With Option 1 no new services would be stimulated to take off. Neither would Option 2 achieve any results in this regard. By contrast, Option 3 would provide the possibility for collecting societies to differentiate prices between premium and other content.

Impacts outside the EU – While the "do nothing" option would have no impact outside the EU, Option 3 might have the effect that right holders from third countries would choose a collecting society from the EU based on the enhanced royalty flow.

9.8.5. Impact on specific groups

Very large collecting societies – While with Option 1 nothing would change, and Option 2 would bring about only initial gains, Option 3, in contrast, would make these societies very attractive to right holders because of their process of distribution, and to users because of their repertoire.

Large and medium size collecting societies – Doing nothing would preserve the status of these societies. Option 2 would provide new business opportunities for efficient societies. With Option 3, however, the status of these societies would be at stake, unless they become an agent of the large collecting societies.

Right holders – Under Option 1 foreign right holders will lose their confidence and trust in cross-border management of copyright. Right holders bargaining power would lessen as compared to the media sector. In the long run, Option 2 would threaten the revenues of right holders as competition on administrative fees would lead to a downward spiral. As opposed to these, Option 3 would create a system where right holders can rely on their collecting societies and their bargaining power vis-à-vis the media sector.

Online content providers – The preservation of the present system would do little to foster new online music services, as they have to clear the rights in each and every territory. Under Option 2, with the reciprocal agreements in place, the only workable way would be the modifications of these agreements so as to allow the societies to extend beyond their territories. With the introduction of competition between collecting societies, commercial users would need to clear rights only with a few collecting societies, which would release the burden that comes with right-clearance in all the Member States.

9.8.6. The Commission's proposal

The Commission's choice for adoption is Option 3, as it believes that it is the most effective model in the long run. The reasons of the Commission are the following.

"With respect to cross-border licensing, allowing right-holders to choose a collecting society outside their national territories for the EU-wide licensing of the use made of his works, creates a competitive environment for cross-border management of copyright and considerably enhances right-holders' earning potential (the "royalty cake").

With respect to cross-border distribution of royalties, the right-holders' freedom to choose any collecting society in the EU will be a powerful incentive for these societies to provide optimal services to all its right-holders, irrespective of their location – thereby enhancing cross-border royalty payments.

In addition, all categories of rights-holders, including e.g., music publishers should have the right to become members of any CRMs[361] of their choice because most of the works they represent are non-domestic. Right-holders representing non-domestic repertoire play a crucial role in the cross-border distribution of royalties and their representation in the different CRMs should reflect the economic value of the non-domestic rights they represent. All categories of rights-holders, especially those that represent works of right-holders from other Member States, should have a say in how royalties collected on their behalf are distributed that is commensurate to the economic value of the rights they represent."[362]

[361] Throughout the Study 'CRM' is used for 'collective rights managers'. As it is explained in footnote 9 of the Study, "[t]he term "collecting society" is not used although it is typically this body which is involved in the collective management of copyright. The term "collecting society" is defined in the Cable and Satellite Directive as follows: "For the purposes of this Directive 'collecting society' means any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes".

[362] Study, p 54.

9.9. Consultation on the Study

The Commission launched a consultation on the Study[363]. The interested stakeholders were given a three-week period until 28 July 2005 to submit comments on the Commission Staff Working Document. This surprisingly short deadline in the middle of the summer was highly criticised and objected by many.

The comments reflect faithfully the interests of the stakeholders. However, the reasoning behind the comments varies considerably not just in length but in their substantial claims. While certain claims are well-founded and backed up with facts and logically coherent arguments, others seem to be pure proclamations of self-interests referring to some of the arguments of the Study as facts.

Amongst the well founded comments those of GESAC, Artisjus and GIART represent the prominent ones. In those comments, the Study is being taken apart, and its incompleteness, deficiencies, ill-founded assumptions, factual errors, omissions, and one-sided approach are being pointed out and scrutinized with analytical demands. At the other end of the scale, like the comments made by IMPA and EMI, these simply echo the assertions of the Study.

Therefore, in the course of summarising the comments, it seems logical to follow the comments of GESAC and complement them with the other critiques and comments. At the same time, views endorsing the Commission's views are to be discussed separately.

9.9.1. Misconceptions

The GESAC comments start out by clarifying some of the misconceptions found in the Study.

First, contrary to what is stated in the Study, it is a general principle in Europe that authors may join the collecting society of their choice. As an example, GESAC refers to the fact that STIM in Sweden includes 600 foreign authors and publishers, nearly 400 of whom are European, and SACEM in France has 13767 foreign right holder members, 4033 of whom are nationals of other Member States. Further, besides that it had never been enforced, article 11(ii) of the original 1974 version of the CISAC model contract[364] was dropped from it.

Second, with regard to the distribution of royalties to foreign authors, it is pointed out that the Study mixes up the collective management of copyright and neighbouring rights. (This confusion is present throughout the Study and gives ground to several misunderstandings.) Further, several factors have not been taken into account by the Commission in making the assertion that collecting societies discriminate against foreign right holders. These factors are i) societies pay most of the royalties owed to foreign authors directly to national sub-publishers[365], ii) some foreign right holders are directly represented by the collecting society

[363] Go to http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/cross-border_management&vm=detailed&sb=Title.

[364] Study, point 1.1.4.3. on p 12.

[365] CISAC gives a clear illustration to this point on p 5: "Publishing contracts between composers and publishers often grant to publishers up to 50% of performing right royalties ("Royalties") due in respect of the exploitation of a Musical Work. Such grant of the right to receive Royalties often operates on a worldwide basis. By way of illustration, an Australian composer may grant to his publisher the worldwide right to receive 50 Euros for every 100 Euros to which that Australian composer is entitled in respect of the composer's so-called Australian Musical Work when performed in another country. Thus, when that so-

making the distribution, iii) national repertoires are used in a much greater proportion than it is stated in the Study, iv) costs are deducted, and v) compared to the US, the European music market is segmented along language barriers.

Third, the clauses in the reciprocal representation agreements according to which the mandated society is free to carry out its mandate as it sees most fit are not exclusivity clauses. As CISAC explained, "[s]imply because there are territorial limits in a contract between two Societies does not mean that such contract is exclusive (as Paragraph 1.1.4.1 of the Document concludes). Such contract could equally be non-exclusive. Indeed, as the Commission well knows, the Model Contract has provided for non-exclusivity between European Societies since 1996."[366]

Fourth, the market of (online) music is not supranational in reality but national – again for linguistic reasons.

Fifth, some of the economic data relied on by the Study are inaccurate.[367] In addition to this, the characteristic of the market for mobiles is not covered in the Study.

Finally, in connection to the gap between the US and European online markets, GESAC points out that certain objective factors are completely independent of the collecting societies. For instance, the difference in Internet penetration and in the high speed Internet, further the piracy situation is different in the two markets, which has an impact on the willing of record labels to offer their recordings online.

With regard to the gap between the US and European online markets, contrary to what the Commission says, CISAC states that the national performing right blanket licence does not cause in any way Europe's lagging behind the US online market. CISAC goes even further, and argues that "it is precisely because of the well-established Blanket Licence system which has stood the test of time that there is today a level playing field for innovators. Since CISAC's members apply the same system in the hundred or more territories in which those members are situated, an equal opportunity has been offered to the entrepreneur, whether he be from Sweden or from Burkina Faso."[368,369] Artisjus shares the view that the licensing

---

called Australian Musical Work is exploited in France, the Australian composer receives his share from the Australian society APRA via the French society while the 50 Euro publisher share may be distributed to the publisher's French sub-publisher. This French sub-publisher may be a member of French Society SACEM and may well be contractually obliged to assist in the exploitation of the so-called Australian Musical Work in the French territory. Accordingly, using the statistical analysis adopted in the Document, only 50 Euros will be shown as having been distributed in respect of an Australian Musical Work. For its part, under the Document's statistical approach, SACEM will have been deemed to have made a 50 Euro domestic distribution – even though the Musical Work was in fact "Australian". Whilst the Document briefly alludes to this issue, the Document then appears to give little or no weight to such a critical factor in its subsequent argumentation."

[366] CISAC, p 4.

[367] The Commission's working paper is based on a study, which was not published at the time of the publication of the Commission's paper.

[368] CISAC, p 6.

[369] TEOSTO, on page 10, argues in favour of blanket license: "It is an explicit purpose of the Commission to break up the blanket licence model and to replace it with a "free market model" where the user of music will obtain a set of necessary licences meeting his needs. But how will the user know what those needs are? The Study gives no clue. As we have described above, a "genre-specific" licence is no solution because there are no genre-specific uses of music, at least not in terms of the supply of copyright licences. For example, a radio station specialized in Finnish music cannot operate only with Finnish repertoire, as many works which are generally considered as local songs may be cover versions of international hit songs originating from

technique does not affect the gap, thus the changing of it will not have any effect on it. Instead, the real problems (not mentioning the above factors identified by GESAC) are P2P downloads, the pricing policy of the four majors, and the combined effect of the limitation of liability of Internet service providers combined with the limitation of the telecommunications regulations, which hinder the efficient enforcement of rights. This latter opinion is spelled out in the Instituto AUTOR comment: "[t]he Digital Millennium Copyright Act has created a much safer legal framework in the US that the Electronic Commerce Directive in the EU, particularly with respect to the responsibility of ISPs, as there is no clear Notification and Take down Procedure in most EU Member States. As a consequence of this, the level of piracy and the number of P2P platforms is much higher in Europe than in the US. […] This observation is illustrated by the following examples:

- Legitimate on-line services which do have a multi-territorial license are not popular, because of the extremely high level of on-line piracy in Spain.
- As opposed to Internet services, mobile download services are extremely successful in Spain, because there is actually no real piracy on mobile platforms. Surprisingly enough, the Study does not consider the fact that mobile services in the EU are ahead of the US."[370]

Another factor in connection to the differences between the European and the US markets is pointed out by TEOSTO. In the US, there is one, more or less homogenous repertoire, whereas in Europe several national and regional music markets exist with their own cultural and linguistic characteristics.

GESAC's detailed analysis follows the structure of the Study. First, it is the Commission's view of the market what is assessed then the various options come under scrutiny.

9.9.2. Market situation

GESAC holds against the Commission that it refused to approve the Santiago and Barcelona agreements, which would have made possible to grant, under optimal conditions, multi-repertoire and multi-territorial copyright clearance. Further, GESAC underlines that in reality music service providers are mainly operate in one or few territories. "Not only is it improbable that more than a limited number of markets will be serviced, also international music providers will often make use of local sub-distributors. In doing so, they operate in a local contractual environment and the licensing by the local society fits perfectly in this scheme."[371] It adds that new services are often developed by traditional content providers, like radio and television stations, etc, which already have their relations with the local collecting society. But even where multiple licences are needed from various territories, this does not pose any real difficulty. Further, AER points out in connection to the current situation of radio simulcasting over the Internet: "The target audience remains the same. Accessibility outside the intended market (so-called "multi-territoriality of Internet simulcasting") is from the point of view of private and commercial broadcasters an unintended consequence of the ubiquity of the Internet and has no revenue value for these broadcasters."[372]

---

countries such as Italy, United Kingdom or France. Furthermore, a TV station may not necessarily know that the music played in a cosmetics advertisement is of Argentine origin. All these potential problems for both right holders and music users can only be solved with blanket license."

[370] Instituto AUTOR, p 2.

[371] GESAC point 2.1.

[372] AER, p 3.

9.9.3. Option 2

Since national copyright and collective management are not harmonised in Europe, the "[e]conomic conditions, market sizes, standards of living, the respective importance of national creative endeavour, traditions in copyright protection, necessarily produce different national situations regarding legislation in force and conditions of remuneration. Furthermore, the size, experience, resources, traditions, and management methods of European authors' societies are often very different."[373] Accordingly, such competition between collecting societies would ultimately lead to forum shopping whereby the weakest, least effective and/or demanding collecting society would be the prospective target of users.

9.9.4. Option 3

In demonstrating the detrimental effects of Option 3, whereby collecting management would become more complex and bureaucratic, GESAC draws the attention to several problems.

a) Option 3 is not realistic

On the one hand, big multinational publishers might wish to have contact with only one society (and would like to control that), on the other hand, all other right holders (authors, composers, and independent publishers) would be in a very different situation. Contrary to what is stated in the Study, the right holders are free to choose their collecting society; still, they typically choose the national one, which is accessible to them for geographical, linguistic, and cultural reasons. This holds true for performers as well, as it is doubtful that "the large majority of the performers will choose to become member of a non national society for evident reasons of language and for the fact that most of them have a day-to-day relationship with their CMS. Most of the artists who cannot afford lawyers advice contact every day their CMS in order to the legal advice, for example."[374] In this regard, TEOSTO puts the right questions: "According to the Option 3 scenarios, the critical mass of online rights would be held by a few CRMs, no doubt residing outside Finland. How would they approach the Finnish market? Would it be affected through an agent or by establishing an affiliate? Would such a CRM be willing to assume the role of a "common carrier" in the Finnish market, being responsible for establishing and keeping up business practices for this particular market and serving also other market segments besides the premium market, be it online or any other form of exploitation? Would such a CRM be prepared to use best marketing and licensing efforts to enhance the use of the Finnish works on the Finnish market, which is the main market for all Finnish music? Because this is what the national CRMs are engaged in and what the market and music-users and consumers expect from them."[375]

In order to appeal to users the few larger collecting societies will want to have the most attractive repertoire, on the one hand, which can result in the dropping of the internationally lesser known right holders from the repertoire, and on the other hand, will cut back management costs, which will affect the efficient management of rights of their members. The downside of this competition will be that the small collecting societies will struggle for survival, and ultimately it is going to be paid by their members.

[373] GESAC point 2.2.
[374] GIART, p 10.
[375] TEOSTO, p 6.

In addition to this, the situation caused by Option 3 would bring about high legal uncertainty. Users would not know which rights are cleared and which ones are not as collecting societies would not provide the world repertoire any longer, and because it is very common that multiple right holders are attached to the same work.

It is also noted, that the idea of differentiating between traditional and online rights is flawed. The function of collecting societies (licensing, collection of fees, distribution and payment of royalties) is irrespective of the form of exploitation.[376] A similar view is put forward by AER, saying that "for radio broadcasters content is key and that a licence should be issued on the basis of use and not the platform it will be used on."[377]

b) The copyright management would become substantially more complex and bureaucratic

All users in the Member States would have to negotiate with all the collecting societies, most of whom are located in a different Member State, in order to be sure not to infringe any rights. Beyond the geographic distance, the language and the differing national laws are posing the risk of increased difficulties and expenses. To top it all, effectiveness of long-distance monitoring (if at all) is highly questionable, which, by the way, would favour piracy.

There are about five or six hundred thousand members in the collecting societies within the EU. The process whereby they make an affirmative act of joining a society of their choice would take a considerable amount of time and money. Moreover, the process would draw down countless questions that the societies have to answer. Furthermore, as off-line and on-line rights would be managed separately, a double declaration would have to be made in connection to any given work. "The user wanting to operate both on-line and by traditional methods will have to apply to two different societies for the same work"[378] Similar concerns appear in the AER comment: "radios will continue to be restricted to the national CRM for off-line rights and will have to deal with 2 or 3 (or more) CRMs elsewhere to find the equivalent on-line content."[379] GESAC points out that in order to reach the Commission's desired aim, a mass migration would have to take place (with the above conditions), which is highly unlikely. Consequently, even the result that the Commission envisage would not come about, at the same time all the troubles would encumber the system of collective rights management.

c) Option 3 does not simplify the copyright clearance process for users

What users really want is a quick and easy process whereby they gain access to the world repertoire with the highest possible legal certainty, and with the lowest possible number of contacts. Paradoxically, they are exactly the multinationals who in reality have the means to contact all the collecting societies in the territories they want to operate, while the Commission seeks to satisfy their ostensible needs. On the other hand, the situation would be a nightmare for virtually all the other (smaller) users. For instance, the majority of private and commercial radios broadcast to local, regional and national audiences.[380] "Instead of one interlocutor, having mandate of other collecting societies through bilateral agreements, the

[376] TEOSTO, p 4.
[377] AER, p 2.
[378] ADAMI, p 2.
[379] AER, p 4.
[380] See AER.

user will be confronted to several of them, and will hardly have the time and competence to check which part of the repertoire is represented."[381] The representative body of the hotel, restaurant and café sector, HOTREC, noted that Option 3 does away with the one-stop-shop principle. "From a user perspective, it is doubtful whether this would entail increased efficiency as a lot of time would have to be invested in negotiating multiple licenses in order to access a sufficiently broad repertoire."[382]

A practical consequence of ability of right holders of moving from one collecting society to another on short notice (as envisaged by the Commission) would be that the clearing of rights for radio simulcasting would be impossible "since the licensed content could alter from one day to the next as a result of rights holder movements."[383]

With regard to the cost of negotiations, Artisjus contends the Commission's assumption that the number of negotiations with collecting societies would be the key to the profitability of on-line content providers, further the number of contracts to be concluded. As Artisjus says, "[o]ur personal experience underlines this: in case of the online music shop of T-Online Hungary, the agreement with Artisjus took only a few days time, while the content provider had to discuss the terms and conditions with the major record companies for several months."[384]

d) Option 3 could substantively upset the balance among authors' societies

The competition between collecting societies for right holders will ultimately lead to a situation where collecting societies are divided into two groups: a handful of big societies versus the small societies deprived of many authors, and left with sectors of activity where the costs of rights management are the highest (restaurants, discotheques, etc.). This will, of course, raise the management costs, and the only possible way of counterbalancing (to a certain extent) these higher costs is to make choices purely on cost-effectiveness grounds (e.g. not licensing to difficult places, less precise distribution cost, cut-backs). This situation will, in turn, have bearings on the right holders, who will receive a lesser quality service, and whose income will decline. "The first phase of the competition will diminish the royalties, the financial resources of the creators. However, a second phase may indeed lead to an oligopolic position of the four-five emerging CRMs capable then of practically abusing their oligopolic position and claiming a share of similar size that the four major record companies do now (60% of the price of the downloads). This could be a real obstacle to the online business, and at the end of the day, detrimental to the interest of the right-holders as well."[385]

e) Option 3 could substantively upset the balance among right holders within authors' societies

Small authors, even if they would want to, will lack the means to be an active member in a big society located in another Member State. Accordingly, these authors will be marginalised. As Artisjus says, "[f]oreigners (the small earners especially) will practically be excluded from the participation of the yearly General Assemblies of the Societies."[386] Instead, there is a good

[381] AEPO-ARTIS, p 8.
[382] HOTREC, point (ii).
[383] AER, p 4.
[384] Artisjus, p 23.
[385] Artisjus, p 20.
[386] Artisjus, p 16.

chance that large multinational publishers will dominate the boards of the societies. This scenario is foreseen by the BEUC as well. "Different scenarios seem possible – for instance – the emergence of a society for authors producing under the four big labels, a society for world music, one for independents, creators of samples, etc. Wouldn't it be tempting for a big label to create its own collecting 'society'? We doubt authors could successfully defend their rights against producers in a society that is controlled by the same people who represent the majors."[387]

f) Option 3 could upset cultural diversity

All the above consequences of introducing Option 3 would point to the direction of the weakening of cultural diversity. No facts are referred to in the Study that would back up the Commission's assumption according to which the better cross-border licensing would make available a larger variety of cross-border programming for the various language and cultural communities across Europe. The scenario envisaged in the Study runs against cultural diversity, and undermines solidarity.

g) Option 3 could jeopardize consumers' freedom of choice

The lack of access to the world repertoire at a given collecting society would undermine the freedom of choice. As Artisjus points out in its comments[388], the Study does not consider the possible impact and data of non-European repertoires, as it does not have any well-based data on the dimensions of European repertoires; it does not identify the other large non-European repertoires; it does not compare with the European and non-European repertoires; and it does not estimate the impact of the non-European repertoires on the Option 3 scheme, while they could alone modify the whole system even at its start.

The European Consumers' Organisation shares this opinion. "The Commission ignores the fact that consumers have a direct interest in a well-functioning collective rights management system and a vital interest in having access to a culturally diverse and broad online offer at a price that adequately remunerates the artists and takes into account the cost efficiencies of online distribution. We are alarmed that the study does not seriously assess the valid interests of consumers and believe that this is short sighted – not only but also in view of the illegitimate alternatives available to consumers in the online environment."[389]

Beyond the above, several remarks have been put forward in the comments regarding the inaccuracy, ill-founded assumptions and factual errors of the Study. Just to mention a few:

- With regard to the Commissions assertion that "a separate licence has to be sought from a different collective rights manager i.e. and authors' society, record producer's society and performing rights society for any single transaction"[390], it is noted by Artisjus that "record producers exercise their exclusive rights individually, especially as regards the "ringtone" and download uses. The simulcasting and webcasting agreements, if they are operational at all, concerning economically negligible webcasting and simulcasting. Practically we cannot speak about record producer's

[387] BEUC, p 5.
[388] Artisjus, p 14.
[389] BEUC, p 4.
[390] Study, p 20.

society as CRM as regards exercise of exclusive rights of authorization of online uses."[391]

- The Commission states that "the prevailing model in most Member States is that different rights are administered by different CRMs"[392], while performing and mechanical rights are administered together in 15 of the 24 countries where CRM exists.[393]
- The category of online rights is not defined in the Study.[394]
- There is no real evidence in the Study that would support the claim that consumers' preferences, language and culture are now playing a significant role in forming supra-national linguistic areas of cultural exchange within Europe. TEOSTO has quite opposite experiences.[395]
- IMAE is referred to as an umbrella organisation for performers' rights, however such organisation does not exist.[396]
- In the Study it is submitted that technology allows for significant reductions in management costs and improved accuracy in royalty distribution. Instituto AUTOR says that the trend seems to be the opposite: "collecting societies in the US have increased administration costs in the case of digital exploitation."[397]

The views of the performers differ somewhat from that of the copyright right holders and their societies. Not surprisingly, the GIART comments starts with the remark that no study on the performers' societies was made, and it repeats the concerns regarding the lack of level playing field in the area of neighbouring rights. Accordingly, it gives voice to the problem that certain performers' collecting societies use B and C type agreements, which do not comply with basic EU principles. "The current existing distortions of the Internal Market are linked, in our opinion, to a need of harmonisation of national laws as concerns the distribution systems and the reciprocal representation agreements; this purpose should be further pursued within the framework of a European legislative initiative on collective management."[398]

Though GIART agrees with the establishment of a pan-European licensing system, it underlines the importance of territoriality. It rejects both Options 2 and 3, as Option 2 favours only users, and Option 3 is unacceptable for the smaller right holders (the weakened smaller collecting societies' members' position will be weakened as well).

Some of the users also have concerns regarding Option 3. For example, Deutsche Telekom is of the view that "Option 3 would create Europe-wide monopolies for each repertoire on the downstream licensing markets. This would increase rather than decrease inefficiencies because those collecting societies with "must-have" repertoires could easily pass their administrative costs through to the users."[399] Should this choice work out, neither upstream nor downstream competition would take place, and accordingly, collecting societies would not have the incentive to provide better services.

[391] Artisjus, remark 7, p 6.
[392] Study, p 45.
[393] Artisjus, remark 30, p 22.
[394] TEOSTO, p 3.
[395] TEOSTO, p 5.
[396] GIART, p 6.
[397] Instituto AUTOR, p 6.
[398] GIART, p 10.
[399] Deutshce Telekom, p 6.

By contrast, some stakeholders favour the Commission's choice. MPA sees Option 3 as such that "enable the value of music to be realised and will provide for much more direct and efficient distribution of royalties with the maximum amount possible being passed on directly to rightholders"[400]. This solution would provide for a system where their expectations could be met, namely music publishers would have greater influence in the collecting societies, and would get more money.

Similarly, IMPA adopts the views of the Study, but without elaborating on the issues. "Option 3 is the best solution and an inevitable path to follow… It not only lifts territorial restrictions and allows for cross border services, but it also guarantees that discrimination on the basis of nationality will no longer be allowed. Thus Option 3 … is fully in line with internal market rules."[401] Unfortunately, IMPA does not provide any viable argument that would support this standpoint. The same can be noted with regard to the comments of ICMP/CIEM.

9.10. The Impact Assessment and the Commission's Recommendation

About two months following the deadline for submitting comment to the Study, on 5-7 October 2005, the UK Presidency organised a conference in London on Copyright and the Creative Economy. There, the European Commissioner for Internal Market and Services, Charlie McCreevy held a speech[402] on the Commission's planned recommendation on management of online rights in musical works.

It is interesting to see how the Commission's position did not change. Seemingly, the arguments put forward by the interested parties, let them be persuasive and factual, could not deter the Commission from pursuing its envisaged policy choice. The Commission is determined to carry out the envisaged changes, whatever the outcome may be.

Despite plenty of comments on the possible causes of differences between the European and US markets – other than the licensing system – the Commission does not seem to accept any of those, at least as arguments that override its theory. So it recognises that, amongst other things, cultural and linguistic differences play an important role, however, the Commission still abide by its idea that the present system of copyright clearance is inefficient, thus it has to be corrected. The argument is the same with online piracy. The Commission looks upon the licensing system as an archaic survival from the nineteenth century that cannot keep pace with technological advances. (It is interesting to see though that in the same speech Commissioner McCreevy argues that Option 3 is nothing new, in fact it is going back to the historical roots of collective management).

In the speech, Commissioner McCreevy says that "[m]aking it easier to clear copyright and to secure Europe-wide licences is an essential part of this approach." Yet, not a single proof is put forward as how the new system would make copyright clearance easier. The Commission stuffs its fingers in its ears when it comes to the reasoned arguments on how the new system will make the practice of licensing to a nightmare. To this background, McCreevy states that this is in the interest of all stakeholders, and describes Option 3 as the "lightest possible touch". At the same time, surprisingly, the Commission acknowledges the pure hypothetical nature of its line of thinking, when it says that the recommendation "is based on the *premise* [bold is mine] that territory-by-territory management of copyright clearance is too

[400] MPA, p 5.
[401] IMPA, p 4.
[402] Commissioner Charlie McCreevy's speech of 7 October 2005, SPEECH/05/588.

cumbersome and too costly. It is not efficient for content users and it does not serve the interest of right-holders…" That is, Option 3 as a whole is based on a premise which lacks any solid arguments and is incorrect. McCreevy does not let himself to be bothered by those obvious objections which explain, on the one hand, that a particular work will be available only at one particular collecting society, i.e. it is not possible to get a license for the world repertoire, and on the other hand, given the fact that one work mostly has more than one right holder, it is highly likely that the rights connected to one single work will have to be cleared with several collecting societies. Yet he still speaks about a single contract. Well, after all, it is true: a single contract with every single collecting society.

The argumentation that is unsupported and/or logically does not hold together goes on. "[As Option 3] is a simple model, it is also the cheapest model. And the cheapest model creates the least overhead and thus creates the most value for the right-holders." Simple? In what sense? For whom? Simple means cheap? (And for whom?) How does it create the least overhead? And how does it create the most value for the right holders? No explanations, no facts, no arguments, no logical links. And to top it all, astonishingly, Commissioner McCreevy says that "[t]he fine balance we struck between ease of licensing and maintaining the value of copyright protected works will ensure that content is not available on the cheap."

To make matters worse, the Commission has chosen a highly controversial approach for carrying out the changes: a soft-law instrument in the form of a recommendation. By this solution, the Commission bypassed the European Parliament. "The recommendation was not the correct legal instrument," said Hans-Peter Mayer (EPP-ED, Germany). "I am not happy with the soft law approach chosen by the Commission that did not involve Member States and Parliament," Ms Lévai said in her report, arguing that the EU's legislative triangle had to be upheld.[403]

As was promised by Commissioner McCreevy in his speech, the Impact Assessment[404] reforming cross-border collective management of copyright and related rights[405] for legitimate online music services came out just a couple of days after the conference held in London (on 11 October 2005). The statements of the Impact Assessment were projected by the speech.

The Commission has not changed its view with regard the chosen policy option. It used the submissions of interested parties to back up its theory, using the arguments in favour of its line of thinking, while ignoring to a large extent the concerns put forward by many[406], or dealing with proposed problems only superficially[407].

Besides the clear declaration of the Commission that it keeps with Option 3, it reaches back to the Communication of 16 April 2004, and puts forward additional recommendations to the Member States on good governance, transparency and accountability. These rules would

---

[403] Intellectual Property Watch, article by Monika Ermert, 14 March 2007, available at http://www.ip-watch.org/weblog/index.php?p=565&res=1024_ff&print=0.

[404] Commission Staff Working Document, Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services SEC(2005) 1254, 11.10.2005.

[405] It is worth noting that while the Study, at least in its title, was dealing only with copyright, the Impact Assessment covers both copyright and related rights.

[406] E. g. the problems associated with legal uncertainty in connection to the lack of licence for world repertoire and the inevitable burden of acquiring licenses from almost all collecting societies (a shift from multi-territoriality to multi-repertoire); or the (administrative) costs of smaller collecting societies providing services on behalf of the larger collecting societies.

[407] E.g. the evaluation of culture/creativity on p 20.

concern licensing on the basis of objective criteria, equitable royalty distribution, clarity on represented right holders vis-à-vis commercial users, transparency on deduction other than those for management purposes, equal treatment of domestic and non-domestic right holders, right holders' representation in the decision making process commensurate with the economic value of their rights, reporting obligations, and effective dispute resolution.

The Commission's Recommendation[408] came out on 18 October 2005. As could be expected, the Recommendation follows what was envisaged in the Impact Assessment, that is, Option 3 of the Study.[409] It contains recommendations on the relationship between right holders, collective right managers and commercial users; on equitable distribution and deductions; non-discrimination and representation; accountability; and dispute resolution.

Accordingly, the Option 3 choice means that right holders should be able to determine the online rights to be entrusted for collective management, the territorial scope of the mandate of the collective rights managers, further they should have the right to withdraw the online rights and transfer them to another collective rights manager.

The Recommendation is addressed not just to the Member States, but to all economic operators, which are involved in the management of copyright and related rights within the Community.

9.11. The KEA Study for the European Parliament

The Parliament was not pleased with the Recommendation of the Commission, as it did not take into account the Resolution of the Parliament issued in 2004. Therefore, it commissioned a report to analyse the collective management of copyright and neighbouring rights with particular emphasis on musical works in light of the developments triggered by DG Internal Market and DG Competition.

The report[410] was commissioned from KEA European Affairs with the view to update a 1998 study[411] from Deloitte & Touche on collective rights management carried out for the European Commission. The Study of KEA was delivered in July 2006 under the title "The Collective Management of Rights in Europe. The Quest for Efficiency." The KEA Study was presented to the Committee for Legal Affairs on 11 September 2006. As it is stated in the executive summary, the KEA Study examines the legal framework governing collective management in line with the priority of the European Parliament to consider the issue in light of the Commission interest in collective management of musical works in the on-line sector in particular. The KEA Study "assesses the justification for the European Commission's action in this field and considers policy issues linked to the latest regulatory development in light of the EP's work, the ECJ jurisprudence as well as the latest market developments."[412]

[408] Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), OJ L276 54, 21.10.2005.
[409] Though it never makes mention of it.
[410] Study by KEA European Affairs, The Collective Management of Rights in Europe – The Quest for Efficiency, July 2006, available at http://www.europarl.europa.eu/comparl/juri/study/default_en.htm.
[411] See fn. 277.
[412] KEA Study, p 5.

The KEA Study sensitively draws up a picture of the present situation in the field of collective management of rights. It aptly points out that the ongoing fight is as much a commercial battle as a regulatory issue. It is "a commercial battle between:

- Right holders and users - users seeking to obtain the best licensing deal at the lowest possible costs and at fair and non-discriminatory terms.
- Different categories of right holders which are competing to manage the rights:
  - competition between collecting societies in the race to be among the predominant rights management societies in Europe. This has been given a new dimension since the adoption of the EC Recommendation on copyright management in October 2005. The societies from "smaller" countries are concerned about becoming mere agents of the societies from the largest EU countries (in effect, Germany, France, UK, Spain).
  - competition between management bodies and major entertainment companies that wish to:
    - manage the rights on behalf of artists or authors, independently of collecting societies,
    - centralise negotiations with users,
    - manage some of their own IP rights on an individual basis without mandating collecting societies.
  - possible competition between management bodies, record companies / music publishers on the one hand and (top) artists on the other that may want in the future to negotiate individually, independently of any intermediaries.
  - Competition between music publishers and individual authors and composers for controlling the management board of collecting societies."[413]

Another crucial point that the KEA Study touches upon is the notion of efficiency in connection to collecting societies. "Efficiency" has been referred to by almost all stakeholders during the debate regarding collecting societies. However, the word is understood differently depending on which stakeholder embarks upon the interpretation of this word. The KEA Study aptly identifies the possible efficiencies for the different stakeholders[414]:

- for the authors / composers it is foremost the ability of the collecting society to collect and distribute as high royalties as possible, and as fast as possible;
- for music publishers, it means fast processing of payment with minimum management costs;
- for collecting societies efficiency means that users acquire licences and report sufficiently detailed usage reports, payments on time, and a repertoire that generate an income that can cover the transaction costs;
- for the users, efficiency means transparency with regard to tariffs and accounting practices, lower royalty rates, one-stop shop licensing on non-discriminatory terms.

An important observation of the KEA Study is that efficiency has a different definition within DG Competition and DG Internal Market. For DG Competition, it means competition on management costs and the ability for any collecting society to provide a blanket agreement for the entire European repertoire on a multi-territory basis, independently of any harmonisation of tariffs. For DG Internal Market, efficiency means better governance and fewer societies but with pan-European licences, further the lack of reciprocal agreements, that is, collecting societies with their own exclusive repertoire compete for right holders to attract users. Indeed,

[413] *Ibid.* p 17.
[414] *Ibid.* pp 18-19.

quality has just the opposite meaning for members and users. For members it means the collecting societies' efficient monitoring, auditing, and if needed, suing those who do not pay the royalties, thus collecting fees efficiently. For obvious reasons users are interested in paying as little as possible, hence for them, "quality" means bad monitoring, auditing, not suing, consequently not collecting fees efficiently.

The KEA Study makes a stand already at this point that competition among collecting societies for right holders is not efficient (whatever it means) and creates legal uncertainty, and the US model serves with ample examples to this statement. "Right holders consider that competition amongst the two largest societies in the USA (BMI and ASCAP) to recruit members for their performance income leads to management inefficiency with resources spent on advertising / marketing services instead of managing and monitoring rights. They believe that such a system would work only for high earners with large sums of advances paid to well known authors by the societies to poach them from the competing society. US societies collect far less income for their constituents than their sister organisations in Europe."[415]

The KEA Study draws the attention to the shift in the approach of the Commission to the question of collective management of rights.[416] The Commission recognised that copyright protection serves non-economic objectives as well, such as creativity, cultural diversity and identity. Besides this, the Commission advocated common grounds on right management; it called for transparency and efficiency in relation to the activities of collecting societies. To this end, the Commission was working on a draft directive aimed at regulating collecting societies on the issues of establishment, status, their functioning and accountability, good governance, and control mechanisms including dispute settlement. However, following a senior management change within the copyright unit of the Commission at the end of 2004, a more radical approach appeared from the side of DG Internal Market. The attention turned to licensing, which was pronounced to be inefficient. The Study (Commission Staff Working Document), the Impact Assessment and the Recommendation were conceived against this background.

The core of the criticism to the Commission's approach is presented in the KEA Study[417], some of which are worth remembering here. Language and proximity will be determinant factors in the membership of a collecting society for the vast majority of right holders. Lesser known authors will be less attractive to collecting societies by fear of increasing management costs. A two-tier licensing structure is likely to emerge, one for Anglo-American music and one for national music. The consequences of which for the latter would be higher management costs, lessen bargaining power, international users' disinterest in national repertoires or only for lower licensing fees, the loss of solidarity, big societies would not be interested in lesser known artist, and smaller societies would not be able to compete.

The Commission is contradicted on its view with regard territoriality, stating that it is a de facto reality because of linguistic and cultural reasons. National operators would be at competitive disadvantage to international operators when it comes to licensing. Even the multinationals fear a system where the biggest societies possess sole control over a must-have repertoire. With the loss of single world repertoire, legal uncertainty would be considerable. The Recommendation's scope has been criticised as well for being too narrow.

[415] *Ibid.* p 19.
[416] *Ibid.* pp 42-43.
[417] *Ibid.* pp 44-46.

"The European Commission would create a legal environment that is no longer technology neutral (online licensing vs offline licensing), culturally neutral (international artists vs local artists) or genre neutral (music licensing vs other IP works licensing)."[418]

9.12. The Lévai Report and the Resolution of the European Parliament

Relying on the KEA Study, the European Parliament commissioned a Report – the so-called Lévai Report[419] – which was prepared by the Committee on Legal Affairs, and was tabled on 5 March 2007. Based on the Lévai Report, the European Parliament adopted a Resolution[420] on 13 March 2007 in response to the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

The Commission's Recommendation was heavily criticised on numerous points. The Parliament stated that the Commission failed to undertake a broad and thorough consultation process, despite the fact that the issue is of high importance and the interested parties are from a wide range of spectrum of the music industry. It was particularly emphasised that the soft law approach is unacceptable as it circumvents the legislative control of the Parliament and of the Council, and thereby the democratic process.[421] Therefore, the Parliament "invites the Commission to make it clear that the 2005 Recommendation applies exclusively to online sales of music recordings, and to present as soon as possible – after consulting closely with interested parties – a proposal for a flexible framework directive to be adopted by Parliament and the Council in codecision with a view to regulating the collective management of copyright and related rights as regards cross-border online music services, while taking account of the specificity of the digital era and safeguarding European cultural diversity, small stakeholders and local repertoires, on the basis of the principle of equal treatment."[422]

The envisaged system put forward in the Resolution is one where the reciprocal representation agreements between collecting societies are maintained, and where pan-European multi-repertoire licenses for cross-border and online uses and use in mobile telephony are available with tariffs applicable in the country where the act of copyright consumption by the individual user will take place (country of destination).

The importance of collecting societies was highlighted throughout the text. However, it was deemed to be essential to provide better governance. To this end transparency, non-discrimination, fair and balance representation of each category of right-holders and accountability rules with appropriate control mechanisms were denoted essential.

Competition within the field of collective management of rights should be fair, but at the same time, it should be controlled to avoid downward pressure on royalty levels, and to

---

[418] *Ibid.* p 46.

[419] European Parliament Report on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), FINAL A6-0053/2007, 5.3.2007.

[420] European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), P6_TA(2007)0064.

[421] Katalin Lévai, the rapporteur said in her speech to the Parliament: "The Commission has set a precedent in a very important and sensitive domain. By failing to consult Parliament and Council, it has bypassed the democratic process."

[422] Parliament Resolution point 1.

preserve the collecting societies' cultural and social roles, and their ability to provide support for the promotion of new and minority right holders and local repertoires.

It was included in the Resolution that the proposed Directive should "avoid the over-centralisation of market powers and repertoires by ensuring that exclusive mandates may not be granted to a single or a very few CRMs by major right-holders, thereby guaranteeing that the global repertoire remains available to all CRMs for the granting of licences to users."[423] Or as Klaus-Heiner Lehne, member of the Conservative party (EPP-ED) put it: "Collecting societies are a necessary evil, and certainly Parliament has had its problems with them." So far there are 27 national monopolies of collecting societies and no common market in Europe, he said. "It's therefore completely correct that Commission started to look for solutions. But we also do not want to exchange 27 monopolies with a few oligopolies."[424]

The firm opinion of the European Parliament was presented emphatically by Jens-Peter Bonde, Member of the European Parliament, on the Copyright Summit held on 30-31 May 2007 in Brussels. "Instead of consulting [authors and collecting societies] and the elected representatives of the European Parliament, [the Commission] choose a two-track strategy. With the one hand, they decided a so-called Communication on how to organise the music market. This Communication is a piece of soft legislation. Formally it is not legally binding. In reality it is. And on the other hand, the Internal Market people consulted their friends in the Competition Department, and threaten authors' societies economically."[425]

9.13. Monitoring – comments to the Recommendation

As was indicated in the Recommendation, the Commission intended to assess the development of the online music sector in the light of the Recommendation. To this end, on 17 January 2007, it invited interested parties to submit their views and comments on the development of online music sector. The stakeholders were invited to respond to the "call for comments" until 1 July 2007. The specific questions were divided into four sections: 1) nature of the instrument, i.e. the Recommendation – the Commission inquires whether legally binding rules are preferable, among other things, on licensing 2) EU-wide licensing – the market test is aiming to find out the trends that are underway which envisage EU-wide licensing arrangements, and the possible types of obstacles, 3) scope of the Recommendation – the Commission invites stakeholders to comment, amongst other things, on the questions of whether it should be mandatory to include niche repertoire in EU-wide licences, and 4) governance and transparency. Besides the general views expressed in the comments, of the answers given to the specified questions only some will be analysed below in order to outline the main arguments and standpoint of the interested parties.

The Commission received 89 replies, of which 79 were authorised for publication.[426] The wide variety of stakeholders includes collecting societies (representing authors, performers, and one represents record producers), their umbrella organisations, right holders and their

[423] *Ibid.* point 6.
[424] Intellectual Property Watch, article by Monika Ermert, 14 March 2007, available at http://www.ip-watch.org/weblog/index.php?p=565&res=1024_ff&print=0.
[425] Closing addresses of the Copyright Summit, Jens-Peter Bonde, Brussels, 31 May 2007.
[426] Those that are authorised for publication are available on CIRCA at http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/collective_cross-border&vm=detailed&sb=Title.

representatives, publishers (active in music, magazine, newspaper and book publishing), users (such as broadcasters and mobile phone operators) and Member States.

9.13.1. Joint Position

As can be inferred from the wide spectrum of the respondents, the views are far from being homogenous. To present an overview of the comments, first a joint position of 21 collecting societies, then, grouped by the main groups of stakeholders, general remarks will be analysed, finally some of the responses to the specific questions.

Still before the deadline, 21 authors' societies issued a **joint position** (hereinafter JP21).[427] The joint position was signed by small and medium size collecting societies only. Large societies, which are beneficiaries (at least for the time being) of the legislative and market developments, did not sign this statement.

The main concerns of the 21 collecting societies are

- "the (documented) announcements by the major publishers to virtually all collecting societies that they withdraw major segments of their most commercially successful repertoire from the reciprocal network established by the collecting societies; and,
- the creation of a new entity by two major collecting societies to handle exclusively the repertoire of one of these major publishers; and
- the creation of a new entity by three major collecting societies to handle exclusively their own (national) repertoires."

The signatory societies believe that these trends will eventually lead to a highly concentrated market, both in terms of market power and repertoires; that is an oligopoly is about to emerge. Besides the distortion of competition, these developments will undermine cultural diversity in Europe by placing niche repertoires in an unviable situation. And all this is happening for the sake of right holders' free choice, as spelled out in the free market approach adopted by the Recommendation, while it is just the contrary what is about to happen.

It is also pointed out by the 21 societies that the Recommendation brings about a set of practical problems. Namely,

- "The fragmentation of repertoires, for instance, requires that societies prove title of each and every licensed song, instead of being able to do so under a blanket license including the world repertoire.
- Costly documentation systems – the backbone of collective administration – will have to be adapted to track in detail complex representation schemes generating in the process an enormous administrative burden.
- The anti-piracy effort will no longer be paid for by the popular commercial repertoire."

In order to achieve a "much more subtle balance" between cultural considerations and economic interest of both users and rights-holders three key points are highlighted in the joint position.

a) The reciprocal network for cross border collection of royalties

[427] The JP21 is not available separately on CIRCA, but included into some of the uploaded documents. See for instance the comments of Artisjus.

"While we understand that it is the Commission's perception that this system, in its present form, may not be ideally suited to the purely economic considerations of a single market in Europe and of the digital age, we are entirely convinced that it should not simply be set aside and replaced with entirely new constructions driven by purely commercial interests as proposed by the Recommendation." Rather, the existing reciprocal system should be maintained (albeit with some improvements). It has effectively provided one-stop-shops for the world repertoire for decades and is fully capable of meeting the new challenges and requirements, while establishing the right balance between cultural diversity and the needs of the market for music. It will provide freedom of choice to users and rights-holders for multi-territorial and multi-repertoire licenses."[428]

b) Availability of the entire world repertoire for all collecting societies

"It is to be expected in the logic of business that the process of selecting the societies will not be based on the relative efficiency of individual collective rights managers but on their size. This deprives the majority of collecting societies from having access to large segments of the most commercially successful repertoire. The entire world repertoire should remain available for all collecting societies in order to create a level playing field, and to enable societies to provide a one-stop-shop, whether for their country of establishment (for traditional licensing) or for the entire European Economic Area (for on-line licensing)."[429]

c) No exclusive mandates

"It follows from 2.), above, that the granting of exclusive mandates by major rights-holders in the context of collective management of online rights as suggested by the Commission is undesirable, and should be discouraged rather than stimulated. These exclusive mandates not only undermine the reciprocal system they will also:

- force users to make multiple deals with multiple collecting societies in order to cover:
  - the global repertoire that will no longer be available through a single society; and,
  - that part of the repertoire of the major rights holders where, for example, mechanical and performance rights of works are handled by different CRMs or where split publishing deals result in the different rights-holders involved (e.g. multiple composers and multiple authors of the same work) being represented by different CRMs;
- on account of the above, inevitably result in higher costs to users for the acquisition of licenses;
- make rights management, for the vast majority of rights-holders, more expensive;
- lead to a period of legal uncertainty accompanied or followed by unauthorized uses, vacuums in licensing, and finally to an over-centralisation of market powers and repertoires;
- undermine the existence of certain small collecting societies by removing a significant amount of their turnover; and,
- undermine the position of minority repertoires and cultural diversity in Europe."[430]

9.13.2. Comments

a) Collecting societies

[428] JP21, pp 2-3.
[429] JP21, p 3.
[430] JP21, pp 3-4.

The fears that appear in the JP21 are echoed in the individual responses of the societies. The vast majority of collecting societies are very much concerned about the recent trends that big publishers are withdrawing (or threatening to withdraw) their repertoires, and thus the fragmentation of licensing system is likely to become reality. The Danish collecting society is "deeply worried" about this: "[…] collecting societies form a central part of society's infrastructure and make sure that many thousands of music users, who distribute or make copies of copyright protected works, have easy access to use vast amounts of copyright protected works."[431] As a consequence of fragmentation, cultural diversity and the future of niche repertoires are also given lot of weight in the arguments.

At the same time, it is widely pleaded that while on the face of it, it might seem that a lot is happening on the pan-European online market, in reality the actual licensing activity is low, if there is any at all.

Apart of those societies signing the JP21, there is a separate group of societies that are of alternative opinion. These societies are the big ones with interest in entering into licensing agreements with the big publishers, e.g. CELAS (created by GEMA and MCPS-PRS Alliance, and represents EMI Music Publishing's Anglo-American and German repertoire), PEDL (agreement between Warner / Chappell Music, on the one hand, and the German, the UK and the Swedish collecting societies, on the other hand) and SACEM-UMPG (an agreement between the French society and Universal Music Publishing).[432] MCPS-PRS Alliance considers Option 3 as the most effective option for fostering the development of the legitimate market for online music services, and the soft-law approach as sufficient. But even the societies involved in the new initiatives look upon the cooperation between European collecting societies as essential.

The views and positions, however, are not that clear cut. Some societies are flip-flopping, or at least it is hard to come in terms with their real intentions. BUMA-STEMRA and SABAM while signing the JP21 are granting EU-wide licences, despite the fact that many collecting societies do not recognise the validity of these licences outside the Dutch and Belgian territory. Interestingly, these societies are also concerned about the end of the one-stop-shop. "The entire world repertoire should remain available for all collecting societies in order to create a level playing field, and to enable societies to provide a no-stop-shop, whether for their country of establishment (for traditional licensing) or for the entire European Economic Area (for on-line licensing)."[433] Nevertheless, it considers exclusive mandates by major right holders undesirable.

With regard to the question on the nature of the instrument, from the comments submitted to the Commission, it can be inferred as a general opinion that these issues did not required action at Community level. Artisjus contend that "soft law measures are totally incapable of solving the present situation of online licensing, assignment and withdrawal of online rights"[434]. The nature of the Recommendation continues to be harshly criticised. The Danish collecting society is of the opinion that the non-binding attribute does not hold true. But quite the contrary as collecting societies would be expected to apply the principles laid down in the Recommendation. It adds that "[t]he fact that the commission has circumvented the

[431] KODA, p 1.
[432] For recent market developments, see Chapter 12 on p 157.
[433] BUMA/STEMRA, p 3.
[434] Artisjus, p 5.

democratic workings of the legislative process in order to implement a Recommendation, that for all practical purposes is binding, is not acceptable."[435] Similarly hard opinions can be found in the comments of the Swedish collecting society: "[c]onsidering the chaotic development in Europe the "light touch" non-binding Recommendation has created Stim would have preferred legally binding rules […]."[436]

The big collecting societies are of different opinions on this question as well. They consider the Recommendation the "most appropriate" instrument. It is argued that the Recommendation, "if supported by a clear and consistent message from the Commission, provides precisely the "light touch" regulation that is required to promote and facilitate an environment within which cross-border licensing can evolve."[437]

In connection to EU-wide licensing, the comments of the collecting societies on the recent market developments depend, obviously, on their position. Regarding the question of possible types of obstacles to set up EU-wide licensing schemes, Artisjus rightly points out that "the legal certainty of any such solution is unfortunately endangered practically by the licensing chaos created by the Commission with the Recommendation and the actions of certain major music publisher to withdraw the mandate of representation […]. Further on, the EU-wide licensing of the communication to the public i.e. the "making available" online rights of the composers is not sufficient for the content provider. It has to acquire further rights such as the rights of the producers of sound recordings and of performers. These rights are licensed – individually or collectively – on a territorial basis."[438] A similar argument appears in the comment of Danish collecting society. It argues that the main obstacle in obtaining EU-wide licenses have been created by the Recommendation itself, as the relevant licenses are impossible to secure. Further, it argues that "[a]nother important element to be aware of is the fact that many online music providers have a national scope of the services they provide for other reasons that copyright related issues."[439] A valid and troubling comment from the Swedish collecting society touches upon the issue of fragmented licensing. "It should be noted that one single work can have up to 10, 15 or more different rightsholders of which one, at the specific date and in the specific territory where a radio station uses the work, can be EMI Music Publishing and another Warner Chappell. The following week EMI or Warner can sell their economic shares to another publisher, which happens constantly. The radio station in this case cannot monitor, as opposed to collecting societies, which the current rightholder/s is/are with the actual right to licence the work."[440] By contrast none of these issues have been brought up by the British collecting society. At the same time the tax regimes in each territory were named as a potential hindrance to multi-territorial licensing.

As to the scope of the Recommendation, on the question of the definition of rights collecting societies have divergent views. For instance the Hungarian collecting society is of the view that the definition of online rights in the Recommendation is one of the most problematic parts: it is vague and inaccurate. This is connected to the problem of withdrawal as well, where solely legal definitions should apply.[441] The Finnish collecting society is of similar opinion: "In practice, most – if not all – online or mobile operations, or rather *modes of*

[435] KODA, p 3.
[436] STIM, p 1.
[437] MCPS-PRS, p 5.
[438] Artisjus, p 9.
[439] KODA, p 5.
[440] STIM, p 3.
[441] See Artisjus on pp 9-10.

exploitation, include several of the components listed above [Article 1(f) of the Recommendation]. This means that for the purpose of any licensing scheme, withdrawal of rights etc. The division of rights as set out in the Recommendation is not a workable solution, at least not in the sense that each of the components could be disposed of separately in a meaningful way."[442] The Danish collecting society is more to the point: "Legally speaking it does not make sense to discuss "online rights" as such."[443] Again, the big societies do not articulate any criticism. E.g. MCPS-PRS simply settles the problem by saying that the scope of the Recommendation is adequate.[444]

With regard to the question of mandatory inclusion of niche repertoires in EU-wide licences, the UNESCO Treaty and the Lévai Report are widely referred to by the small and medium size authors' societies in the context of cultural diversity. However, there is no consensus on the issue of mandatory inclusion – certain societies support these measures[445], others strongly oppose to the idea[446], while some societies do not exclude the possibility, though are not in favour of such measures[447].

b) Publishers

Publishers, in general, are in favour of the current market developments and take the Recommendation as "a breath of fresh air"[448]. It is good for consumers, users and right holders. Consumers can take advantages of the simplified licensing, users can get simple services, and right owners benefit the new system by efficient accounting and payment.

At the same time, the comments from this group of respondents are not exempt from criticism. For instance, to the knowledge of IFPI "none of the new structures based on Option 3 and announced in public are actually licensing users. The fact that, almost 2 years after adoption of the Recommendation, there is still no evidence of improvements, which owe their existence to Option 3, illustrates that Option 3 does not provide a workable solution and fails to address the real obstacles."[449]

In connection to the nature of the instrument, IFPI is of the view that these issues should be left to the market, and stakeholders should be let to address the problems by self-regulation.

With regard to EU-wide licensing publishers referred to problems such as contractual concerns of publishers, withholding tax, and the discriminatory licensing practices of collecting societies. By way of example, the International Confederation of Music Publishers points out the problem that certain collecting societies are attempting to prevent copyright holders from choosing one or more collecting societies, further the problem that SABAM and BUMA/STEMRA alleged assumption that copyright holders have granted them worldwide online rights.

[442] TEOSTO, p 4.
[443] KODA, p 6.
[444] MCPS-PRS, p 8.
[445] E.g. IMRO.
[446] E.g. KODA and Artisjus.
[447] E.g. TEOSTO and AKKA/LAA.
[448] Music Publishers Association, p 1.
[449] IFPI, pp 3-4.

As to the scope of the recommendation, the terminology question is regarded as such without any problems – not surprisingly as the ambiguity around terms and withdrawal tend to favour them.

c) Users

The replies were submitted from a heterogeneous group of users: not only broadcasters, but mobile phone operators, digital media associations, and retailers. Though the Recommendation aims to ease licensing for users, it does not necessarily meet with a kindly reception. For instance, right on the front page of the comments from the European Broadcasting Union – in bold and italics – it is highlighted that broadcasters need one-stop-shop for the world repertoire, and legal certainty. The Association of Commercial Televisions in Europe phrased this the following way: "[b]y encouraging a direct licensing model (which we assume will be rolled-out also in the offline world), the Recommendation has led to a situation which undermines users' access to the world wide repertoire, thereby contradicting the Recommendation's objective of guaranteeing "*enhanced legal certainty to commercial users in relation to their activity*" [Recital 8 of the Recommendation]"[450]. Along this line, the BBC argues that "the only efficient way for broadcasters to operate is to use a single music collecting society to meet our key requirements of: (a) access to the worldwide repertoire; and (b) in relation to both broadcast and on-demand services"[451].

Similarly, Vodafone is highly critical of the Recommendation. It observes that "very few of the recommendations have been implemented and overall very little has happened on the market for cross-border management of copyright and related rights for legitimate on-line music services"[452]. Further, it spells out that its transaction cost would not decrease for the following three reasons: 1) for all other repertoires it would need to negotiate licences at national level, 2) a greater amount of analysis would be required, and 3) specific centralised reporting and payment would need to be set up for one set of repertoire.

Another comment is worth quoting here, that of the Sveriges Television. "Since public broadcasters through their remits generally have an obligation to serve the general public with content online and deal with such a great number of rights a day, collective management is a must, if rights are to be properly cleared. Music rights clearances would become totally inoperable if rights, as a consequence of the recommendation, were to be sought for among all the individual European collective rights managers that might operate exclusive rights to musical works."[453]

When it comes to the nature of the instrument, most of the users are in favour of legislation, i.e. binding rules.

In connection to the obstacles to EU-wide licenses, some publishers point out that it is the Recommendation itself that "creates such dangerous effects not only for on-demand rights for on-line sales of music recordings but also for traditional broadcasting rights because it encourages the major right-holders in music recordings to withdraw *any* rights from the collective licensing schemes […] without respect for the needs of any other stakeholders

[450] ACT, pp 2-3.
[451] BBC, p 2.
[452] Vodafone, p 1.
[453] SVT, p 1.

[…].”[454] Other users refer to the problem associated with the ‘appropriate licensee’, namely that collecting societies are only willing to license to users that are close to the end-user.[455] Other issues have been identified by Google. It contends that “[b]ecause the societies do not identify their repertoire, YouTube cannot know which repertoire is covered by which of these licences […].”[456] Further, it finds impossible to commercially negotiate appropriate licence fees, as the repertoires, and thus its values, cannot be ascertained.

d) Member States

Only few Member States responded, however, as regards general comments, that of the Swedish Justice Department are worth to take note of. Though the Swedish Government shares the Commission’s views on the need of legitimate online music services, it takes note of the fact that this is a very complex market with fragile balance, thus the modification of the rules can have severe consequences. The Swedish Government is concerned about the situation that evolved after the Recommendation. There is great uncertainty on the market, and the fragmentation of the market can very well lead to the opposite result compared to that which the Commission envisaged.

However, the UK Government apparently endorsed the views of the British collecting society. It argues that the Commission took the right approach in bringing forward the Recommendation, as “in areas in which the market is rapidly developing it is extremely difficult to in place legislative arrangements that will still be fit for purpose by the time they are enacted.”[457]

In February 2008, the Commission published a summary[458] of the responses to the call for comments. Opinions favouring the Commission’s line of thinking are highlighted, while opposing opinions (and the reasoning behind them) are barely mentioned. As to the effect of the Recommendation on the market, the Commission speaks in a low key. On the one hand, it says that the marked is still in a developing stage, and that negotiations are still in process, on the other hand, it says that “[t]he Recommendation […] seems to have produced an impact on the licensing marketplace” without indicating whether this impact has been positive or negative. This is rather telling. Then, in a laconic manner, it closes the document saying that it will follow further developments and repeat the monitoring, should a clear need to do so arise. It would have been more appropriate to say “after me, the flood.”

[454] EBU, p 6.
[455] See e.g. Vodafone, p 4 and GSM Europe, p 25.
[456] Google-YouTube, p 19.
[457] UK Government, p 1.
[458] European Commission, Monitoring of the 2005 Music Online Recommendation, Brussels (Summary of the Results), 07.02.2008.

10. EC CASE LAW ON COLLECTIVE RIGHTS MANAGEMENT

It would be mistaken not to provide, even if to such a short extent, an overview of the case law regarding collecting societies. The jurisprudence of the European Court of Justice and the decisions of the Commission are of high importance in the way of gaining a comprehensive picture about the current situation of collective management of rights within the EU. The approach of the DG Internal Market, the views of the European Parliament, the proceedings of the DG Competition, and the rulings of the European Court of Justice all have their bearings on the music industry. The legislative efforts and other steps of the DG Internal Market and of the European Parliament cannot be fully comprehended without keeping an eye on the on-going cases before the DG Competition. Apparently, there are both correlations and discrepancies within the Commission that are important to be highlighted in order to make the picture, provided in the previous chapter, complete.

In what follows, a short account will be given on the competition law cases related to collecting societies. First, the case law on abuse of dominant position will be presented. Then, cartel cases will be outlined, with especial regard to the ongoing *CISAC* case.

When it comes to antitrust cases (dominant position and cartel), it is common to categorise the cases related to collecting societies along the relationships that these societies form[459] (for the time being). These are: i) the relationship between collecting societies and their members (internal relationship), ii) the relationship between collecting societies and users (external relationship), and iii) the relationship between collecting societies (horizontal relationship).

10.1. Dominance

10.1.1. Collecting societies and their members

a) Protection of foreign right-owners against exclusionary behaviour of collecting societies

It was set out both by the Commission and European Court of Justice that discrimination of a collecting society on grounds of nationality is against the Treaty.

– *GEMA I*[460]

In its *GEMA I* decision (1971), among other things, the Commission held that the rules of GEMA discriminated right owners from other Member States by not letting them to become a member of GEMA (on equal grounds as German right holders). Further, the Commission held that the rights of GEMA's members should not be limited so as not to be able to leave the society and join another collecting society of another Member State.

[459] For convenience, I will follow the structure of Thomas Kaufmann presented in his speech before the European Commission in 26 April 1995.

[460] Decisione della Commissione 71/224/CEE del 2 giugno 1971 (IV/26760), GU L 134, 20.6.1971, pag. 15

– *GVL*[461]

Similarly, in its *GVL* decision (1983), the Court held that "a refusal by an undertaking having a de facto monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality of residence must be regarded as an abuse of a dominant position"[462]

b) The extent to which collecting societies ask for the assignment of copyrights

– *GEMA I*[463]

One of the most important founding in the first *GEMA* case (1971) concerned the extent to which GEMA required its members to assign their rights. It is up to the members to decide "whether they want to assign all or part of their rights for countries, in which GEMA does not operate directly, to GEMA or to another authors' society; whether they want to assign all their rights for countries, in which GEMA does operate directly, to GEMA or to split them among several societies by category; whether they want to withdraw the administration of individual categories from GEMA after duly giving notice to the end of any year."[464] The decision differentiated between the following categories of rights: 1) general performing rights, 2) broadcasting rights including the right of communication, 3) film performing rights, 4) mechanical reproduction and distribution rights including the right of communication, 5) film synchronisation rights, 6) the right to manufacture, reproduce, distribute and communicate carriers for video recording equipment, 7) the rights to uses arising as a result of technical developments or a change in legislation in the future.[465] As to the certain categories of works, GEMA was allowed to demand an exclusive assignment of all the works of an author, including his or her future works. These categories have become known as the "GEMA categories".

– *GEMA II*[466]

In the *GEMA II* case (1972) the Commission has redefined these categories in a more narrow way, including not 7 but 12 categories: 1) the general performance right; 2) the broadcasting right; 3) the public performance right of broadcasting works; 4) the television rights; 5) the public performance right of televised works; 6) the right of cinematographic exhibition; 7) the right of mechanical reproduction and diffusion; 8) the public performance right of mechanically produced works; 9) the cinematographic production right; 10) the right to produce, reproduce, and diffuse on video tape; 11) the public performance right of works

[461] Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* [1983] ECR 483.
[462] *Ibid.* point 56.
[463] Decisione della Commissione 71/224/CEE del 2 giugno 1971 (IV/26.760), GU L 134, 20.6.1971, pag. 15
[464] See *ibid.* at C, 1. e) as translated by Professor Dr. Reinhold Kreile and Professor Dr. Jürgen Becker in their paper, '*GEMA (2003)'*, available at http://www.gema.de/en/press/publications/papers/gema-2003/.
[465] „1. il diritto generale di esecuzione; 2. il diritto di radiodiffusione, compreso il diritto di trasmissione; 3. il diritto di rappresentazione cinematografica; 4. il diritto di riproduzione e diffusione meccanica, compreso il diritto di trasmissione; 5. il diritto di produzione cinematografica; 6. il diritto di produrre, riprodurre, diffondere e trasmettere su supporti per magnetoscopi; 7. il diritto di sfruttamento derivante dallo sviluppo tecnico o da una modificazione della legislazione."
[466] Decisione della Commissione 72/268/CEE del 6 luglio 1972 (IV/26.760), GU L 166, 24.7.1972, pag. 22

reproduced on video tape; 12) the exploitation rights resulting from technical developments or future changes in the law.[467]

– *DaftPunk*[468]

In its decision in 2002, the Commission held that members of a collecting society should have the freedom not to appoint any collecting societies in respect of the categories of rights. The rule that required the members to appoint a collecting society for every category of rights constituted an abuse of dominant position. That is, individual management of rights with regard to on-line exploitation should be available for authors.[469]

– *BRT/SABAM II*[470]

In this case of 1974, the Court indirectly approved the GEMA categories set by the Commission. In investigating the possible, direct or indirect, imposition of unfair conditions by BUMA on its members within the meaning of Article 82 (ex Article 86), the Court considered it necessary that "account must […] be taken of the fact that an undertaking of the type envisaged [BUMA] is an association whose object is to protect the rights and interests of its individual members against, in particular, major exploiters and distributors of musical material, such as radio broadcasting bodies and record manufacturers."[471] For the effective protection of interests, the Court went on, a collecting society must enjoy a position that allows it to carry out its activity on the necessary scale. However, the Court added that "it is desirable to examine whether the practices in dispute exceed the limit absolutely necessary for the attainment of this object, with due regard also to the interest which the individual author may have that his freedom to dispose of his work is not limited more than need be."[472] Therefore, the Court arrived to the conclusion that "a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition"[473]. Further, the Court concluded, that the imposition on its members of "obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse".[474] Accordingly, in assessing the status of a collecting society from a competition law aspect the two tests to be employed are the "indispensability" test and the "equity" test.[475]

[467] „a) il diritto generale d'esecuzione, b) il diritto di radiodiffusione, c) il diritto di comunicazione pubblica di opere radiodiffuse, d) il diritto di televisione, e) il diritto di comunicazione pubblica di opere telediffuse, f) il diritto di rappresentazione cinematografica, g) il diritto di riproduzione e diffusione meccanica, H) il diritto d'esecuzione pubblica di opere riprodotte con mezzi meccanici, i) il diritto di produzione cinematografica, j) il diritto di produrre, riprodurre e diffondere su supporti per magnetoscopi, k) il diritto d'esecuzione pubblica di opere riprodotte su supporti per magnetoscopi, l) il diritto di sfruttamento derivante dallo sviluppo tecnico o da una modificazione della legislazione."

[468] Commission Decision of 12 August 2002 (COMP/C2/37.219 – Banghalter & Homem Christo v SACEM) non-official publication.

[469] For a summary of the case, see Wood on pp 7-8.

[470] Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313.

[471] *Ibid.* point 9.

[472] *Ibid.* point 11.

[473] *Ibid.* point 12.

[474] *Ibid.* point 15.

[475] Guibault and Gompel, p 5.

– *Tournier*[476]

The above statement was confirmed again in1989 in the *Tournier* case. "Copyright-management societies pursue a legitimate aim when they endeavour to safeguard the rights and interests of their members vis-à-vis the users of recorded music. The contracts concluded with users for that purpose cannot be regarded as restrictive of competition for the purposes of Article [81] unless the contested practice exceeds the limits of what is necessary for the attainment of that aim. Those limits may be exceeded if direct access to a sub-division of a repertoire, as advocated by the discothèque operators, could fully safeguard the interests of authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works."[477] As it can be seen, the Court ruled that it was not against Article 81 (then Article 85) that the collective management society refused to grant national users authorisation to only one part of the repertoire (the foreign repertoire), save this practice does not go beyond what is necessary for the attainment of its aim.

c) Limitations on the freedom of the right owner to enter and leave a collecting society

– *BRT/SABAM II*

In the 1974 case[478], the request for preliminary ruling contained a question that concerned the stipulation of the collecting society to exercise the right holder's right for five years following the withdrawal of the member. The Court held that "a compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal."[479]

10.1.2. Collecting societies and users

a) Limitations hindering trade between Member States

– *GEMA IV*[480]

In the fourth *GEMA* decision, in1981, the Commission was concerned with the practice of charging royalties on musical works reproduced and put into circulation in another Member State, and for which licences from a collecting society had already been obtained (custom pressing).[481] Set up as a defence, GEMA was referring to the German copyright law. The Commission was of the view that sound recordings are products to which the principle of free movement of goods applies. Consequently, "national legislation whose application results in obstructing trade in sound recordings between Member States must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty."[482] Further, the Commission pointed out that the argument according to which "in the

[476] Case 395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 2521.
[477] Tournier, point 31.
[478] See fn. 470.
[479] BRT v SABAM II, point 12.
[480] Joined cases 55/80 and 57/80 *Musik-Vertrieb membran GmbH et K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* [1981] ECR 147.
[481] Fifteenth Report on Competition Policy (1985) point 81.
[482] GEMA IV, point 8.

absence of harmonization in this sector the principle of territoriality of copyright laws always prevails over the principle of freedom of movement of goods within the common market cannot be accepted."[483]

b) Refusal to negotiate on the whole or parts of the repertoire of the collecting society

– *Tournier*

One of the questions referred to the Court in the *Turnier* case[484] (1989) was whether the practice of collecting societies of refusing to grant any access to their respective repertoires to users established in other Member States was in breach of Community competition law. The questions were raised in a criminal proceeding, before a French court, which was initiated against Jean-Louis Tournier, the Director of Sacem, by a discothèque owner who claimed that the royalties were excessive, unfair or undue. The Court arrived to the conclusion that the systematic refusal of granting direct access to their repertoires to foreign users must be regarded as a restrictive practice. At the same time, however, the Court held that no concerted action can be presumed where the reason for the parallel behaviour is such that "the copyright-management societies of other Member States would be obliged, in the event of direct access to their repertoires, to organize their own management and monitoring system in another country."[485]

c) Problems relating to tariffs asked by collecting societies

– *Tournier*

Another question raised in the *Tournier* case[486] (1989) concerned the royalties charged to French discothèques by Secam. "When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States."[487]

10.2. Cartels

10.2.1. *Tournier*

The first case to be mentioned here is the *Tournier* case[488] from 1989. The judgement of the Court is of seminal importance to the horizontal relationship between collecting societies. The Court held – in the context of public performance of copyrighted musical works – that reciprocal representation agreements are "contracts for services which are not in themselves restrictive of competition in such a way as to be caught by [81 (1)] of the Treaty."[489]

[483] *Ibid*. point 14.
[484] See fn. 476.
[485] Tournier, point 24.
[486] See fn. 476.
[487] Tournier, point 38.
[488] See fn. 476.
[489] Tournier, point 20.

However, the Court added that "the position might be different if the contract established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad."[490] This judgement was interpreted by some as an implicit statement that there could be competition between different national collecting societies, which represent the same categories of rights.[491] This view can be found in the *Lucazeau* case[492] as well.

The judgement has been interpreted in two different ways. The narrow interpretation says that due to the practical impossibility of setting up a parallel monitoring system in another Member States, collecting societies are not competitors, thus the reciprocal representation agreements do not fall foul of Article 81. The broader interpretation, however, implies that once collecting societies become actual or potential competitors, the reciprocal agreements could come under the ambit of Article 81.[493]

10.2.2. *IFPI Simulcasting Agreement*[494]

On 16 November 2000 the International Federation of the Phonographic Industry (IFPI)[495] applied to the Commission for negative clearance or, alternatively, for exemption under Article 81(3) of the Treaty in respect of a model reciprocal agreement between record producers' collecting societies to facilitate the grant of international licences for simulcasting. Simlucasting, as defined by the notifying parties, is the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals.

The IFPI submitted the notification on behalf of the record producers' collecting societies which are party to the agreement (IFPI itself is not). IFPI assisted the collecting societies to set up the arrangements that are the subject of the notification.

The aim of the agreement was to provide a one-stop-shop licence that was covering all the territories of the collecting societies party to the agreement. The underlying principle to the remuneration of rights was the country-of-origin principle. According to this, it was the act of communication to the public what mattered, thus a collecting society was empowered to grant an international simulcasting licence only to broadcasting stations whose signals originated in its territory.

Further, the agreement stipulated that the remuneration was due in all countries where the simulcast signal could be received. The rate was set to each territory by each collecting society, respectively. "Given that the envisaged 'one-stop' simulcast license comprises several repertoires and is valid in multiple territories, the tariff for a simulcast license will be an aggregate tariff composed of the relevant individual tariffs charged by each participating collecting society for simulcasting on its own territory. This means that the society granting a

---

[490] *Ibid.*
[491] See Kaufmann, p 5.
[492] Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811.
[493] See Wood, pp 8-10.
[494] Commission Decision 2003/300/EC of 8 October 2002 (COMP/C2/38.014 – IFPI 'Simulcasting') OJ L 107, 30.4.2003, p 58.
[495] IFPI is an international trade association, which represents about 1400 record and music video producers in 72 countries and affiliated industry associations in 44 countries. The producers of phonograms are members of national collecting societies.

multi-repertoire and multi-territory license will have to take into account all the relevant national tariffs, including its own, for the determination of a global licence fee."[496]

"More specifically, the Reciprocal Agreement will enable each participating collecting society:

(a) in the case of an exclusive right, to authorise, whether in its own name or in the name of the right holder concerned, simulcasting of sound recordings pertaining to the repertoire of the other contracting party and, where claiming equitable remuneration, to collect all remuneration, to receive all sums due as indemnification or damages and to give due and valid receipt for the aforementioned collections;
(b) to collect all licence fees required in return for the authorisations, and to receive all sums due as indemnification or damages for unauthorised simulcasts;
(c) to commence and pursue, either in its own name or in that of the right holder concerned, upon request and with explicit consent, any legal action against any person or corporate body and any administrative or other authority responsible for an illegal simulcast."[497]

According to the parties, the main advantage of simulcasting was the possibility for each collecting society to function as a 'one-stop-shop'.

However, the Commission had concerns about two provisions of the reciprocal agreements. One of them was linked to the clearance of rights, namely the original country-of-origin principle. By virtue of this provision, the broadcasters had no other choice but to approach the collecting society in their own Member State.

To meet the expectations, on 21 June 2001, the IFPI notified to the Commission an amendment to the agreement, according to which the broadcasters whose signal originate in the EEA would be able to approach any EEA collecting society established in the EEA in order to seek and obtain a multi-territorial simulcasting licence. "The reciprocal agreement is entered into subject to the existence of a right to prohibit / authorise or claim for an equitable remuneration under the relevant national laws in the countries where the signals are transmitted to."[498]

The subject of the other competition concern was the structure of the remuneration fee. Since the global tariff to be charged by a society granting a multi-repertoire / multi-territory licence had to be an aggregate of all the relevant national tariffs, the EEA-based collecting societies were to offer exactly the same products. Thus, no price competition would have existed. "What renders this mechanism particularly restrictive is the fact that the lack of price competition as it results from the envisaged system occurs not only in respect of the royalty proper due for the use of protected works but also as regards that part of the license fee which is meant to cover the administration costs of the grantor society. In fact, no distinction is made between the two elements the sum of which necessarily constitutes the total amount of the license fee. By not distinguishing the copyright royalty from the administration fee, the notifying parties significantly reduce the prospects of competition between them as regards pricing for the provision of the licensing service."[499]

[496] Commission decision, paragraph (24).
[497] *Ibid.* paragraph (19).
[498] *Ibid.* paragraph (21).
[499] *Ibid.* paragraph (71).

"The amalgamation of copyright royalty and administrative fee that results in an undifferentiated global license fee to be charged to a user cannot be considered as directly related to the notified agreement or objectively necessary for the existence of the Reciprocal Agreement."[500]

In light of the above concerns, IFPI notified to the Commission a second amendment on 22 May 2002 in which it undertook to increase transparency in connection to the remuneration fees charged by the collecting societies for the licence. Accordingly, the separation of the royalty element and the administration fee was included in the reciprocal agreement.

On 8 October 2002 the Commission exempted the agreement under Article 81(3) for a rather short period from 22 May 2002 until 31 December 2004.

10.2.3. *Santiago Agreement*[501]

As an answer to the challenges brought about by satellite broadcasting transmitting programs to more than one territory, in 1987, CISAC amended its model contracts. The Addendum (to the Model Contract of Reciprocal Representation between Public Performance Rights Societies of CISAC) concerning direct broadcasting satellites was adopted in Sydney at a session of the CISAC Administrative Council.[502] The Model Contract was to be supplemented with this addendum in those cases when a footprint was covering several countries. The Sydney Addendum constituted three formulae. Basically, these meant either that the conferred rights were valid for all countries within the footprint, or that the validity of the rights was subject to the contracting society's agreement or to prior consultation on the conditions.

"Due to the differing positions of the member societies of CISAC [on the use of the addendum], it has not been possible to reach a general agreement about a Sydney-type amendment to the Model Contract. Since, however, it became evident that the absence of a sufficiently simple licensing system for Internet transmission might lead to the proliferation of unauthorized uses and to growing disrespect for copyright, five societies with big repertoires have decided to work out and apply a new licensing model."[503]

The new model was adopted on the CISAC World Congress in Santiago de Chile, hence the agreement is called the "Santiago Agreement". The bilateral agreements were signed on 26 September 2000 by the following five societies: BMI (United States of America), BUMA (Netherlands), GEMA (Germany), PRS (United Kingdom) and SACEM (France). Later on, several other societies joined the agreement. The agreement was to expire at the end of 2001 (a trial period), with the possibility of extension.

The societies proclaimed that "[w]e realize that the extensive use of copyrighted music is not limited to territorial boundaries in the online world. We hope that others will agree that this is a necessary step to assure the legal performance of music online, and that many other societies will enter into such agreements."[504] The definitions contained in the agreement (e.g.

---

[500] *Ibid*. paragraph (72).
[501] See the Notice in cases COMP/C2/39.152 — BUMA and COMP/C2/39.151 – SABAM (COMP/C2/38.126 – Santiago Agreement) OJ C 200 17.8.2005, p 11.
[502] FICSOR, point 305 on p 111 *et seq*.
[503] *Ibid*. point 311 on p 114.
[504] BMI News, 25 September 2000, available at http://www.bmi.com/news/entry/232770.

online exploitation, webcasting / streaming, music on demand, video on demand) were regarded as performing rights.

The licence was to provide for a worldwide repertoire licence for on-line use without the territorial restrictions. The Santiago Agreement contained five important principles:

1) The licence was granted to the content provider.
2) The collecting society to provide the licence had to be the one within the territory of which the content provider had its actual or economic location (place of business).
3) The granted licence was a worldwide licence on a non-exclusive basis.
4) The prompt distribution of royalties.
5) The royalty rate was set according to the country of destination principle. Meaning that the royalty rate of the collecting society in the country where the download took place.

On 17 April 2001, BUMA, GEMA, PRS and SACEM notified to the Commission a number of bilateral reciprocal agreements they entered into with each other.[505] With the exception of the Portuguese collecting society SPA, all the other EEA societies joined the notification.

As it was summarized by the Commission in its Notice "the problems lay in the fact that (Section II of) the Agreement determines that the society with authority to grant the mentioned multi-repertoire licenses is the society of the country where the content provider has its actual and economic location. Given the fact that there is a single, monopolistic, collecting society per territory in the EEA, and that all collecting societies enter into such bilateral agreements, this means that each national collecting society is given absolute exclusivity for its territory as regards the possibility of granting multi-territorial/multi-repertoire licenses for online music rights. In addition, the Agreement contains a Most Favoured Nation (MFN) clause which reinforces the exclusivity referred to above. Therefore, according to the Statement of Objections, although the infringement of Article 81 derives from the limitation in each society's authority to license to its own territory, the multi-lateralisation of this limitation throughout the network of bilateral agreements, supported on a multilateral reassurance that all other collecting societies will be subject to the same territorial limitation, leads to a standardisation of the licensing terms throughout the EEA, preventing the market from evolving in different directions and crystallising the exclusivity enjoyed by each of the participating societies."[506]

The collecting societies, with two exceptions, protested against the findings of the Commission, as the elimination of the economic residence clause would have resulted in competition between collecting societies with a detrimental effect to their principle tasks of such societies. (A scenario that was brought forward as Option 2 in the Study commissioned by DG Markt, and was rejected as an unworkable model.[507] It would have enabled users to forum shop, and the system would have resulted in a "race to the bottom" as regards royalties.) Following the Statement of Objections, issued on 29 April 2004, two societies, BUMA[508] and SABAM[509] undertake "not to be party to any agreement on licensing of public performance rights for online use with other copyright management societies containing an

[505] Notification of cooperation agreements (Case COMP/C2/38.126 – BUMA, GEMA, PRS, SACEM), OJ C 145, 17.5.2001, p 2.
[506] Commission Notice of 17 August 2005, OJ C 200/11, points 6 and 7.
[507] See Study.
[508] By a letter of 20 April 2005.
[509] By a letter of 10 May 2005.

economic residency clause, similar to that contained in the Santiago Agreement and identified as restrictive in the Statement of Objections."[510] The commitments were considered by the Commission as such that adequately addressed the concerns.

In the case at hand, basically, the Commission questioned the territoriality, which serves as the basis for the present system of reciprocity between collecting societies. The Santiago Agreement was not renewed, hence expired on 31 December 2004.

10.2.4. *BIEM Barcelona Agreements*[511]

Collecting societies of mechanical rights entered into agreements that were modelled on the Santiago Agreement. The agreements were adopted on 28 September 2001, on the general meeting of BIEM in Barcelona. The BIEM Barcelona Agreements were notified to the Commission on 28 February 2002.

The agreements amended those reciprocal agreements that were already in place between the collecting societies, and related to online reproduction. It covered webcasting and on-demand transmission of music by acts of streaming or downloading. (In the off-line world, the Cannes Agreement[512] and the Cannes Extension Agreement[513] were aiming to achieve a similar goal.) Similarly to the Santiago Agreement, these agreements had territorial clause. And just like the Santiago Agreement, the BIEM Barcelona Agreements expired on 31 December 2004 in lack of renewal.

10.2.5. *CISAC*[514]

On 30 November 2000, RTL filed a complaint against GEMA, which concerned the refusal of GEMA to grant a Community-wide licence to the RTL Group for all its music broadcasting activities. According to RTL, this refusal was based on the territorial restrictions found in the reciprocal representation agreements between collecting societies, which are anti-competitive and cannot be justified in the digital environment. As a result of this, RTL contends, it must seek a licence in each Member State in which it operates, and is prevented from obtaining a single licence for the whole of the EU. This situation places RTL to a serious competitive disadvantage. As a solution, central licensing should be introduced, which would significantly reduce costs for international broadcasters.

On 4 April 2003, Music Choice filed a complaint against CISAC. The complaint concerned a model contract for public performance rights between collecting societies that are members of CISAC. As the two cases were similar in substance, the Commission merged them under the *CISAC* case.

On 31 January 2006, the Commission sent a Statement of Objections to, and thereby opened formal proceedings against, CISAC and the individual national collecting societies in the EEA that are members of CISAC.

---

[510] Commission Notice of 17 August 2005, OJ C 200/11, point 9.
[511] Notification (COMP/C2/38.377 – BIEM Barcelona Agreements) OJ C 132 4.6.2002, p 18.
[512] The Cannes Agreement was concluded on 13 November 1997 and expired on 30 June 2002.
[513] The Cannes Extension Agreement extended the terms of the Cannes Agreement for another three and a half years. The Commission initiated proceedings which ended with the making the offered commitments binding. See Commission Decision of 4 October 2006 (COMP/C2/38.681 – The Cannes Extension Agreement).
[514] Commission Decision of 16 July 2008 (COMP/38.698 – CISAC).

In the press release on the Statement of Objections the concerns are summarised as follows.

"The Statement of Objections concerns certain parts of the CISAC model contract and its implementation at bilateral level by CISAC members in the EEA. This model contract and its duplicates at bilateral level concern the collective management of copyright for every category of exploitation, for example the broadcasting of music in a bar, a night club or via internet. However, the SO concerns only certain relatively new forms of copyright exploitation: internet, satellite transmission and cable retransmission of music. The traditional forms of exploitation are outside the scope of the SO. As regards these new forms of copyright exploitation, the Commission considers that certain aspects of the agreements might infringe the EC Treaty's prohibition of restrictive business practices (Article 81). These aspects are:

(i) the membership restrictions which oblige authors to transfer their rights only to their own national collecting society (whatever the subsequent exploitations of the rights)

(ii) the territorial restrictions, which oblige commercial users to obtain a license only from the domestic collecting society and limited to the domestic territory, and

(iii) the network effects of the agreements (the effect of the network of interlocking agreements between the collecting societies is that the membership and territorial restrictions multiply and guarantee to collecting societies an absolutely exclusive position on their domestic market: the historical de facto monopoly is strengthened and potential new entrants are prevented from entering the market for the management of copyright)."[515, 516]

The very first reactions mirror a complete being at a loss on the side of CISAC and its member societies. It was spelled out that the Commission takes an unduly narrow approach towards the issue of collective management of rights, and it did not take into account the cultural dimensions, although, on the one hand, the UNESCO Convention for cultural diversity stated that cultural creations are not comparable to ordinary goods and services, and on the other hand, Commissioner McCreevy declared the importance of "maintaining the value of copyright protected works so that content is not available on the cheap"[517]. Further, it was pointed out right at the beginning that the clause on member affiliation no longer exists in the CISAC Model Contract and that a provision introducing non-exclusivity into Reciprocal Agreements between EEA societies was inserted in 1996.

In April 2006, CISAC sent its responses for the Statement of Objections of the Commission. In it, CISAC harshly criticizes the Statement of Objections, and draws the Commission's attention to several factual errors and omissions. First, it reminds the Commission that the CISAC Model Contract had been subject to competition assessment, and a comfort letter was obtained in 1999. Further, the Commission seems to be forgotten about the *Tournier* and *Lucazeau* cases, in which the Court said that the territorial restrictions were not restrictive.

It is also pointed out that the Statement of Objections lacks any factual and legal analysis of the market, instead, the Commission's approach is theoretical. Examples for errors and omissions are many: for example, the Commission assumes that the Model Contract precludes

[515] Press Release of 7 February 2006, MEMO/06/63.
[516] These three concerns shrank to two by the time the commitments were submitted.
[517] Press Release of 12 October 2005, IP/05/1261.

commercial users from obtaining multi-territorial licences. In reality, since the Sydney modifications, the Model Contract provides that possibility.

Furthermore, the Statement of Objections challenges two provisions that have already been removed from the Model Contract. The membership clause was abandoned in 2004, and the abandonment of the exclusivity provision was recommended by CISAC more than 10 years ago.

Finally, the complete ignorance on the Commission's side with regard to the cultural aspects is pointed out. Looking upon cultural creations as ordinary goods or services is not in line with the UNESCO Convention for cultural diversity. Additionally, the dangers of such a destructive approach are highlighted.

The addressees of the Statement of Objections expressed their views in their written replies and during an oral hearing which took place on 14, 15 and 16 June 2006. There, CISAC pointed out its main arguments in connection the three concerns: membership, exclusivity and territoriality. Regarding the first and second, CISAC only referred to the fact that CISAC deleted the membership clause and that CISAC recommended that all its EEA members abandon the exclusivity provisions.

In the rest of the oral hearing, it was the territorial question that the Director General of CISAC, Eric Baptiste was focusing on. Without quoting extensively from the speech[518], it worth recalling the headings, which are very telling.

I. The approach taken in the SO is purely theoretical and is replete with important factual errors and omissions
   (a) Lack of any economic assessment
   (b) The authors' societies' role against piracy has not been taken into account
   (c) It is wrongly assumed in the SO that true pan-European satellite broadcasters still have to obtain a licence on a national basis
   (d) There is no evidence that remote monitoring would be a viable alternative for cooperation among authors' societies
   (e) The SO ignores the notification to the Commission of the CISAC Model Contract made in 1994 and the Commission's subsequent comfort letter issued in 1999
II. Forcing authors' societies to compete vis-à-vis commercial users would be damaging and detrimental to the vast majority of creators and users
III. Forcing authors' societies to compete vis-à-vis commercial users would be contrary to past studies on the issue
   (a) Economic studies show that competition vis-à-vis commercial users would be damaging and inefficient
   (b) The views expressed in the SO regarding the internet contradict the Commission's 2005 study on a Community Initiative on the Cross-Border Collective Management of Copyrights
   (c) The views expressed in the SO are at odds with former Commissioner Monti's assessment

[518] Available at http://cisac.org/CisacPortal/globalSearch.do?method=forwardToGED.

Following the Oral Hearing (in the autumn of 2006), the Commission requested additional information from the collecting societies in order to gain full knowledge of the facts. The questions related to revenues, royalties, administrative fees, pricing structures, market concentration, cost structure, etc. The detailed answers did not change the Commission's approach.

In spite of their strong overt opposition, fearing the possible fines, the collecting societies offered to abide by a set of commitments which were designed to remedy the Commission's concerns. In the proposed commitments, submitted on 7 March 2007, the societies emphasized that the commitments under no circumstances should be interpreted or construed to mean or imply any acknowledgment of (a) violation(s) of the EC competition rules by CISAC or bay any Signatory Society. The commitments, as summarized in the Notice of 9 June 2007, are the followings.

"Concerning the 'membership clauses', CISAC offers not to recommend in relation to the reciprocal representation between EEA societies, and the signatory societies offer to remove from representation agreements with another EEA collecting society, clauses identical, similar or having the same effect as the clause on which the Commission expressed concerns within 30 days of the date in which CISAC and the signatory societies are notified of the European Commission's decision under Article 9(1) of Council Regulation (EC) No 1/2003.

Concerning the 'territoriality clauses', CISAC offers not to recommend the granting of exclusive rights between EEA societies and the signatory societies offer to remove, from the representation agreements with another EEA collecting society any clause identical similar or having the same effect as the exclusivity clause at latest 30 days after the date on which CISAC and the signatory societies are notified of the European Commission's decision under Article 9(1) of Council Regulation (EC) No 1/2003.

In addition, with regard to the territorial delineation, signatory societies undertake (1) to license their own performing rights repertoire to internet services, satellite services and/or cable services directly across the EEA or (2) to mandate, under certain conditions, each signatory society which fulfils certain qualitative criteria to grant multi repertoire multi territorial performing right licences for internet services, satellite services and cable retransmission services. Concerning internet, the proposed commitments cover all cross border internet websites accessible within the EEA. Concerning satellite transmission, collecting societies located within the area of uplink of the broadcast or in which the broadcaster economically targets end-consumers will have the possibility to grant a licence covering the relevant licensing area to the broadcaster which exploits a channel on a multi territorial basis. For cable retransmission services of a satellite broadcast, not only the collecting society in the Member State where the cable operator is located but also the collecting society which grants the licence to the broadcaster will have the possibility to grant a licence for cable retransmissions. This does not apply when a collecting society offers a global licence for cable retransmissions for all transmitted channels at a tariff which is independent of the number of retransmitted channels or when a cable operator has a statutory obligation to re-invoice the royalty fee in respect of the cable retransmission licence to the end-consumer. Notwithstanding the above, the commitments do not preclude the signatory societies from excluding internet services, satellite services and/or cable services from the network of reciprocal representation contracts. Each signatory society shall implement the commitments at the latest six months, in relation to internet service, and nine months, in

relation to satellite and cable retransmission services, after the adoption of the European Commission's decision under Article 9(1) of Council Regulation (EC) No 1/2003.

All signatory societies which fulfil certain qualitative criteria will have the possibility to issue the multi repertoire multi territorial licences described above. The qualitative criteria are listed in an exhaustive way in the proposed commitments and relate in particular to tariffs, deductions, administrative infrastructure, technical capacities, transparency and rules of distribution."[519]

According to the commitments, one of the criteria to be fulfilled by each Signatory Society to be eligible for offering a multi-territorial multi-repertoire performing right licence to users, concerns tariffs. The other Signatory Society has to guarantee that it will apply tariffs, schemes or formulas which are agreed between them. In practice, this meant that each Signatory Society will have the possibility to apply the country of destination principle.

Interested parties were invited to present their comments, by 9 July 2007, on the commitments offered by CISAC and 18 (eventually 19) EEA collecting societies. The following day of the publication of the Notice in the Official Journal, on 10 July 2007, some of Europe's largest copyright users, altogether 27 companies, sent a letter[520] to José Manuel Durao Barroso, the President of the European Commission and to Neelie Kroes, Commissioner for Competition opposing the commitments.

In the letter, which was signed by such companies as France Telecom, Orange, RTL, ProSiebenSat1, Deutsche Telekom, the signatory companies express their concerns in connection to the proposed commitments which "raise substantial issues as regards application of competition law and internal market rules, cultural diversity, and the relationship between smaller and larger representatives of right holders." They urge the Commission not to accept the proposal which "would undermine the current system of licensing the global music repertoire as a single package and lead to a costly, inefficient and fragmented licensing system for music rights." "Such fragmentation would result in regional and national linguistic repertoires either not being played or paid" the letter continues. The companies conclude that "cultural diversity would suffer immediately and directly."

Though at first glance this statement comes as a surprise, it is a covert attack against the country of destination principle, which would mean that the users cannot shop around and press down royalties. In its press release of 19 July 2007[521], CISAC commented the above letter with the following: "CISAC was naturally delighted to read the statements in the user's letter "vehemently supporting" the cause of the individual creator and espousing concerns about cultural diversity. Nevertheless, coming from the conglomerates in question, the arguments sounded rather like the fox asking to guard the hen coop. In reality, one must not forget the avowed aim of certain powerful music users which have openly and without the slightest hint of embarrassment signalled their wish to provoke a "race to the bottom" on the royalties due to creators (the vast majority of whom struggle to make ends meet). As a representative of creators and publishers worldwide, CISAC remains committed to resisting

[519] Commission Notice, OJ C 128, 9.6.2007, p 12.
[520] Available at http://www.euractiv.com/29/images/Letter_Kroes_tcm29-165471.pdf.
[521] Available at http://www.cisac.org/CisacPortal/consulterDocument.do?id=4458.

this barely concealed and deleterious aim at every opportunity." Therefore, CISAC reaffirmed[522] its support for the Commitments, without, of course, any admission of liability.

Apart of the above letter, the Commission received many other comments from interested parties. On 30 August 2007, the non-confidential versions of the replies to the market test were sent out to the parties. The majority of the market players are dissatisfied with the commitments (and the direction of the case in general). The most common observations are that the commitments do not solve the problems, in fact create problems. It is argued that the commitments mirror the interests and will of a handful of large collecting societies, that of the most powerful ones. In case of altering the market structure to such an extent as is the case at hand, consultation extending to the whole of the market is inevitable. Yet, the Commission has ears only for the biggest market players, and for economic considerations. The solution envisaged by the Commission is not balanced well – if at all.

One of the main points that are highlighted by many is the need for the one-stop-shop for the world repertoire. This is considered essential, in particular, by users who would be in a hopeless situation if they were to seek licenses from possibly dozens of collecting society, and still having to live under the permanent threat to be sued for using unlicensed music. Besides legal uncertainty, costs incurring with all these additional applications for licences (and possible litigations) would leave many of the market players in a miserable situation.

As for the competition concerns regarding national monopolies, the new situation would replace the old one with new type of monopolies and, for that matter, much worse ones. The concentration of repertoires (instead of a world repertoire) to one market player with exclusive licensing would distort the market considerably. This holds especially true in case the repertoire is a "must have" content.

An additional concern from the side of users regards the fact that the Statement of Objections covers performing rights only. However, performing rights rarely come alone; mechanical rights have to be cleared as well, and it is rather uncomfortable to have separate licensing schemes for two rights that usually come hand in hand.

Lastly, an argument that has been made again and again: cultural diversity will be stifled if smaller repertoires will not be disseminated. This represents only one aspect of the consumer harm that is not taken into account by the Commission. Albeit competition matters boil down to consumer welfare, the new licensing system will not confer benefits on consumers.

Following the opinion of the Advisory Committee[523] – given at its meeting of 17 June 2008 – the Commission adopted its decision on 16 July 2008. The decision did not spring any surprise. The same argument was put forward that we have seen. The Commission tried to be on the safe side by emphasizing that it did challenge the existence of the reciprocal representation agreements as such. However, besides condemning the membership clause and the territorial exclusivity clause anti-competitive, the Commission held that the systematic and coordinated territorial delineation of the agreements by national territory constituted a concerted practice. CISAC and many of its member societies appealed the decision to the Court of First Instance, where, at present, the case is pending.

[522] On 1 February 2008, CISAC anew reaffirmed the commitments, but this time together with ICMP and IMPA. Available at http://www.cisac.org/CisacPortal/consulterDocument.do?id=12588.
[523] Opinion of the Advisory Committee, OJ C 323, 18.12.2008, p 9.

11. FALLING OUTSIDE OF ARTICLE 81(1)

This chapter explores the proportionality test applied in EC competition law cases, and the legal exception provided by Article 81(3). As it will be demonstrated below, the jurisprudence of the European Court of Justice provides examples for taking into account non-competition considerations that outweigh the anti-competitive nature of practices. That is, it is possible to balance non-competition objectives against a restriction of competition. This bears importantly on the issue of collective rights management.

It stands to reason that not all agreements prevent, restrict or distort competition. The practice of applying the prohibition to the cases developed differently in the US and the EU. In US law, the rule of reason approach was taken. It means that in deciding whether a practice restricts competition or not the pro- and anti-competitive effects are balanced. The background to the rule of reason approach was the Sherman Act 1890, as Section 1 did not provide any exemption similar to 81(3). Therefore, a solution had to be found in order to make the antitrust rules meaningful in practice by reasonable interpretation. This solution was the rule of reason approach developed on a case-by-case basis.[524]

EC competition law, however, differs considerably from US antitrust law. Besides the single market aspect, the 81(3) serves as an exemption possibility. Therefore, many argue, the rule of reason approach does not need to be, and should not be, incorporated into EC competition law.[525]

Still, the question is not as simple as it seems, and the controversy over the application of the rule of reason (or something equivalent to it) is more or less a constant issue. The reconciliation of the two rules was offered by Advocate General Léger in the *Wouters* case[526]. The Advocate General put forward that "irrespective of any terminological dispute, the rule of reason in Community competition law is strictly confined to a purely competitive balance-sheet of the effects of the agreement. Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article [81(1)] of the Treaty. The only legitimate goal which may be pursued in accordance with that provision is therefore exclusively competitive in nature."[527]

Wider public interest issues are to be considered under Article 81(3). "According to the case-law, the wording of Article [81(3)] makes it possible to take account of the particular nature of different branches of the economy, social concerns and, to a certain extent, considerations connected with the pursuit of the public interest. Professional rules which, in the light of those criteria, produce economic effects which are positive, taken as a whole, should therefore be eligible for exemption under Article [81(3)] of the Treaty."[528]

---

[524] The US Supreme Court defined the competition balance-sheet method as follows: "An analytical method intended to draw up, for every agreement in its own context, the balance-sheet of its anti- and pro-competitive effects. If it shows a positive balance, because the agreement stimulates competition more than it restricts it, section 1 of the Sherman Act will not apply." See the opinion of Advocate General Léger delivered in the *Wouters* case, paragraph 101.

[525] See e.g. Whish on p 133.

[526] Opinion of Mr Advocate General Léger delivered on 10 July 2001 in the *Wouters* case (see fn. 529).

[527] *Ibid.* paragraph 104.

[528] *Ibid.* paragraph 113.

However, this approach was not indorsed by the ECJ. In its landmark judgement in the *Wouters* case[529], the ECJ decided a preliminary ruling. The case concerned the rule adopted by the Dutch Bar Council which prohibited lawyers entering into partnership with accountants. Though the rule restricted competition – contrary to what the Advocate General put forward in its opinion – the Court stated that "[h]owever, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience […]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."[530]

The ECJ clearly stated that the manifest anti-competitive nature of the professional rules of the Dutch Bar was outweighed by non-competition considerations, thus Article 81(1) was not infringed. "[D]espite the effects restrictive of competition that are inherent in it, [the regulation of the Bar] is necessary for the proper practice of the legal profession, as organised in the Member State concerned."[531]

It is worth noting that the decision in the *Wouters* case was not without antecedents. In the *DLG*[532] case – which concerned provisions in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organised cooperation which are in direct competition with it – the Court said that "a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article [81(1)] of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers."[533]

This approach is similar to that which would have been reached under Article 46.[534] Member States may adopt rules that restrict the freedom to provide services within the Community on the condition that the restriction serves legitimate public interests not incompatible with Community aims, and which do not go beyond what is necessary to attain its objective.[535] That is, the objectively justifiable purpose must be proportionate to the harm it does.

---

[529] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
[530] *Ibid.* paragraph 97.
[531] *Ibid.* paragraph 110.
[532] Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641.
[533] *Ibid.* paragraph 45.
[534] Article 46 provides for that the provisions of that Chapter (Chapter 2, Right of Establishment) and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
[535] Craig and de Búrca, pp 775-776.

The proportionality test in connection to the rules of the internal market has been applied in several cases. In connection to sports[536], the Court of Justice employed this justification in *Bosman*[537], *Deliège*[538] and *Lehtonen*[539] cases. It is worth to take a closer look of these judgements, and not just because the reasoning of the Court was basically the same as in the *Wouters* case, but because in all three cases the Advocate Generals put forward an identical reasoning under competition law.

In the *Bosman* case, the Court established that "the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose."[540]

In the *Deliège* case, in connection to selection rules for participating in high-level international sports competition, the Court found justifications for rules that inevitably had the effect of limiting the number of participants in a tournament. The Court held that "such a limitation is inherent in the conduct of an international high-level sports event […] Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 of the Treaty."[541]

Finally, in the *Lehtonen* case, the ECJ held that "[t]he existence of an obstacle to freedom of movement for workers having thus been established, it must be ascertained whether that obstacle may be objectively justified."[542]

It is interesting to see at the same time that the Advocate Generals made the same arguments, however, against competition law background.

Bosman case

"[I]n interpreting Article [81(1)] the Court of Justice does not proceed from a formal concept of restriction of competition, but carries out an evaluation. […] Moreover, the Court also regards restrictions of competition as compatible with Article [81(1)] if, taking all the circumstances of the particular case into account, it is apparent that without those restrictions the competition to be protected would not be possible at all."[543] "[T]he Court of Justice does indeed attach weight to the concerns on which the 'rule of reason' doctrine is based."[544]

---

[536] For an excellent analysis of the sporting exemption, and the conflict between internal market and competition rules, see Rincón.

[537] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA* v *Jean-Marc Bosman and others and Union des associations européennes de football (UEFA)* v *Jean-Marc Bosman* [1995] ECR I-4921.

[538] Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* (C-51/96) *and François Pacquée* (C-191/97) [2000] ECR I-2549.

[539] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681.

[540] Paragraph 104.

[541] Paragraph 64.

[542] Paragraph 51.

[543] Paragraph 268.

[544] Paragraph 269.

Deliège case

„Applying that reasoning to this case, I also take the view that, even if they were to be regarded as reducing competition, in the sense that they prevent certain judokas from taking part in certain international tournaments, the contested rules do not fall within the scope of Article [81] of the Treaty because they are indispensable for attaining the legitimate objectives deriving from the particular nature of judo."[545]

Lehtonen case

„In so far as the present transfer deadlines do not disproportionately affect freedom of movement for workers, they guarantee comparability of results of matches within a season. That objective is decisive for the competition between clubs which consists in increasing the attractiveness of their matches. Transfer periods are therefore compatible with Article [81] of the EC Treaty to the extent that they may be reconciled with freedom of movement for workers."[546]

This approach was followed by the Commission as well. In a press release, in which it elaborated on the application of competition law to sporting activities, it acknowledged the proportionality test as one of the possible approaches. "[T]he Commission has taken note of certain preliminary conclusions on the application of the competition rules in the sport sector by debating examples of sporting organisations' practices grouped in four categories: (1) rules to which, in principle, Article [81(1)] of the EC Treaty does not apply, given that such rules are inherent to sport and/or necessary for its organisation."[547]

An example to this approach is the *ENIC/UEFA* case, where ENIC filed a complaint against UEFA regarding the latter's rule on multiple ownership of football clubs according to which a company or individual cannot directly or indirectly control more than one of the clubs participating in a UEFA club competition. In its rejection of complaint decision, the Commission took the position that "the question to answer in the present case is whether the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions. Taking into account the particular context in which the rule is applied, the limitation on the freedom to act that it entails is justified and cannot be considered as a restriction of competition."[548]

This proportionality test is recognised in competition law as the qualitative appreciability test. As Whish explains it in connection to the *Wouters* case, it is 'regulatory' ancillarity, as opposed to commercial ancillarity. The Court concluded that it is possible to balance non-competition objectives against a restriction of competition.[549] This line of reasoning is very similar to that that would have been employed under Article 49 – however, in that case it is a Member State, and not an undertaking, that adopt restrictive rules.

The test applied in *Wouters* is not limited to that regulatory context. It is a rule that may be applied to any regulatory environment – provided that the circumstances in general are similar: the procompetitive aspects outweigh the anti-competitive ones.

[545] Paragraph 112.
[546] Paragraph 108.
[547] Commission debates application of its competition rules to sports, IP/99/103, 24 February 1999.
[548] Rejection of Complaint COMP/37.806 – ENIC/UEFA (2002), point 32.
[549] Whish, p 127.

In the *Meca-Medina* case[550], in connection to sporting rules, the Court held that the "mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[551] However, in connection to the present argument this is of minor importance right now. What is of interest in the judgement is that the Court's decision went back to the *Wouters* judgement, and was in line with the Advocate Generals opinions in the *Bosman, Deliège* and *Lehtonen* cases. It held that "the compatibility of rules with the Community rules on competition cannot be assessed in the abstract (see, to this effect, Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 31). Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97) and are proportionate to them."[552]

It is hard not to see the similarity to this respect with the situation of collecting societies. One-stop-shop, besides other things, is a feature in the system of collective rights management that is desired by the vast majority of the market players and consumers. It is an essential element of the system, and the anti-competitive aspects (if any) are inherent in the pursuit of the objectives thereof and are proportionate to them, as it clearly outweigh the anti-competitive effects of territoriality as a result of reciprocal representation agreements.

So far, it has been discussed whether Article 81(1) was infringed at all. As we have seen, it is safe to say that very strong non-competition arguments can be made, which should not be ignored. Still, in case the agreement falls under Article 81(1), Article 81(3) provides one more possibility to escape the prohibition, providing that four conditions are satisfied.

The conditions for the legal exception to apply are the following. The agreement

- must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- must allowing consumers a fair share of the resulting benefit;
- must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

From our discussion's point of view the first condition is of high importance. The efficiencies brought about by the agreement are specified in the Article. However, the nature of these efficiencies depends on their narrow or wide interpretation. While the former one confines the efficiency to an economic one, the latter goes beyond that of economic nature. The broader interpretation gives way to non-economic considerations. That is, other Community policies can be taken into account in the assessment, such as environment, employment or industry,

[550] Case C-519/04 P *David Meca-Medina and Igor Majcen* v *Commission* [2006] ECR I-6991.
[551] Paragraph 27.
[552] Paragraph 42.

and, in the case of collective rights management, more importantly, culture. This means that benefits in these spheres are weighed against the anti-competitive effects.

In the *Métropole télévision SA v Commission* case[553] the CFI said that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [81(3)] of the Treaty."[554] As we have already seen, the public interest, that is, non-competition considerations were already taken into account in establishing whether Article 81(1) was infringed at all.

The requirement of fair share for consumers prescribes that the consumers must be better off as a result of the agreement. They have to benefit, however, from all the efficiencies as a whole, and not from each and every one of them separately. In case of a multi-repertoire and multi-territory licence, the cultural gain of consumers by having access to the world repertoire and the financial gain of multi-territory service providers (users) by having the possibility of obtaining a single licence would be quite obvious.

The indispensability test, which is a pre-condition for the fair share requirement, is a two-fold test. As the Guidelines[555] explain it in paragraph 73, "[f]irst, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies." Basically, this means that in absence of the restriction or by less restrictive means the efficiency gains would not materialise or at least not to that extent that otherwise would.

The fourth condition sets forth that competition must not be eliminated in a substantial part of the market. The elimination of competition in respect of a substantial part of the market is an autonomous Community law concept[556], in the assessment of which both actual and potential competition should be taken into account.

The very aim of collective rights management is the smooth functioning of the clearance of rights, meaning the simple and reliable intercourse between right holders and users, and a workable system for collecting and distributing royalties. The one-stop-shop is an indispensable element in the attainment of these objectives, and is appropriate in achieving these aims. It is a system that is necessary for the effectuation of the above goals and to ensure the proper practice to that regard. Moreover, it is inherent in the system and could hardly be achieved in any other means. Therefore, it does not go beyond what is necessary, and thus, is by no means disproportional to the drawbacks of reciprocal representation agreements. Hence, if this is coupled with the realisation of the mono-territoriality, the new service of the provision of mono-repertoire and mono-territory based licences can be very well argued to satisfy the conditions of Article 81(3).

[553] Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision SA v Commission* [1996] ECR II-649.
[554] *Ibid.* paragraph 118.
[555] Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p 97.
[556] *Ibid.* paragraph 106.

12. RECENT MARKET DEVELOPMENTS

12.1. New licensing entities

Under the pressure of the Commission's Recommendation, on the one hand, and the competition proceeding against CISAC and individual collecting societies, on the other, the market started to change. The two-front attack on collecting rights management has produced an environment full of uncertainties, which proved to be ideal for publishers to exercise and test their bargaining power by withdrawing their repertoires. In the logic of game theory, as demonstrated in the prisoner's dilemma[557], collecting societies are positioning themselves in a hurry to strike the best deals with publishers for pan-European licences, while putting small and medium size authors' societies in hopeless situation. And they are doing so even if it is clear to everyone that the loss of one-stop-shop will bear severe consequences for virtually all market players.

The EU-wide licensing initiatives are still at an early stage. Most of them are far from being up and running. First, those initiatives will be touched upon, that are connected to the big collecting societies. Then, the smaller authors' societies' initiatives will be presented.

1) CELAS

CELAS[558] (Central European Licensing and Administrative Service) is a joint venture between the MCPS-PRS and GEMA, and was set up[559], on 12 December 2007, to represent EMI Music Publishing's Anglo-American repertoire (or as it is phrased by CELAS: predominately for songs written and composed in the English language) in 40 European countries for online and mobile uses. As it defines itself on its homepage, "CELAS is leading the way in promoting rights-holders choice and control over how their music is used. It is making a ground breaking step towards supporting the changes the European Commission is encouraging in Collective Rights Management (CRM) operations in Europe."[560] Currently, it licenses mechanical rights of EMI.

Following the spirit of the Commission Staff Working Paper, this corresponds to the Option 3 model. By January 2009, more than 20 of the largest digital providers in Europe have been granted licences.

Initially, EMI granted exclusivity to CELAS, which was later on lifted, so that other agents and collecting societies could in principle manage EMI's mechanical rights.[561]

---

[557] The dilemma: "Two suspects are arrested by the police. The police have insufficient evidence for a conviction, and, having separated both prisoners, visit each of them to offer the same deal. If one testifies ("defects") for the prosecution against the other and the other remains silent, the betrayer goes free and the silent accomplice receives the full 10-year sentence. If both remain silent, both prisoners are sentenced to only six months in jail for a minor charge. If each betrays the other, each receives a five-year sentence. Each prisoner must choose to betray the other or to remain silent. Each one is assured that the other would not know about the betrayal before the end of the investigation. How should the prisoners act?" See http://en.wikipedia.org/wiki/Prisoner's_dilemma.

[558] Go to http://www.celas.eu.

[559] For the steps taken to inform European collecting societies about the establishment and activities, see the ELIAMEP Study, fn. 40.

[560] Go to http://www.celas.eu/CelasTabs/About.aspx.

[561] ELIAMEP Study, p 30.

2) PAECOL

The Pan-European Central Online Licensing GmbH (PAECOL) was set up by Sony/ATV Music Publishing and GEMA, the German collecting society, in July 2008 for the multi-territorial licensing of the mechanical rights of Sony/ATV. PAECOL is a 100% subsidiary of GEMA, and may use GEMA's administration structures and data sources.[562]

3) Alliance Digital

MCPS-PRS, the UK collecting society set up this platform[563] for EU-wide licensing of repertoires of small and medium sized publishers for online and similar exploitation in July 2008. It is foreseen to offer quarterly distributions, low administration charges, access to online databases of the repertoire, licence databases and audit results, and full transparency. To date, more than 800 small and medium sized publishers have mandated their online rights to Alliance Digital. Its aim is to attract as many licensors of online rights in musical works as possible.

4) PEL

The Pan European Licensing Initiative of Latin American Repertoire (PEL) was set up by SGAE, the Spanish collecting society, with the goal to become the one-stop-shop licensor for the digital use of Latin American repertoire. SGAE entered into agreement with Sony/ATV and Peer Music, and Central and South American collecting societies.[564]

5) PEDL

The Pan-European Digital Licensing (PEDL) was initiated by Warner/Chappell Music, the publishing arm of Warner Music Group. The first three collecting societies that singed up for it were GEMA, MCPS-PRS and STIM – as it was revealed by the press release on 30 January 2008.[565] However, currently five societies are participating: PRS (UK), STIM (Sweden), SACEM (France), SGAE (Spain) and BUMA-STEMRA (the Netherlands). Warner/Chappell Music grants non-exclusive rights in its catalogue to these collecting societies. As it stands on the Warner/Chappell's website "PEDL is Warner/Chappell Music's Pan European Digital Licensing initiative that offers digital and mobile service providers the opportunity of licensing Warner/Chappell Anglo US copyrights on a pan European basis from a single point in Europe, should they want to. We want to make the process of digital licensing an easy, streamline and hassle free experience."[566] It is an Option 3 model. PEDL remains open to other societies, as the participating collecting societies are non-exclusive licensing agents.

6) ARMONIA

The French, the Spanish and the Italian societies (SACEM, SGAE and SIAE) entered into an agreement in January 2007 to set up a licensing platform for online and mobile content.

[562] ELIAMEP Study, p 31.
[563] Go to http://alliancedigital.co.uk/.
[564] ELIAMEP Study, p 31.
[565] Not available anymore on Warner/Chappell Music's homepage.
[566] Not available anymore on Warner/Chappell Music's homepage.

ARMONIA or in other name the 'Joint Venture Alliance' would exclusively license the repertoire of these three societies. A number of points are still under discussion.

7) SACEM-UMPG

The Universal Music Publishing Group (UMPG) and the French collecting society, SACEM, signed an agreement on 28 January 2008 to set up a joint framework for the licensing and administration of their rights for online and mobile exploitation in Europe. The platform is to be operational during the second half of 2008.

8) BUMA/STEMRA and eMusic

BUMA/STEMRA licensed the world repertoire to eMusic on a pan-European basis. The pan-European licensing agreement was announced on 12 September 2006.[567] However, this arrangement and the legal argument behind is highly criticised by other collecting societies.

9) GESAC model

The General Assembly of GESAC (European Grouping of Societies of Authors and Composers), on 16 November 2005, set up an Online Licensing Working Group (OLG) in order to work out a "new cross-border licensing model for the online exploitation of the musical repertoire, that would enable European authors' societies to issue any on-line music service provider established in the EU with a multi-territorial licence covering the world repertoire, under specific conditions that would ensure the necessary protection of right holders' interests."[568] The non-exclusive licensing model would apply the tariffs of the country of destination. Accordingly, some societies deem the "GESAC model" as a Santiago "plus" model.[569]

GESAC envisaged that „[t]his Working Group will provide the GESAC General Assembly with the result of its deliberations at the beginning of 2006, as well as to the membership of each of the European societies as the agreement of the rightholders to the proposal will be fundamental. Results will also have to be discussed with the European Commission."[570] However, as reported by Artisjus in its comments on the Recommendation, there were no final results "as the discussion making has been blocked by the "Big5" societies, having in mind their own arrangements (CELAS, etc.)."[571]

10) Nordic model

The Nordic model is envisaged as a cross-border licensing cooperation for online and mobile exploitation in eight countries: Sweden, Norway, Denmark, Finland, Iceland, Lithuania, Latvia and Estonia – that is in the Nordic/Baltic region. It is possible that the societies of these countries will use the existing network of NCB (Nordisk Copyright Bureau). The tariffs applied are those of the country of destination. At the same time AKKA/LAA observes that

[567] Go to http://www.openpr.com/news/11182/direct-eMusic-and-Buma-Stemra-Announce-First-Pan-European-Author-Society-Licensing-Deal.html.

[568] GESAC Communiqué on governance and on-line licensing, Brussels, 22 November 2005. Available at http://www.gesac.org/ENG/NEWS/COMMUNIQUESDEPRESSE/download/COMMUNIQUESEN_20051122_Collective%20Cross-Border%20Management%20of%20Copyright.doc.

[569] See AEPI's comments to the Recommendation, p 8.

[570] *Ibid.*

[571] Artisjus, p 8.

"[u]p to now this model has worked successfully, but future initiatives faces serious obstacles due to major publishers withdrawing their online rights."[572]

11) eLOS

eLOS is collaborative project initiated by MCPS-PRS Alliance and SGAE, the Spanish society. It was announced[573] on 20 January 2006, and the aim of the project is to build a licensing model for online music in Europe. With the Commission's Recommendation in mind, the collecting societies want joint licensing of Anglo-Latin repertoires.

12) ICE

On 29 March 2007, MCPS-PRS and STIM announced the creation of a jointly-owned commercial service centre. The new approach will involve a centralised and consolidated approach, and the building of a new copyright works registration system. The new service centre, ICE (International Copyright Enterprise) will be set up in Sweden.

13) 21+ model

The 21+ model, based on the GESAC draft, was created by 21 small and medium sized collecting societies as an amendment to the existing reciprocal representation agreements. These societies cover the whole of Europe, save the "Big5" (UK, DE, FR, IT, ES) societies. The model would enable EU-wide licensing on a non-exclusive basis, with the application of tariffs of the country of destination.

14) SABAM and BUMA/STEMRA

Negotiations on the collaboration between Belgian and Dutch societies were initiated in 2004. The boards of the two societies, on 17 February 2004, approved the joint management of mechanical rights.[574] The planned cooperation covers joint management of mechanical rights and IT support.

15) SOLEM

SOLEM (Société pour l'Octroi de Licences Européennes de Musique – Society for the Granting of European Music Licences) was set up by SABAM at the end of 2007. It is a one-stop-shop for the whole of the EEA for online exploitation. However, sister authors' societies are harshly oppose the Belgian collecting society's move, as no rights were granted to SABAM. For the time being, SOLEM's activities are suspended.

12.2. Online Commerce Roundtable

The two-front attack on collecting societies has produced an environment full of uncertainties. The Commission's Recommendation, on the one hand, and the competition proceeding against CISAC and individual collecting societies, on the other, resulted in a market satiation which does not corresponds to the desired one. In an effort to ameliorate the present unsatisfactory state of affairs, on 17 September 2008, Competition Commissioner Neelie

[572] AKKA/LAA, p 7.
[573] Go to http://www.sgae.es/tipology/notice/item/en/1363.html.
[574] Go to www.sabam.be/website/data/BUMAengl.doc.

Kroes met with senior consumer and industry representatives[575], as was put in the press release, to discuss the opportunities and barriers to increased online retailing in Europe.

A group of advisers was established to prepare a report on the online provision of goods and services to consumers in the European Union[576], including the provision of copyrighted products. On the basis of this report, Ms Kroes will decide whether to support further regulation, deregulation or competition law enforcement.

Looking at the contributions[577] submitted by interested parties and by the roundtable participants, the dialogue follows that of the one we have seen in connection above. The arguments follow the same lines. For the sake of avoiding repetition, it is enough to pick on those comments that are of novelty or importance right here.

Apple says that "[t]he reason [iTunes Store] is not available in every EU country is that many of the countries do not offer a large enough marketplace to justify the expense and effort required to sell in that country."[578] It is worth remembering that DG MARKT's Study identified the lack of pan-European licences as the reason for the revenue gap between the US and the EU. Undoubtedly, getting one licence is much easier and cheaper than getting separate licences for each and every Member State. However, this is only one – presumably a tiny – factor in the evaluation of a marketplace. The size of the country, hence the marketplace and the language of it will not change because of the pan-European licence.

What will change, however, is the revenue increase for the publishers. As EMI phrased it, it "has taken an initiative to license its rights on a pan-European basis, as […] cost-effectively as possible"[579]. This gives us a hint about how EMI defines the "undue restrictions" of the intermediaries.

In fact, Apple summarise the market situation very aptly. "While it is clear that the European Commission's intentions behind issuing both the 2005 Recommendation and the CISAC decision have been to foster competition and a healthy environment in the field of cross-border copyright licensing, because of the legal uncertainty and strenuous efforts that are required, the consequences have been steps backwards from the simpler country-by-country multi-repertoire licensing of musical works that we had enjoyed at the inception of the iTunes Store in Europe. While it may be the case that, given sufficient time, enhanced competition might cause the marketplace to find its balance, it is not clear that developing online businesses can outlast an unpredictable transition. And it is already the case that new business models in the online world are being delayed and taking longer because of the arduous path."[580]

Following a second Roundtable meeting in December 2008, the Online Commerce Roundtable Report[581] was published in May 2009. The Report outlined the results of the meetings Besides setting out that performing rights should follow mechanical rights, and that

[575] Online Commerce Roundtable, see http://ec.europa.eu/competition/sectors/media/online_commerce.html.
[576] Issues paper: Opportunities in Online Goods and Services, see http://ec.europa.eu/competition/consultations/2008_online_commerce/online_issues_paper_annex.pdf.
[577] Available at http://ec.europa.eu/competition/consultations/2008_online_commerce/index.html.
[578] Apple/iTunes, p 1.
[579] EMI, p 2.
[580] Apple/iTunes, p 2.
[581] Available at http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf.

publishers should not be allowed to refuse licensing to collecting societies, conflicting views were present, among other things, on the on the 2005 Recommendation.

The present market situation is far from being suitable to the market players. For instance, in its contribution[582] submitted by Deutsche Telecom on the Online Commerce Roundtable Report, it says that the current licensing practice is to the disadvantage of both, right owners and users, and that in its experience "the current withdrawal initiatives do not facilitate the acquisition/clearance of rights in the online market at all. To the contrary, the withdrawal initiatives lead to a further fragmentation of repertoire and rights which make it much more difficult for the respective platform providers to clear the necessary rights in the music repertoire and audiovisual works offered on their on demand platforms. As a result, there is increasing uncertainty as to who controls which rights."[583]

And all this turmoil is because policy decisions are biased. The profit maximising efforts of the publishers were given undue weight, and came under the guise of pan-European licensing. The obvious way forward seems to be quite obvious. As it was phrased by Deutsche Telecom, "[a]ny European initiative should focus on the improvement of the current reciprocal agreements between the collecting societies in a way which allows each collecting society to grant multi-territory licenses."[584]

Following the third Roundtable meeting in September 2009, a joint statement was made on 19 October 2009, during the fourth meeting of the Roundtable, by the Online Commerce Roundtable participants on the "General principles for the online distribution of music" in which rather general objectives are set, such as developing efficient licensing platforms, securing an appropriate level of royalties for right holders, carefully monitoring, etc. Without details, not much can be said about the possible outcome, moreover there are two elements of uncertainty. First, DG Competition does not have the competence to develop legislation on this field, second, Commissioner Kroes mandate is coming to an end. However, this initiative fits together with, and supports the Reflection Paper on Content Online.[585]

12.3. Reflection Paper

The Commission's DG Information Society (INFSO) launched a public consultation in 2006 on "Content Online in Europe's Single Market" to "pave the way for a true European single market for online content delivery"[586]. The background to consultation is the EU's i2010 initiative[587], one of the key aims of which is the creation of an open and competitive single market for online content. The public consultation, to which a great number of contributions were submitted[588], was complemented with the Study[589] commissioned by the Commission. The aim of the Commission was twofold: "in the short term, to promote pragmatic solutions enhancing the availability of creative content online and ensuring additional revenues for all

[582] Contributions submitted by interested parties are available at http://ec.europa.eu/competition/consultations/2009_online_commerce/index.html.
[583] Deutsche Telecom AG, p 1.
[584] Deutsche Telecom AG, p 2.
[585] In fact, DG COMP and DG INFSO have been closely cooperating on the issues of online licensing and rights management.
[586] See Press Release of 28 July 2006, IP/06/1071.
[587] See Press Release of 1 June 2005, IP/05/643.
[588] See http://ec.europa.eu/avpolicy/other_actions/content_online/contributions/index_en.htm.
[589] Study on Interactive Content and Convergence; Implications for the Information Society. Available at http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/interactive_content_ec2006.pdf.

players in the value chain; in the medium term, to look at the need for regulatory intervention."[590]

Based on the consultation and the study, the Commission published a Communication in January 2008, on Creative Content Online in the Single Market[591]. In it, four areas have been identified for further EU actions: 1) availability of creative content, 2) multi-territory licensing for creative content, 3) interoperability and transparency of DRMs, and 4) legal offers and piracy. Stakeholders were invited for a second consultation on these issues.

To address these challenges, the Commission set up a "Content Online Platform", a kind of discussion group in which the various stakeholders can discuss the issues, and which would provide a framework for content specific and cross-industry negotiations. The platform, which gathered 77 high-level experts, amongst other things, dealt with the issues of improvement of rights clearance mechanisms, development of multi-territory licensing, management of copyright online, and cooperation mechanisms. The cooperation platform ran from April 2008 to January 2009, with five meetings, of which the one on management of copyright online was held on 17 July 2008.

The Final Report on the Content Online Platform[592] was published in May 2009. Regarding management of online rights, the discussions were rather fruitless. There seems to be one thing that the stakeholders agree on, namely the chaos. Due to the complexity of the questions, the ambiguous regulatory situation and the irreconcilable differences between the stakeholders, the whole process was on hold for about six months. Then, the Commission announced that it would issue a new Communication in October 2009. At the same time, in July 2009, Commissioner Reding made firm statements about employing legislative solution with regard to online content. This issue is her first and most important priority[593] for Commission's European Digital Agenda[594], a joint initiative with Consumer Affairs Commissioner Meglena Kuneva.

Just three days after the joint statement of the Online Commerce Roundtable participants, and one day after Competition Commissioner Neelie Kroes' speech in which she regarded the joint statement as a breakthrough, saying that the members of the roundtable "went from fragmented view to some basic but important shared ground"[595], on 22 October 2009 the DG INFSO and DG MARKT published its so-called Reflection Paper on a European Digital Single Market for Creative Content Online[596]. The paper is part of the Digital Agenda. At the same time, the Commission launched a public consultation on the online distribution of creative content.

Instead of the planned Communication, the paper takes a non-binding Reflection Paper form. The main goal of the Reflection Paper is to clean up the regulatory chaos that was mainly as a

---

[590] Final Report on the Content Online Platform, p 1.
[591] Creative Content Online in the Single Market, Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 836 final, Brussels, 03.01.2008.
[592] Available at http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf.
[593] See Commissioner Viviane Reding's speech of 9 July 2009, SPEECH/09/336, p 7.
[594] See Press Release of 5 May 2009, IP/09/702.
[595] See Commissioner Neelie Kroes' speech of 21 October 2009, SPEECH/09/486, p 3.
[596] Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT, 22 October 2009. Available at http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm.

result of the Recommendation. This explains the Internal Market DG's involvement in the drafting of the document. An honourable endeavour, at least. The main points of the Reflection Paper are the following. On the first place, the Commission wishes the find practical solutions that strike the balance between fair remuneration, copyright protection, new pan-European business models, and cultural diversity. As regards the online dissemination of music, the multiple layers of ownership cause the biggest challenges.[597] A further problem to overcome is the simultaneous clearance of mechanical and performing rights.[598, 599] In addition to this, the split between international on-line licensing and national licensing of public performances makes things even complicated.[600] To overcome these problems, the documents put forward different possible options, including a single licence one-stop-shop, a mandatory collective management system for the administration of the digital making available rights, and the consolidation of the two sets categories of rights into a unitary licence. Apart of these actions, the harmonisation of copyright laws is an option, thought definitely not a short term one.[601]

12.4. ELIAMEP Study – Collecting Societies and Cultural Diversity in the Music Sector

Following the Resolution of 13 March 2007, for about one and a half years, the European Parliament did not actively take part in the discussions. In that Resolution it pointed out that cultural diversity would be best served by a system of competition where downward pressure on authors' revenues is avoided. Further, it invited the Commission to present a proposal for a flexible directive to be adopted by the parliament and the Council in codecision, with taking into account small stakeholders and local repertoires, on the basis of the principle of equal treatment.

However, the European Parliament closely followed the events. One the one hand, the summary report of the on the results of the monitoring of the 2005 Recommendation did not take into account the opinion of the European Parliament given in its Resolution of 13 March 2007, and on the other hand, the Commission decision in the CISAC-case from July 2008 made it even more difficult for collecting societies to come up with a workable right clearing solution, and at the same time is threatening in the existence of small collecting societies and minority cultures.

---

[597] Reflection Paper, p 4.

[598] Reflection Paper, p 5.

[599] In the case *MyVideo v CELAS* the District Court of Munich decided on 25 June 2009 that CELAS has no right to prohibit reproductions of the Anglo-American repertoire of EMI Music Publishing Ltd. online in Germany. The Court held that the making available copyrightable works online requires both making available rights and mechanical reproduction rights as a making available online is technically not feasible without a reproduction. Therefore, the splitting of rights for online-uses into mechanical reproduction rights and rights of making available is inadmissible, the Court stated, because mechanical reproduction rights for online-uses without the right of making available does not exist as individual kink of use. Furthermore, the Court stated that a specific kind of use could be licensed only if the kind of use qualified as sufficiently clearly separable, economically and technically autonomous and unitary use according to prevailing public understanding. Reproduction is inherent to the making available of copyrighted works online and, thus, could not be separated from the right to make available. For a summary of the case, see K&L GATES LLP' summary at http://www.klgates.com/newsstand/Detail.aspx?publication=5793.

[600] Reflection Paper, p 6.

[601] Reflection Paper, pp 14-20.

Against this background, on 25 September 2008, the European Parliament adopted a Resolution[602]. Considering that the above situation "reflects the fact that the Commission has chosen to ignore the warnings given by Parliament, in particular in its resolution of 13 March 2007, which includes concrete proposals for controlled competition, as well as protection and incentives for minority cultures within the European Union", the European Parliament calls on the Commission to ensure that it is involved effectively, as a co-legislator, in the initiative on Creative Content Online.

To make sure that its concerns and views are heard, the European Parliament commissioned a study on "Collecting Societies and Cultural Diversity in the Music Sector"[603], which was published on 9 December 2009. The start of the assignment[604] was 27 November 2008, and was completed in June 2009. The ELIAMEP Study take stock of the recent EU policy of music rights licensing. It identifies market developments and examines new business models emerging as a result of the 2005 Recommendation, further it gives an assessment of these trends. At the end, it analyses the potential effects of the new licensing models on cultural diversity, and formulates some policy options. It concludes that there are no truly multi-territory and at the same time multi-repertoire system in place, and though the territorial fragmentation has been overcome, repertoire fragmentation has been entailed by the 2005 Recommendation. The mono-repertoire licensing formats constitute a real threat to niche repertoires, thus to cultural diversity.

Still during the delivery of the ELIAMEP Study, on 20 April 2009, the European Parliament put forward a written question[605] to the Commission with regard to the 2005 Recommendation. It asked, first, what measures have been taken by the Commission to ensure that the obligation set out in Article 151(4) of the EC Treaty (to take cultural aspects into account in actions under other provision of the Treaty, in order to respect and to promote the diversity of its cultures) are being complied with in relation to the multi-territorial licensing of music rights; second, how will the Commission protect the interest of the numerous right-holders who do not have the economic power to secure the exclusive provision of services by a single, powerful collective management organisation.

The answer[606] given by Commission on 16 June 2009 is interesting to read. One the one hand, it tries to minimise the damage that the 2005 Recommendation brought about by saying that the Recommendation does not recommend that cross-border licensing should be done on an exclusive basis, and by hurrying to say that smaller collecting societies are still entrusted with the traditional forms of exploitation, on the other hand, it says that "in the present circumstances" the threat to cultural diversity is taken very seriously. Hopefully this means that the outcome of the Reflection Paper will take due account of the cultural aspects.

---

[602] European Parliament resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, P6_TA(2008)0462.

[603] Founded by the European Parliament, Directorate General for Internal Policies, Policy Department Structural and Cohesion Policies. Project coordinator: Hellenic Foundation for European and Foreign Policy (ELIAMEP). Drafted in collaboration with German, Belgian, English, Danish, Greek and Italian experts. Publication number: 419110. Available at http://www.europarl.europa.eu/studies.

[604] GESAC lobbied the European Parliament on the idea of carrying out a study on the economic impact of cultural diversity.

[605] Written Question E-2702/09 by Jan Cremers (PSE), Ieke fan den Burg (PSE) and Bert Doorn (PPE-DE) to the Commission (20 April 2009). Not yet published in the Official Journal.

[606] Answer given by Mr Figel' on behalf of the Commission (16 June 2009). Not yet published in the Official Journal.

The interest of the European Parliament in the Content Online initiative was already made clear in its Resolution of 25 September 2008, as was seen above. The Committee on Culture and Education will organise a hearing on copyright and content online in January 2010.

13. CONCLUSIONS

In summarizing the findings of this paper it is necessary to put the addressed problems in perspective. That is, the main motifs and lines of arguments have to be pointed out and linked together, which hopefully will outline the contours of the big picture. In doing so, I will first recall what has been said about the aims and goals of intellectual property, and copyright specifically, and of competition policy. Further, I will give a brief overview of collective rights management, the historical reasons for bringing it into being, and the rationales behind it. Then, against the challenges of technical and market developments, the legal responses of the EU, and in particular that of the European Commission will be covered; as well as the amiss and blunder of the latter's approach, and its consequences will be touched upon. Finally, some possible solutions will be proposed.

The legal instrument of intellectual property law and copyright law are both bodies of law that came into being in order to accommodate the needs and interest of certain groups of people within society, and – motivated by public policy considerations – to spur creativity and creation. Although intellectual property as such is disputed by many, far more acknowledge and support its existence.

The main justifications for intellectual property rights fall under either the natural law or the utilitarian approach. While the former embraces ethical and moral arguments – authors' natural or human rights over the product of their labour – the latter is an instrumental justification, where the legal instrument of intellectual property induces or encourages desirable activities. Under the natural law approach, protection is granted because it is right and proper to do so. Because such productions emanate from the mind of an individual author. It is the expression of a particular author's personality. The fruit of the mind. The work is the extension of the persona of its creator, and as such it should be seen as his or her property. Copyright is the positive law's realization of this self-evident, ethical precept; it sees copyright protection as the manifestation of pre-existing rights of the author, to which he or she is entitled by nature.

By contrast, the utilitarian approach denies the pre-existing nature of the right. The right is granted by society for reasons serving cultural and economical goals. Typical arguments under the utilitarian approach are the reward and the incentive arguments. The "reward for labour" argument states that copyright is a legal expression of gratitude to an author for doing more than society expects or feels that they are obliged to do. The reward is an end in itself. This is especially so in the cultural industry, where creation is the end result of (financial) investment. The incentive argument is closely linked to the previous one. If it is accepted that creating involves labour that is to be rewarded, then this reward serves as an incentive to create. It is a stimulus. There is a presumption that without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level.

Of course, many argue against the existence of intellectual property. In doing so, intellectual property opponents claim that property-like protection is ill matched to intellectual creations because of its nonrivalrous character. Further, the freedom of information, the value of expression, and the information commons, among other things, are commonly held against intellectual property protection.

When it comes to the question of public interest, it first must be stated that copyright is a tool that is good and bad at the same time. From a public interest point of view, it is beneficial to provide incentive and reward for the author, and thereby securing a flourishing artistic and literary environment. But on the other hand, it is also for the benefit of the public to secure the unlimited access to cultural assets.

In striking the balance, the state makes decisions on various issues, such as limitation and duration; and all these decisions are matters of policies. Cultural, economic and social policies, just to mention a few. All interests have to be taken into account, which means that in designing or changing a legal instrument, both internal and external (sometimes controversial) interests have to be consolidated. By internal and external interests, I mean those interests that are respectively directly and indirectly have their aims to (re)shape intellectual property and copyright law specifically. In doing so, the manifestations of interests, public policies have to be considered, which very often appear in the form of other legal instruments. Accordingly, both internal and external influences have their role to play.

One of these external factors which being in the focus of this paper is competition policy. At the same time, it is not to be overlooked that competition law – being just one of the numerous legal instruments and manifestation of certain public policy considerations – has its own internal limits as well.

Competition policy is the state's policy to sustain economic competition. Competition law is a tool in the hand of state to intervene to economy in order to remedy market malfunctions. Competition law is only one of the tools, though undoubtedly the most important one, to reach these goals. At the same time, it is important to remember that certain market failures might require other type of interventions, such as sector regulation.

Besides the conventional functions and objectives of competition policy (e.g. welfare maximisation, fairness and equity), it has its special place and role within the European Union, namely it has a market integrating function, it is a tool to establish a common market. While the integrating function of competition policy was in the forefront in the first years of the Community, lately it is regarded as a means to increase overall European wealth. With the development of the integration, the balancing of the aims has changed. The emphasis shifted from one task to the other. Still, the two most important goals of Community competition policy are the pursuing of integration and the fostering of workable competition.

It is equally important to take note of the obvious fact that other public policies exist as well. In fact, there are numerous other policies that are taken into consideration in political decision-making, and there is no hierarchy between the policies of the EU. In case of conflict, the Commission strives to resolve it, usually in two ways. On the one hand, the Commission "imports" certain goals from other policies; on the other, it tries to implant competition policy considerations to other policies.

When comparing the goals specific to the two legal fields in question, and some of those that are specific to the Community, it is hard to find the antagonism. Besides the fact that some goals are identical (competitiveness, innovation, research and development, integration), most of the others are either complementary or neutral (environment favourable to innovation and investment – workable competition). By and large, it is the cultural aspect that can come to conflict with those of competition policy. As we will see in connection to the effort of reorganising the system of collective management of rights (allegedly) on competition policy

considerations, besides one-stop-shop and the consumers, it is the cultural aspect which is the most affected.

So turning now to collective rights management, it is worth remembering what the very aim of this whole system is. Once a work has been fixed in some material form copyright protection is automatically subsists on the work. This exclusive protection gives the power to the owner of the right (an author, a performer, a producer or a broadcasting organisation) to authorise or prohibit the exploitation of the right. The exploitation may take various forms, such as reproduction, public performance, and communication to the public. These rights are independent of each other, meaning that the authorisation of the performance of one act does not confer a right upon the licensee (in case the right was licensed) to do the other acts protected by the exclusive right.

All the acts of authorisation or prohibition qualify as an exercise of the right. The exercise of rights usually takes one of the two following forms: individual exercise or collective exercise. Individual exercise is the neutrally inherent way as it is the author who is the source of the protected work, and whose rights are at stake. It should be in his or her power to decide whether to authorise a particular form of exploitation of his or her work, and under what conditions. The reasons for different ways of administration of rights lie mostly with the characteristics of the works and their exploitation.

When looking at the purposes of collective management of rights, it is to be remembered that the real value of an exclusive right is that it ensures that works are exploited in a way that corresponds to the intentions and interests of the owner of the right. The objective of collective management is to offer ways and means to achieve this in certain situations. Though these societies were brought into being primarily for the benefit of right holders (the first one in 1851, stemming from the recognition of the difficulties associated with the administration of the public performance rights), there was another purpose for their existence; namely, to provide a one-stop-shop access to protected works for users. That is, these societies play the role of intermediaries between right holders and users. Both right holders and users are many, which makes it extremely difficult, if not downright impossible (both in practical and economical terms), to users to find the right holder to get a license, and to right holders to negotiate the terms of the license to monitor the uses of the works, and to collect royalties. This mechanism has proved to provide clear advantage for both sides in the off-line world.

Furthermore, due to the fact that users cannot go around collective societies, there are economies of scale and scope when license terms are negotiated. The bargaining power of these societies to negotiate favourable licensing conditions is advantageous from a public interest point of view as well. Without this mechanism, the appropriate protection of the interests of right holders, and thus their capability to actually exercise their rights (to materialise it), could not have been accomplished. Besides this, collecting societies play an important role in the dissemination of works.

The tasks and roles of collecting societies have changed with time. This change is mirrored in the name that is used. In the beginning, the term ‘authors’ society’, then, ‘copyright society’ was employed. Lately, the ‘administration society’ is used widely. The change of vocabulary reflects the difference in the approach: instead of authors (persons), it is business what is in the centre.

Collecting societies provide various types of services in legal, economic, social, and political spheres. These activities entail tasks such as the granting of licenses, monitoring of uses, enforcing the rights, and collecting and distributing royalties.

On the one hand, the basic activities of these societies have become more sophisticated: e.g. drawing up model contracts; on the other hand, new tasks are carried out, which serve the interest of authors in a broader sense: political, social, and cultural actions. The latter ones are especially important, and supported by governments in Continental Europe. This is not surprising taking into account the continental approach in copyright law: it is the personality of the artist, and the manifestation of his or her creativity embodied in the work what is more important as opposed to the more material and opportunistic approach of the common law countries. The difference in the approach is reflected in the terminology: authors' rights versus copyright.

As mentioned above, these rights are important not only from the right holders' point of view but also from a public interest point of view given the cultural and economical significance of these rights and their administration. Further, collecting societies – with a few exceptions – are in a monopoly-like position in a given country, representing the right holders in that country. Therefore, in order to maximise the benefit of these societies to the public, and at the same time to minimize the potential negative effects associated with abuse of dominant position, certain amount of state control is exercised in various forms.

But lurking back to the role of collecting societies and more precisely to the question as how they fulfil their basic roles, it is inevitable to keep in mind the two most important principles upon which this regime rests. These are the principles of reciprocity and solidarity. Reciprocity, or to put it in another way national treatment is a core principle in international conventions. What the principle says is that all countries (party to the given convention) shall provide for foreign authors the same protection as is provided for the nationals of that particular country. The implementation of national treatment requires international cooperation. It cannot be done in other way but by the mutual application of the principle in the exercise of the rights. Following the establishment of performing rights collecting societies in Europe, in 1926, CISAC, the international confederation of these societies was established. The cooperation among collecting societies takes the form of the so-called "reciprocal representation agreements" applied on bilateral basis. To achieve the highest possible uniformity, CISAC has developed the "Model Contract of Reciprocal Representation between Public Performance Rights Societies". It is important to emphasise that these contracts were symmetrical, as opposed to the recently agreed or offered contracts. What concerns the mechanical rights collecting societies, between their international umbrella organisation BIEM and IFPI similar standard contracts are applied as well.

In practice, the term "territoriality" means that each collecting society represents the world repertoire within its own territory. In each territory the world repertoire is made up of two repertoires. On the one hand, the society represents its own national / domestic repertoire, since authors usually join the collecting society in their home country. On the other hand, by way of the network of bilateral agreements, each collecting society represents all the other collecting societies' domestic repertoire. In that respect, all of them are affiliated societies to the other ones. As a result of these bilateral reciprocal representation agreements, each collecting society represents the world repertoire, that is the domestic and the non-domestic repertoires together. This network of representation agreements makes possible the use of

blanket licenses, by which users are authorised to use (almost) any musical work from the world repertoire.

In order for this system to work, the licenses are valid only on the territory belonging to the collecting society giving the license. Therefore, for an international company willing to use a particular musical work anywhere within the EU, it has to obtain a licence in each and every territory.

Solidarity, the other principle upon which the regime of collective rights management rests, is to be understood in two ways. On the one hand, solidarity exists between collecting societies, and, on the other, between copyright holders. Each society shall apply to works in the repertoire of the other society the same tariffs, methods, and means of collection and distribution of royalties as those which it applies to works in its own repertoire. This is what enables the freedom of choice for users, which is a cultural aim at the same time: it ensures cultural diversity. Solidarity is closely related to, and builds upon, the national treatment. Solidarity is embodied in the application of national rates regarding the whole world repertoire.

Apart of the above, when looking at the legal solutions (or rather answers) that the EU has given to certain problems, not only the institutional background what is of importance, but the economic environment within which it exists. Especially so as the considerations behind the answers are competition and market oriented. Although many reject to use the word "industry" in connection to music, still, a significant part of the activities related to music are to be found in the sphere of business. The commercial exploitation of music is in fact an industry.

Publishers, the business entities dealing with the commercialisation of musical works, are exploiting the works of authors under contract, and signing authors and providing them with financial and marketing support as a counterpart to the transfer of their musical works. For the publishers the most important question lies with the rights. That ensures their profitability. However, the legislative environment sets out the means by which the aims of the publisher can be met. The difference in continental (authors' rights) and common law (copyright) traditions is quite apparent and is of significance when it comes to music publishing. Depending on the given national legislation in place, (some of) the economic rights can be assigned or licensed (albeit with a similar effect) to publishers. The transfer of rights (related to the forms of exploitation) may be subject to limitations by national law. As a consequence, the rights – or certain rights – can be owned, controlled, and administered by the author, the publisher, and the collecting society to various extents.

The three most important of the economic rights, at least in respect to the present topic, are the reproduction rights, the public performance, and the communication to the public. The licensing of these rights to users in order exploit the works accordingly are done by collecting societies. The rights of public performance and the communication to the public are licensed by performing rights societies, while the reproduction right is managed by the mechanical rights societies. The status of the author and the publisher in relation to these three rights can vary considerably depending on the legal regime in force and on the publishing agreement between the author and the publisher.

It is equally important to make mention of the technological challenges with which the industry as a whole has to cope with. There is nothing new about technology having an impact

on music. Changes have affected various aspects of music: new instruments, the transmission of music, the recording of sounds, etc. However, the changes in the analogue world affected these aspects sometimes independent of each other, but definitely on a relative slow pace – irrespective of how profound the change happened to be. The challenges imposed by the most recent development are substantially different from the previous ones, and they are so in at least three aspects. First, digitisation affected the whole spectrum of the music industry: from the making of (composing) music, through the process of recording and distribution, to the listening to it. Second, the speed of the development. Third, the scale of availability of these technologies to practically anyone.

The digitisation has triggered an extraordinary change in the field of intellectual property. The works of intellectual property (text, image, audio, video, virtually everything that can be turned into 0s and 1s) now can be stored in any memory irrespective of its form. Techniques such as MP3 enable the compression of the size of digital music recording. And doing so that the quality (fidelity) of music remains basically the same.

Though the digitisation in itself would have been enough to challenge the copyright regime, the new ways of distribution that the Internet has brought about, combined with the digitisation, proved to have a profound and unprecedented effect on the music industry.

What made this effect possible is not just the dramatic fall in transaction costs, but the mere ease and speed with which the content can be transferred through the Internet. The expensive hardware, the lengthy and costly process of producing an end product provided protection both against competitors and consumers. The high entry barrier meant a relatively safe market environment, on the one hand, while on the other hand, these circumstances prevented (to a large extent) consumers of getting the desired products (music) from anyone else then the established market players. However, the new developments are threatening the *status quo*. The large investments are sunk costs which – up to a certain but continuously decreasing level – are not prerequisites for market entry anymore. Anyone having a computer, the appropriate software (which itself are widely available), and Internet connection can produce and deliver music to the public. On the other end of the spectrum, consumers do not rely exclusively on the conventional market players of the music industry to get hold of the desired music.

Nevertheless the market has not collapsed, and there are numerous attempts to establish new and lucrative business models in the online world. And it is to be added that digitisation gave rise to a number of new market players on the demand side, e.g. mobile phone corporations. The response from the side of the industry was, and to a large extent still is, hostile. The most obvious (and scenic – as that is the primary aim) form of attack is legal action. These legal actions are taken in three directions: 1) against the file-sharing platforms, 2) against the internet service providers, and 3) against individuals using these networks. At the same time, the role of file-sharing in respect of the drop in music sales in the last few years is not clear. Albeit casual relationship between the two phenomena can be established, it is very difficult to give even a ballpark figure. Besides, file-sharing may have a number of positive effects as well, not to mention the neutral aspects of it. Thus, litigation might be an abortive effort, which only increases the frustration of the majors (and the annoyance of the consumers).

At the same time, efforts to establish legitimate exploitation schemes are in their way. Though no groundbreaking business model has turned up yet, there are entrepreneurs who try to establish themselves on the market amidst the turmoil. Collecting societies have limited possibilities to come up with a solution as a result of the CISAC decision.

As a result of the above market situation the search for new market solutions was not confined to the market players. Given the significance of this segment the EU started to have increasing interest in the process of finding new ways of doing business within this field. The issue of collective rights' management came up, in different contexts, in two directorates of the European Commission: the Directorate General for Competition, and the Internal Market and Services Directorate General. The approach taken by the two DGs changed over time, but to a wrong direction. The approach of the DG MARKT, and that of the DG COMP are the following.

The early approach of the DG MAKRT was that intervention on the part of the Community authorities was not regarded as desirable. The management of rights was to be left to the market, irrespective of digitisation, and many interested parties favoured the one-stop-shop solution. While one-stop-shop was not called into question, the structure and competence of such centralised bodies invoked differing views. A number of interested parties called for harmonised rules for collecting societies.

The European Parliament acknowledged the disparities regarding the national rules and provisions, and the structures and practices of collecting societies within the Community, which hindered the attainment of the internal market, and the full realisation of the information society. Therefore, it took the position that a wide harmonisation was desired covering both structural and procedural issues, such as representation, control, procedures for the settlement of cross-border conflicts, exchange of information, standards, etc. Transparency and uniformity were, therefore, to be achieved but in a way that takes due account of the author and cultural aspects.

However, as it can be gathered from the various documents throughout the consultation process, the position of the Commission has gradually changed. In the beginning the adaptation of the regime of collecting rights management to the digital environment was to be left to the market. By the end of the consultation period the Commission's view, as manifested in the Communication, shifted from non-legislation to legislation; and it concluded that abstaining from any legislative action did not seem to be an option any longer. That is, the Commission did not see the reliance on soft law an option anymore, and, as it outlined in its Communication, it intended to propose a legislative instrument on certain aspects of collective management and good governance of the collecting societies.

The Commission's approach was spelled out in more detail in its policy paper, the Study, which presented the options on the cross-border collective management of rights. The point of departure for the Commission was the significant revenue gap between the US and the EU in connection to legitimate online music services. Besides acknowledging that the reasons for this could be many, the Commission concluded that the lack of innovative and dynamic structures for the cross-border collective management of legitimate online music services was one of them. Of the policy options that was drawn up for the attainment of the objectives outlined by the Commission, it choose Option 3 which would give right holders the choice to authorise collecting societies of their choice to online rights for the entire EU.

By giving right holders the choice to authorise the collecting society of his or her (or its) choice, collecting societies would be forced to compete with each other for right holders. Combined with the possibility of giving Community-wide licences, this option would eliminate territoriality, as there would be no need of collecting societies representing each

other. Each collecting society would then have its own repertoire to license for the whole territory of the EU. According to the Commission, this option would make collecting societies to compete on management services, which would be interesting to both well-known and small right holders. Additionally, this option would allow collecting societies to build up genre-specific repertoires.

The Commission's approach is highly debated, and especially so as it is largely based on misconceptions. But what is of more relevance is that Option 3 is not realistic. It is highly questionable whether members of collecting societies would really change their societies. For evident reasons (e.g. language, day-to-day relationship) authors would choose their own society. And in fact, so far no evidence of mass-migration of authors has taken place.

In addition to this, the situation caused by Option 3 would bring about high legal uncertainty. Users would not know which rights are cleared and which ones are not as collecting societies would not provide the world repertoire any longer, and because it is very common that multiple right holders are attached to one and the same work.

Further, copyright management would become substantially more complex and bureaucratic. All users in the Member States would have to negotiate with all the collecting societies, most of whom are located in a different Member State, in order to be sure not to infringe any rights. Beyond the geographic distance, the language and the differing national laws are posing the risk of increased difficulties and expenses. To top it all, effectiveness of long-distance monitoring (if at all) is highly questionable, which, by the way, would favour piracy.

Option 3 does not simplify the copyright clearance process for users at all, but to the contrary. What users really want is a quick and easy process whereby they gain access to the world repertoire with the highest possible legal certainty, and with the lowest possible number of contacts. Paradoxically, they are exactly the multinationals who in reality have the means to contact all the collecting societies in the territories they want to operate, while the Commission seeks to satisfy their ostensible needs. On the other hand, the situation would be a nightmare for virtually all the other (smaller) users.

Further, Option 3 could substantively upset the balance between authors' societies. The competition between collecting societies for right holders will ultimately lead to a situation where collecting societies are divided into two groups: a handful of big societies versus the small societies deprived of many authors, and left with sectors of activity where the costs of rights management are the highest (restaurants, discotheques, etc.). This is already happening.

This, of course, raise the management costs, and the only possible way of counterbalancing (to a certain extent) these higher costs is to make choices purely on cost-effectiveness grounds (e.g. not licensing to difficult places, less monitoring, less precise distribution cost, cut-backs). This situation will, in turn, have bearings on the right holders, who will receive a lesser quality service, and whose income will decline. It is worth remembering that efficiency was a keyword in the Commission's argument, whilst it was completely ignored that it had the exact opposite meaning for members and users – for the former: efficient monitoring, auditing, and efficient collection of royalties; for the latter: inefficient monitoring, auditing, and inefficient collection of royalties.

Importantly, Option 3 could upset cultural diversity as all the above consequences of introducing Option 3 would point to the direction of the weakening of cultural diversity. No

facts are referred to in the Study that would back up the Commission's assumption according to which the better cross-border licensing would make available a larger variety of cross-border programming for the various language and cultural communities across Europe. The scenario envisaged in the Study runs against cultural diversity, and undermines solidarity.

Last but not least, Option 3 would create Europe-wide monopolies for each repertoire on the downstream licensing markets, which could jeopardize consumers' freedom of choice.

Apparently, the Commission looks upon the licensing system as an archaic survival from the nineteenth century that cannot keep pace with technological advances. (It is interesting to see though that in the very same speech in which Commissioner McCreevy considers the European model of copyright clearance as something that belongs more to the nineteenth century than to the twenty first, and which, then, may have made sense, he speaks about Option 3 as nothing new, but something that goes back to the historical roots of collective management.) Thence, it has to be modified, and adjusted to the challenges of the present.

Though the aim of the Commission is to ease the clearance of right and to secure Europe-wide licences, yet not a single proof is put forward as how the new system would make copyright clearance easier. The Commission stuffs its fingers in its ears when it comes to the reasoned arguments on how the new system will make the practice of licensing to a nightmare. To this background, McCreevy states that this is in the interest of all stakeholders, and describes Option 3 as the "lightest possible touch". At the same time, surprisingly, the Commission acknowledges the pure hypothetical nature of its line of thinking, when it says that the recommendation "is based on the *premise* [bold is mine] that territory-by-territory management of copyright clearance is too cumbersome and too costly. It is not efficient for content users and it does not serve the interest of right-holders […]." That is, Option 3 as a whole is based on a premise which lacks any solid argument and is incorrect. McCreevy does not let himself to be bothered by those obvious objections which explain, on the one hand, that a particular work will be available only at one particular collecting society, i.e. it is not possible to get a license for the world repertoire, and on the other hand, given the fact that one work mostly has more than one right holders, it is highly likely that the rights connected to one single work will have to be cleared with several collecting societies. Yet he still speaks about a single contract. Well, after all, it is true: a single contract with every single collecting society.

At the same time, the Commission has chosen a highly controversial approach for carrying out the changes: a soft-law instrument in the form of a Recommendation. By this solution, the Commission bypassed the European Parliament.

In parallel to DG MARKT's pursuit of changing collective rights management, DG COMP had its say as well with regard to collecting societies. In the *Tournier* case the Court held – in connection to public performance of copyrighted musical works – that reciprocal representation agreements are contracts for services which are not in themselves restrictive of competition in such a way as to be caught by 85 (1) of the Treaty. This is of high importance, even if the Court added that the position might be different if the contract established exclusive rights whereby copyright-management societies undertook not to allow direct access to their repertoires by users of recorded music established abroad. Despite the fact that some interpreted the judgement as an implicit statement that there could be competition between different national collecting societies, the Commission was of the view, as Mr Mario Monti explained, that collective rights management can be considered an appropriate form

which enables a satisfactory balance to be struck between the interests of right holders and the culture industry, on the one hand, and those exploiting the works, on the other.

However, this balance has been upset as a result of the Commission's *CISAC* decision (and as a result of the Recommendation of the Commission). On account of the complaints made by RTL and Music Choice, the Commission sent a Statement of Objections to the parties with regard to membership restrictions, and territorial restrictions in the form of express exclusivities in the reciprocal representation agreements and a concerted practice on the territorial delineation of the scope of the licence. The parties opposed to the statement of the SO, and pointed out that it was without any factual or legal analysis. Still, fearing the possible fines, the parties made commitments which mirror the interests and will of a handful of large collecting societies, that of the most powerful ones. These manoeuvres were the result of the alteration of the market conditions, and hence the market structure to such an extent that the collecting societies started to follow their putative or actual interest as one could very well anticipated on the grounds of game theory.

Consequently, one of the cornerstones of the system is threatened: one-stop-shop for the world repertoire. This is considered essential, in particular, by users who would be in a hopeless situation if they had had to seek licenses from possibly dozens of collecting society and licensing agents with mono-repertoires, and still having to live under the permanent threat to be sued for using unlicensed music. Besides legal uncertainty, costs incurring with all these additional applications for licences (and possible litigations) would leave many of the market players in a miserable situation.

As for the competition concerns regarding national monopolies, the new situation would replace the old one with new type of monopolies and, for that matter, much worse ones. The concentration of repertoires (instead of a world repertoire) to one market player with exclusive licensing would distort the market considerably. This holds especially true in case the repertoire incorporates "must have" content.

An additional concern from the side of users regards the fact that the Statement of Objections covers performing rights only. However, performing rights rarely come alone; mechanical rights have to be cleared as well, and it is rather uncomfortable to have separate licensing schemes for two rights that usually come hand in hand.

Lastly, an argument that has been made again and again: cultural diversity will be stifled if smaller repertoires will not be disseminated. This represents only one aspect of the consumer harm that is not taken into account by the Commission. Albeit competition matters boil down to consumer welfare, the new licensing system will not confer benefits on consumers.

In this regard, the Wouters exception is not to be neglected in connection to the situation of collecting societies. One-stop-shop, besides other things, is a feature in the system of collective rights management that is desired by the vast majority of the market players and consumers. It is an essential element of the system, which clearly outweigh the anti-competitive effects of territoriality as a result of reciprocal representation agreements.

Speaking of outweighing anti-competitive effects, the notion of efficiencies might be the key in solving the problem of collective rights management in an online environment (at least from a competition law prospective).

Undoubtedly, the rules of competition must be respected by all market players. However, for consumers (and society) it is not always competition that brings the best results. In some circumstances certain restrictions can have beneficial effects. This is the case for instance when as a result of a concerted practice a new product or service is introduced to the market. This line of reasoning is recognised in Article 81(3) of the Treaty, and in fact it is endorsed by the Commission's Notice on the application of Article 81(3). It speaks of pro-competitive benefits, and positive economic effects. Paragraph 33 says that the aim of enhancing consumer welfare can be achieved by restrictive agreements if the agreement has pro-competitive effects by way of efficiency gains that outweigh the anti-competitive effects. Efficiencies may create additional values by creating a new product, for instance.

In the field of collective rights management in case of online licensing, this new product could be a multi-territorial and multi-repertoire system. This is what has not been accomplished so far. Before the 2005 Recommendation and the CISAC decision, the multi-repertoire feature was the standard. However, on a territorial basis. As a result of the 2005 Recommendation and the CISAC decision some pan-European licences with many uncertainties on the side were given, but a high price had to be paid: the one-stop-shop started to fall apart. Instead of multi-repertoires, mono-repertoires that are licensed. The territorial fragmentation was taken over by repertoire fragmentation. Accordingly, a truly new product with all the efficiencies that multi-territorial and multi-repertoire system can provide would offer such pro-competitive benefits that could outweigh the possible anti-competitive effects.

The very aim of collective rights management is the smooth functioning of the clearance of rights, that is, the simple and reliable intercourse between right holders and users, and a workable system for collecting and distributing royalties. The one-stop-shop is an indispensable element in the attainment of these objectives, and is appropriate in achieving these aims. It is a system that is necessary for the effectuation of the above goals and to ensure the proper practice to that regard, moreover, it is inherent in the system, and could hardly be achieved in any other means. Therefore, it does not go beyond what is necessary, and thus, is by no means disproportional to the drawbacks of reciprocal representation agreements.

To conclude, it can be inferred from the above that under the pressure of the Commission's Recommendation, on the one hand, and the competition proceeding against CISAC and individual collecting societies, on the other, the market started to change. The two-front attack on collecting societies has produced an environment full of uncertainties, which proved to be ideal for publishers to exercise and test their bargaining power by withdrawing their repertoires. In the logic of game theory collecting societies started to position themselves in a hurry to strike the best deals with publishers for pan-European licences, while putting small and medium size authors' societies in hopeless situation. And they are doing so even if it is clear to everyone that the loss of one-stop-shop will bear severe consequences for virtually all market players.

The just reconciliation of these interests should be the foremost goal in reshaping the copyright law, and similarly, the system of collective rights management. In the right balancing of interests, what is of utmost importance is the appropriate policy option: which interests are to be preferred against others, and on what public interest grounds. In formulating the right policy in this field cultural diversity, social, and technological aspects, besides that of competition, have to be taken into account. Furthermore, the purposes and aims of the respective legal institutions have to be always remembered, and taken into consideration in due measure.

In the midst of the unfolding turbulent events – with both the Commission's DGs concerned and the European Parliament involved with their initiatives – the time has come that all the stakeholders settle the problems, and arrive to a satisfactory solution. The careful balancing of interests and the understanding of the legal instruments and their relationship will be inevitable in reshaping collective rights management. Whether these concerns will genuinely be taken account of, remains to be seen.

MAGYAR NYELVŰ ÖSSZEFOGLALÓ

A versenyjog és a szellemi alkotások joga közötti kapcsolat, illetve konfliktus régóta képezi tárgyát mind elméleti, mind gyakorlati vitáknak. A két terület egymáshoz való viszonya, az egyik szerepe a másik határainak kijelölésében és viszont, céljaik és eszközeik meghatározása: kimeríthetetlen kutatási területnek bizonyul. Az utóbbi évek egyik legégetőbb kérdéseket felvető konfliktusa a zenei közös jogkezelés és a versenypolitika viszonya az Európai Unióban. Az értekezés kitűzött kutatási feladatként a közös jogkezelés terén végbemenő változásokban közreható versenypolitikai megfontolások, valamint versenyjogi lépések következményeit vizsgálja az Európai Unióban.

Az Európai Unió közös jogkezelés kérdésében folytatott politikájának alakulása, valamint a konkrét versenypolitikai érvek (illetve azok hiányának) vizsgálata alapján az értekezés rá kíván mutatni a helytelen versenypolitikai megközelítés káros hatásaira, ami nemcsak a közös jogkezelés szerzői jogban lefektetett céljainak elérését biztosító rendszer működőképességét veszélyezteti, de az érintett piacon a versenyfeltételeket is rontja.

Az értekezés a vizsgált kérdéskört az alábbiak szerint tárgyalja. Elsőként a két jogintézmény elméleti alapjait vizsgálja, valamint számba veszi céljaikat és eszközeiket, majd ezek összevetését követően a szerzői jog és közös jogkezelés lényeges elemeit mutatja be. A zeneipar és a digitalizáció kérdéseinek, majd az Európai Unió szellemi alkotások területéhez fűződő viszonyának bemutatását követően a közös jogkezelésre vonatkozó szabályozási környezet mutatja be. A téma szempontjából legfontosabb kérdéseket, az utóbbi évek változásainak okát adó események elemzését az értekezés a Bizottság két főigazgatóságának tevékenységén keresztül vizsgálja. A lezáró fejezet a különböző jogalkotási, illetve policy lépések, valamint egy versenyügy részletes elemzése során kirajzolódó változások lehetséges kimenetelét foglalja össze, és egyúttal egy versenyszempontból is megnyugtató lehetséges megoldásra tesz javaslatot.

1. A szellemi tulajdonjog és a versenypolitika

A szellemi tulajdonjog, azon belül pedig a szerzői jog normarendszere azért jött létre, hogy (érdek)védelmet nyújtson a társadalom bizonyos csoportjai számára, s mindezt úgy, hogy közérdekű megfontolások alapján a kreativitás és a szellemi javak előállításának ösztönzése mellett az e javakhoz történő hozzáférést is biztosítsa.

A szellemi tulajdonjogot igazoló elméletek alapvetően két csoportba sorolhatók aszerint, hogy természetjogi vagy pragmatikus megközelítésűek. Míg az előbbi etikai és morális érveket sorakoztat fel – a szerzőnek természetes, illetve személyiségi joga a szellemi termékén fennálló tulajdonjog –, addig az utóbbi inkább eszközként tekint ezen jogi intézményre, amely az ösztönzés és ellenszolgáltatás révén éri el a kívánt hatást.

A közérdeket az szolgálja, ha a szerzői jog megfelelő egyensúlyt talál az ösztönzés és ellenszolgáltatás révén biztosított virágzó művészeti és irodalmi élet, valamint a szellemi termékekhez történő minél szélesebb és egyszerűbb hozzáférés között.

A megfelelő egyensúly megtalálása végett az államok különböző politikai megfontolások (pl. kulturális, gazdasági és szociálpolitikai) alapján bizonyos korlátozásokat (így pl. időbeli, tartalmi) alkalmaznak. Ezen folyamat során gyakran egymásnak ellentétes érdekeket kell figyelembe venniük. Ezek között mind belső, mind külső érdekek/érvek is jelen vannak: azaz

a szellemi tulajdonjog intézményét, illetve a szerzői jogot belülről, annak belső logikáját, történetét figyelembe véve megváltoztatni igyekvő elképzelések, illetve azt kívülről, más, e területet csak áttételesen érintő érdekek mentén. Ezen úgynevezett külső érdekek, politikák gyakran egy másik jogintézmény formájában jelennek meg.

Ilyen, a jelen értekezés középpontjában álló külső tényezők egyike a versenypolitika. Jóllehet már most fontos leszögezni, hogy a versenypolitikának is, mint minden más jogintézménynek, illetve mint a közérdek valamiféle kifejeződésének megvannak a maga korlátai.

A versenypolitika az államok azon politikája, melynek célja a gazdasági verseny fenntartása. A versenyjog eszköz az államok kezében, amelyet a piac nem megfelelő működése esetén használnak. Bár a versenyjog nem az egyetlen ilyen eszköz, kétség kívül az egyik legfontosabb. Emellett azonban nem szabad elfelejteni, hogy bizonyos piaci kudarcok másféle beavatkozást tesznek szükségessé, így például szabályozást.

A versenypolitikának a hagyományos céljai és funkciói (pl. a jólét maximalizálása, tisztességes versenyfeltételek biztosítása) mellett az Európai Unióban speciális helye és szerepe van, nevezetesen a piaci integráció, azaz a közös piac megteremtésének az eszköze. Míg a kezdeti időkben az integráló funkciója volt hangsúlyos, addig az utóbbi időkben inkább a jólét növelésének eszközeként tekintenek rá – a fejlődéssel az elérni kívánt célok változtak, a hangsúlyok áttevődtek egyik célról a másikra. Ezzel együtt mind a mai napig mindkét cél megmaradt a legfontosabbak között.

Az Európai Unióban a politikai döntéshozatal során, természetesen, nincs hierarchia a számos figyelembe vett politika között. Konfliktus esetén a Bizottság azt általában kétféleképpen oldja fel: vagy más politikából „importál” bizonyos célokat a versenypolitikába, vagy a versenypolitikát igyekszik „exportálni” más politikákba.

Ha összevetjük a két jogintézménynek, a versenyjognak és a szellemi alkotások jogának céljait, beleértve az EU-specifikusakat is, akkor meglehetősen kevés ellentétet fedezhetünk fel közöttük. Amellett, hogy bizonyos célok megegyeznek egymással (versenyképesség, innováció, kutatás és fejlesztés, integráció), mások vagy kiegészítik egymást vagy semlegesek (működő verseny). Leginkább a kulturális szempontok azok, amelyek konfliktusba kerülhetnek a versenypolitikával. Amint az kiderül az értekezésből, a közös jogkezelés versenypolitikai szempontok alapján történő átalakítása (vagy legalábbis a meglévő rendszer felborítása) kapcsán a fogyasztói kérdéseken túlmenően a kulturális szempontok azok, amelyeket különösen érzékenyen érintenek a változások.

2. A zenei közös jogkezelés

A szerzői jog egy fontos sajátsága, hogy a szerzői művet létrejöttekor automatikusan megilleti a szerzői jogi védelem. E mindenkivel szemben hatályos jogosultság a tulajdonos (szerző, szövegíró stb.) kizárólagos jogkörébe utalja a mű felhasználásának engedélyezését. A felhasználás különböző formákat ölthet, így különösen: többszörözés, terjesztés, nyilvános előadás, nyilvánossághoz közvetítés stb. Ezek a jogok függetlenek egymástól, azaz minden egyes felhasználás engedélyezése önállóan történik.

A jog érvényesítése (engedélyezés vagy tiltás) egyénileg vagy kollektíve történik. Bár a jog kizárólagosságánál, valamint a szerzői mű és a szerző közötti kapcsolat jellegénél fogva az

egyéni engedélyezés a jogérvényesítés természetes formája, a tömeges felhasználás okán a közös jogkezelés bizonyult gyakorlatilag az egyetlen járható útnak a jogérvényesítés terén.

Ha szemügyre vesszük a közös jogkezelés életre hívásának okait, akkor láthatjuk, hogy az intézmény célja éppen az, hogy a gyakorlatban biztosítsa a szerzők kizárólagos jogainak érvényesülését/érvényesíthetőségét, hiszen a jogosultság annak gyakorlása révén ölt testet, tölti be rendeltetését. A közös jogkezelés tehát ezt a célt tűzi maga elé: a szerzők önkéntes elhatározása alapján az ő érdekükben érvényt szerez a törvény adta joguknak. Bár a közös jogkezelő szervezetek a szerzők érdekében jöttek létre, volt ugyanakkor egy másik ok, ami indokolta létrehozásukat. Az nevezetesen, hogy egyablakos hozzáférést biztosítsanak a felhasználók számára a védelem alatt álló művekhez. Azaz e társaságok közvetítőként vannak jelen a szerzők (jogosultak) és a felhasználók között. A tömeges felhasználás nemcsak a szerző számára nem teszi lehetővé azt, hogy utánajárjon művei nyilvános felhasználásának, de a felhasználó számára sem, hogy felkutasson minden egyes jogosultat. Ennélfogva a közös jogkezelés intézménye mind a két oldal számára fontos előnyöket biztosít.

Ezen túlmenően, minthogy a felhasználók nem tudják megkerülni a közös jogkezelőket, méretgazdaságossági tényezők segítenek ellensúlyozni a felhasználók gazdasági erejéből fakadó erős tárgyalási pozíciót a felhasználási díj kialkudása során. E nélkül a mechanizmus nélkül a jogosultak nem lennének abban a helyzetben, hogy a törvény adta jogaikat igazi tartalommal töltsék meg, és érvényt szerezzenek a jogalkotói szándéknak.

A közös jogkezelő szervezetek feladatai és szerepük is változott az évek során, ami az azokat jelölő szóhasználatban is tükröződik (authors' society, copyright society, administration society), ami egyúttal más megközelítést is sejtet: a szerzők/személyek helyett inkább az üzlet, illetve a hatékony, szakszerű jogkezelés áll a középpontban.

A közös jogkezelő szervezetek különféle szolgáltatásokat nyújtanak; nemcsak jogi, de gazdasági, szociális és politikai téren is. Ide tartozik, mindenekelőtt, a jogosítás, a piacfigyelés, a jogérvényesítés, valamint a jogdíjak beszedése, felosztása és kifizetése. De ezeken túlmenően a közös jogkezelő szervezetek a művek terjesztésében is fontos szerepet játszanak, ami kulturális szempontból is fontos.

Amint már említettük, a közös jogkezelő szervezetek által kezelt jogok nem csak a jogosult szempontjából fontosak, de a közérdek szempontjából is, azok kulturális és gazdasági jelentőségének okán. Ezen szervezetek – egy-két kivételtől eltekintve – minden országban monopóliumhoz hasonló helyzetben vannak, hiszen bizonyos műtípusok bizonyos felhasználásai tekintetében egy szervezet képviseli az adott ország összes érintett jogosultját. Emiatt, részben azért, hogy e jogkezelők közérdekű tevékenységét maximálják, részben pedig azért, hogy csökkentsék az erőfölénnyel való visszaélés lehetőségét, a közös jogkezelők állami felhatalmazással, illetve elismeréssel működnek.

Visszakanyarodva a közös jogkezelők által betöltött funkcióhoz szem előtt kell tartani azt a két legfontosabb alapelvet, amelyen a közös jogkezelés rendszere nyugszik. Ezek a kölcsönösség és a szolidaritás. A kölcsönösség vagy más néven a belföldiekkel azonos elbánás elve nemzetközi egyezmények alapelve (lásd BUE 5. cikk). E szerint minden (szerződéses) államnak a külföldi szerzők részére ugyanazt a védelmet, ugyanazokat a jogokat kell biztosítania, mint a saját állampolgárai, szerzői részére. Ennek az elvnek az érvényesülését csak kölcsönösség elvén nyugvó nemzetközi megállapodások révén lehet biztosítani. Az 1926-ban létrehozott CISAC – Zeneszerzők és Szövegírók Társaságainak

Nemzetközi Szövetsége – ezt az együttműködést a kétoldalú kölcsönös képviseleti szerződések formájában érvényesíti. Az egységességet feltételező kölcsönösség biztosítása érdekében a CISAC által alkalmazott modellszerződések szimmetrikus pozíciót kínáltak a megállapodást megkötő feleknek.

A területiség a szerzői jog területi megosztottságán túl azt jelenti, hogy a közös jogkezelők a világrepertoárt a „saját" területükön, azaz belföldön képviselik, a helyi szabályoknak megfelelően. A helyi közös jogkezelő szervezet egyrészről képviseli a hazai repertoárt – hiszen egy ország szerzői tipikusan a helyi közös jogkezelőt bízzák meg a képviselettel –, másrészről pedig a kölcsönös képviseleti szerződések révén a többi közös jogkezelő repertoárját. Ebből következően egy közös jogkezelő szervezet gyakorlatilag a teljes világrepertoárt jogosítja, azaz a felhasználó a helyi közös jogkezelőn keresztül egyablakos hozzáférést kap a világrepertoárhoz. Fontos még hozzátenni, hogy a tényleges világrepertoár jogosításának biztosításában a fentieken túlmenően az úgynevezett kiterjesztett közös jogkezelés, illetve a törvényi vagy bírói vélelmek is szerepet játszanak: ezek révén a közös jogkezelő képviseleti jogosultsága a képviseleti szerződéseken túlra is kiterjed, azaz az adott ország valamennyi érintett jogosultját képviseli.

A rendszer működőképességének elengedhetetlen feltétele, hogy a jogosítás (más megközelítésben a képviselet) csak egy területre szól, azaz külföldre nem jogosít a közös jogkezelő. Ennélfogva egy több tagállamban is jelenlévő felhasználónak minden egyes érintett tagállamban a helyi közös jogkezelő szervezetnél kell az adott területre jogosítást kérnie.

A közös jogkezelés másik alapelvének, a szolidaritásnak két olvasata van. Egyfelől a közös jogkezelő szervezetek közötti szolidaritást jelenti, másfelől pedig a jogosultak, szerzők közötti szolidaritást. Minden szervezet az általa jogosított műveket (függetlenül attól, hogy azok a saját repertoárjában vagy képviselt repertoárban vannak) egyforma feltételekkel, ugyanolyan díjszabás és jogdíjfelosztás mellett jogosítja. Ez nemcsak a felhasználók választási szabadságát, de egyúttal a kulturális sokszínűséget is biztosítja. A szolidaritás szorosan kapcsolódik a területiséghez, sőt: arra épül, és a világrepertoár területileg egységes díjszabásában testesül meg.

3. A vagyoni jogok és a zeneműkiadók

Amikor szemügyre vesszük az Európai Unió által adott válaszokat az e területen jelentkező bizonyos problémákra, akkor nemcsak az intézményi háttér, de a gazdasági környezet vizsgálata is fontos. Különösen is, mivel az Európai Unió érvelése mögötti megfontolások gazdasági, illetve versenyszempontúak. Bár sokan visszautasítják az „ipar" szó használatát a zenével kapcsolatban, a (könnyű) zenéhez kötődő tevékenységek jelentős hányada erősen gazdasági színezetű, így indokolt a zeneipar kifejezés használata. A zene gazdasági kiaknázása manapság valóban iparággá vált.

A szerző három legfontosabb vagyoni joga, legalábbis a jelen értekezés tárgyának szempontjából, a többszörözés joga (a többszörözési és kiadási mechanikai jogok), a nyilvános előadás joga és a mű nyilvánossághoz való közvetítésének joga. A felhasználáshoz szükséges jogosítást a közös jogkezelő szervezetek végzik. A nyilvános előadást és a mű nyilvánossághoz való közvetítését nyilvános előadási jogokat kezelő közös jogkezelők jogosítják, míg a többszörözést (és a kiadói jogokat) mechanikai közös jogkezelő szervezetek. A jogok szerzők és a zeneműkiadók közötti „megoszlását" a jogrendszer engedte keretek között a két fél közötti szerződés határozza meg.

A zeneműkiadók, a zeneművek gazdasági kiaknázását végző vállalkozások, a szerzők támogatását, promócióját vállalják a jogdíjaik egy részének átengedése fejében. Éppen ezért a kiadók számára a legfontosabb kérdés a jogokhoz, illetve jogdíjakhoz való hozzáférés, hiszen ezek biztosítják számukra a bevételt. Ennek módja azonban jogrendszerenként eltérő. A kontinentális és az angolszász jogrendszer ezen a téren is jelentős eltéréseket mutat, amit az elnevezések is jól tükröznek: authors' rights – copyright. Míg az előbbi esetén a szerzők (jogaik védelme érdekében) csupán az őket illető jogdíj egy részéről mondhatnak le a zeneműkiadók részére, addig az utóbbiban jogátruházás útján a zeneműkiadók válnak jogosulttá. Ez különösen is azért fontos, mert a világrepertoár megközelítőleg 70%-át kezében tartó négy nagy (major) nemzetközi zeneműkiadó ez utóbbi angolszász jogrendszerhez tartozik, és a mechanikai jogokat jogátruházással teljes egészében megszerzi a szerzőktől.

Ettől a ténytől függetlenül az angolszász szerzői jogi alapokon álló zeneműkiadók is a közös jogkezelő szervezeteken keresztül adtak képviseleti jogot a mechanikai jogdíjaik beszedésére, egészen addig, amíg 2007-ben, illetve 2008-ban az angolszász repertoárjukra nézve vissza nem vonták a többszörözési (azaz mechanikai) jogok közös jogkezelési képviseleti jogát az online felhasználások tekintetében.

4. Digitalizáció

Fontos szót ejteni a technikai fejlődés támasztotta azon kihívásokról, amelyek a zeneipar szereplőinek mindegyikét érintik. A technikai fejlődés mindig hozott magával olyan változásokat, amelyek hatással voltak a zeneiparra: új hangszerek, hangrögzítés, a hang közvetítése stb. Függetlenül attól, hogy ezek a hatások milyen mértékben befolyásolták a zeneipart, egyvalami közös volt bennük: az analóg világban a változások meglehetősen lassan következtek be. Ezzel szemben a legutóbbi kihívások a változás rohamos voltán túlmenően három téren is különböznek a korábbi hatásoktól. Egyrészt a digitalizáció a zeneipar teljes spektrumát érinti: a zene létrehozásától (komponálásától) kezdve a rögzítésen és terjesztésen át egészen tárolásig. Másrészt különbözik a fejlődés ütemében. Harmadrészt pedig különbözik abban, hogy e technológiák gyakorlatilag bárki számára könnyen hozzáférhetőek.

Bár a digitalizáció önmagában is nagy kihívást jelentett volna a szerzői jog számára, az ezzel párosuló, az Internet által életre hívott, illetve lehetővé tett terjesztési/megosztási módok egy mindezidáig példa nélküli hatást gyakoroltak a zeneiparra, és egyúttal nagy kihívások elé is állították azt.

Ezt a hatást nem csupán a tranzakciós költségek drasztikus csökkenése tette lehetővé, de az a könnyedség és sebesség is, amivel a tartalom az Interneten gazdát cserél. Korábban a drága műszaki felszerelés, valamint a hosszadalmas és bonyolult eljárás, aminek az eredményeképpen megszületett a végtermék, megfelelő védelmet jelentett mind a versenytársakkal, mind a fogyasztókkal szemben. A magas belépési korlátok kényelmes piaci környezetet jelentettek, ugyanakkor megakadályozták a fogyasztókat abban, hogy az óhajtott terméket máshonnan szerezzék be. A fent említett változások azonban fenyegetik a status quot. A nagy befektetések elsüllyedt költségek, amelyek egyre csökkenő mértékben jelentenek belépési korlátot bárki számára. Egy számítógép, megfelelő program és Internet hozzáférés birtokában bárki szerezhet, rögzíthet és a nagyközönség számára hozzáférhetővé is tehet zenei számokat. A spektrum másik végén pedig a felhasználók már nem kizárólag a nagy piaci szereplőktől tudják megszerezni a kívánt zenét.

A jogszerű online zenei szolgáltatásokkal sok piaci szereplő kísérletezik, jóllehet eddig nagy áttörés nem történt. Ugyanakkor a közös jogkezelő szervezetek nincsenek abban a helyzetben, hogy ők nyújtsanak megoldást a mostani helyzetre, különösen a CISAC döntés fényében (vagy inkább: árnyékában).

Többek között a digitalizáció és az Internet hatásainak következtében előálló jelentős bevételcsökkenés az, ami arra késztette a zeneműkiadókat (és a hangfelvétel-előállítókat is), hogy veszteségeik pótlására új források után nézzenek. Az elmaradt jogdíjak megszerzésért indított pereken túl egy másik bevételi forrásnak a befolyó jogdíjak mértékének a növelése látszott. A major zeneműkiadók ezt a közös jogkezelők olcsóbbá tétele révén kívánták elérni, úgy, hogy megversenyeztetik a szervezeteket.

5. Az Európai Bizottság 2005-ös Ajánlása

E piaci folyamatok támasztotta kihívásokra azonban nem csak a piac szereplői keresték, illetve keresik a választ. Tekintettel a piac jelentőségére az Európai Unió is egyre növekvő érdeklődéssel figyelte az eseményeket, mígnem az Európai Bizottság két igazgatósága is be nem kapcsolódott az események irányításába/befolyásolásába – sajnos azonban rossz irányt szabva az események folyásának.

A Belsőpiaci Igazgatóság először még amellett a megközelítés mellett tört lándzsát, hogy nincs szükség közösségi beavatkozásra: a jogkezelés kérdését a piacra kell bízni, függetlenül a digitalizáció tényétől. Az egyablakos jogosítás előnyeit senki sem vonta kétségbe, ugyanakkor az érdekelt felek a közös jogkezelő szervezetekre vonatkozó szabályok harmonizációját sürgették.

Az Európai Parlament elismerte a különbségeket, illetve egyenlőtlenségeket a vonatkozó nemzeti jogszabályok, a közös jogkezelők szervezeti felépítése és gyakorlata között, valamint ezeknek a belső piaci célkitűzések elérésében játszott negatív szerepét. Ennek fényében széleskörű harmonizációs lépéseket sürgetett, mind strukturális téren, mind az eljárási kérdések terén. Az átláthatóságot és az egységességet ugyanakkor a szerző személye és a kulturális vonatkozások figyelembevétele mellett kívánta elérni.

Mindezek ellenére, amint az a konzultációs folyamat dokumentumaiból kiviláglik, a Bizottság álláspontja fokozatosan megváltozott. Míg eleinte a közös jogkezelés digitális környezethez való igazítását a piacra bízta volna, addig a konzultációs folyamat végére a jogalkotás szükségessége mellett kardoskodott, amint az *A szerzői és kapcsolódó jogi jogkezelés a Belső Piacon* című Közleményből is kiderül: a Bizottság itt már a jogalkotás elkerülhetetlen voltáról ír.

A Bizottság álláspontját egy szolgálati munkadokumentumban (*Tanulmány a szerzői jog határokon átívelő kezelésére vonatkozó közösségi kezdeményezésről)* fejtette ki részletesebben, amiben a több országra szóló online jogosítás létrehozásának lehetőségeit taglalta. A Bizottság kiindulópontja az online zenei szolgáltatások amerikai és európai bevételei közötti különbség. Annak ellenére, hogy maga is utal egy félmondat erejéig arra, hogy ennek számos oka lehet, mégis kijelenti, hogy a fő ok a határokon átnyúló online közös jogkezelés hiánya. Ennek a problémának az orvoslására felvázolt három lehetőség, úgynevezett opció közül a Bizottság azt a 3. opciót választotta, ami szerint biztosítani kell a jogosultak számára, hogy szabadon válasszanak maguknak az Európai Unió egész területére érvényes online jogosítást nyújtó közös jogkezelő szervezetet.

Megadni a jogosultak számára a lehetőséget a közös jogkezelő szervezet megválasztására, azt jelenti, hogy a közös jogkezelőknek versenyezniük kell egymással a jogosultakért. Az Unió egész területére kiterjedő jogosítás pedig a területiség megszűnésével egyenlő, hiszen a közös jogkezelőknek nem kell egymás repertoárját képviselniük. Minden szervezet a saját repertoárját jogosítja az egész Európai Unió területére. A Bizottság elképzelése szerint ez a megoldás arra kényszerítené a közös jogkezelő szervezeteket, hogy a kezelési költségek tekintetében versenyezzenek a jogosultakért, ami mind a jól-, mind a kevésbé ismert művészek számra előnyös lenne. Ez pedig lehetővé tenné a közös jogkezelőknek, hogy zsánerspecifikus repertoárokat építsenek fel.

A Bizottság „megoldási" javaslatát sokan sokféleképpen bírálták, különösen is azért, mert téves feltevéseken alapul. Továbbá, mert a 3. opcióban felvázolt elképzelés teljesen irreális. Felettébb kérdéses, hogy a közös jogkezelő szervezetek tagjai valóban váltanának-e jogkezelőt. Meglehetősen egyértelmű okokból (nyelvi, kulturális, napi kapcsolati okok) a tagok a saját jogkezelőjüket választanák. S valóban, mindezidáig semmi jele tömeges elvándorlásnak.

Ezen túlmenően a 3. opció nagymértékű jogbizonytalanságot eredményezne a piacon. A felhasználók nem tudnák, hogy mely művekre kaptak jogosítást, és melyekre nem, hiszen a közös jogkezelő szervezetek nem a világrepertoárt jogosítanák. Tovább bonyolítja a helyzetet, hogy egy műhöz gyakorta több jogosult is kapcsolódik.

Az új modellben a jogkezelés sokkalta bonyolultabb és bürokratikusabb lenne. A felhasználóknak minden tagállamban külön-külön kellene tárgyalniuk a közös jogkezelő szervezettel, ahhoz hogy biztosak lehessenek a felhasznált zene jogtisztaságát illetően. A földrajzi távolságokon túl a nyelvi és jogszabályi különbségek gyakorlatilag leküzdhetetlen akadályt jelentenek. Ráadásul a nem helyben végzett piacfigyelés működőképessége igencsak kérdéses, ha egyáltalán lehetséges (még akkor is, ha online felhasználásról van szó), ami megint csak a kalózkodást erősíti, és nem a jogosultaknak járó jogdíjbevételek beszedését.

Tehát a 3. opció egyáltalán nem teszi egyszerűbbé a jogosítási eljárást, sőt inkább bonyolítja. A felhasználóknak leginkább arra van szükségük, hogy a lehető legegyszerűbben és leggyorsabban hozzáférést kapjanak a világrepertoárhoz, a lehető legnagyobb jogbiztonság mellett és a lehető legkevesebb szerződés megkötése árán. Paradox és ironikus módon épp a multinacionális felhasználók azok, akiknek mind a technikai, mind az anyagi hátterük megvan ahhoz, hogy a működési területükön minden közös jogkezelővel felvegyék a kapcsolatot, ugyanakkor a Bizottság pont az ő állítólagos érdekeik szem előtt tartásával propagálja a 3. opciót. Ugyanakkor az új rendszer szinte mindenki más (főleg a kis felhasználók) számára egy rémálommal lenne egyenértékű. Ennek ellenére fontos rámutatni, hogy még a nagy felhasználók életét sem könnyíti meg ez a „megoldás"! Ugyanis egy több országra szóló online jogosítás esetén egyrészt még a mechanikai jogok engedélyezését is több közös jogkezelőtől kell megkérni, másrészt a nyilvános előadás, illetve a nyilvánossághoz való közvetítés jogait és a világrepertoárnak nem a négy nagy zeneműkiadóhoz tartozó részét továbbra is a helyi jogkezelőknél kell jogosítani.

További problémát jelent, hogy a 3. opció megbontja a közös jogkezelő szervezetek közötti egyensúlyt. A közös jogkezelők közötti verseny következtében ezen szervezetek két csoportra oszlanak: néhány nagy erős szervezetre és sok kicsi, számos szerzőtől megfosztott olyan

szervezetre, amelyeknek a legmagasabb költségeket jelentő jogdíj-beszedési területek maradnak meg (éttermek, diszkók stb.). Ez a folyamat már elindult.

Ez természetesen meg fogja emelni az kezelési költségeket, aminek az ellensúlyozása végett (bizonyos keretek között) az bizonyulhat megoldásnak, ha a szervezet kizárólag költséghatékonysági alapon hoz döntéseket. Így például nehezen ellenőrizhető, távol eső helyekre nem jogosít, illetve kevesebb és kevésbé pontos piacfigyelést folytat stb. Ennek a helyzetnek elkerülhetetlen hatásai lesznek a jogosultakra, akik alacsonyabb minőségű szolgáltatást fognak kapni, és csökkenni fog a jogdíj-bevételük.

Fontos megjegyezni, hogy a 3. opció a kulturális sokszínűséget is veszélyezteti. A Bizottság semmilyen tényre, adatra nem hivatkozik a tanulmányában szereplő azon feltételezés alátámasztása végett, miszerint a több országra szóló online jogosítás nagyobb zenei választékot biztosítana az európai nyelvi és kulturális közösségeknek. A tanulmányban vizionált forgatókönyv nemcsak a szolidaritást ássa alá, de a kulturális sokszínűséget is.

Végül, de nem utolsósorban a 3. opció Európa-szerte monopóliumokat hozna létre minden egyes repertoárra, amely a felhasználók választási szabadságát is veszélyeztetné.

Bár a Bizottságnak az a célja, hogy egyszerűsítse és egyúttal biztosítsa a több országra szóló online jogosítást, ugyanakkor semmilyen érvvel nem támasztja alá az egyszerűsítés megvalósításának mikéntjére vonatkozó megállapításait. Ezzel párhuzamosan minden, tényekkel alátámasztott érvelés, amely az új rendszer működőképtelenségére világít rá, a Bizottságnál süket fülekre talál.

Mindezek mellett a Bizottság egy meglehetősen ellentmondásos utat választott a tervezett változások keresztülviteléhez: egy úgynevezett „soft law" megoldást: ajánlás formájában. Ezzel a lépéssel a Bizottság megkerülte az Európai Parlamentet.

6. Az Európai Bizottság CISAC döntése

A Belsőpiaci Főigazgatóság közös jogkezelés megváltoztatására koncentráló törekvéseivel párhuzamosan a Versenyügyi Főigazgatóság is szükségesnek érezte, hogy hallassa hangját a vitában. Egészen addig a Bizottság megközelítésének a *Tournier*-ügyben mondottak szabtak irányt. A nyilvános előadás tekintetében az említett ügyben a Bíróság megállapította, hogy kölcsönös képviseleti szerződések olyan szolgáltatásokra vonatkoznak, amelyek önmagukban nem minősülnek a 85. cikk (jelenleg 101. cikk) (1) bekezdésébe ütköző versenykorlátozó megállapodásnak. Ennek nagy jelentősége van még akkor is, ha a Bíróság hozzátette, hogy más lehet a megítélése ezen megállapodásoknak, ha olyan kizárólagos jogokat állapítanak meg, amelyek értelmében az egyes közös jogkezelő szervezetek arra vállalnak kötelezettséget, hogy külföldi felhasználóknak nem engednek hozzáférést a repertoárjukhoz. Bár ezt néhányan úgy értelmezték, mint annak az implicit kimondását, hogy közös jogkezelők között lehetséges a verseny, a Bizottság azon az álláspontón volt – amint azt Mario Monti, korábbi versenyügyi biztos is kifejtette –, hogy tudniillik a közös jogkezelés intézménye a megfelelő eszköz arra, hogy a helyes egyensúly kialakuljon egyrészről a jogosultak, illetve a kulturális ipar, másrészről pedig a felhasználók között.

Ezt az egyensúlyt az 2005-ös Ajánlás mellett a Bizottság CISAC döntése borította fel. A Bizottság az RTL és a Music Choice által benyújtott panasz alapján kifogásközlést küldött az eljárásban érintett zenei közös jogkezelő szervezeteknek. A Bizottság véleménye szerint a

kölcsönös képviseleti szerződés összehangolt magatartás eredménye, azaz versenykorlátozó célból jött létre, melynek következménye, hogy kizárja a felhasználókért folytatott versenyt a közös jogkezelők között, így beleütközik az EKSz. 81. cikkébe (jelenleg EUMSz. 101. cikke).

A felek cáfolták a kifogásközlésben foglalt megállapításokat, és rámutattak az érvelés ténybeli és jogi hiányosságaira. Tartva azonban a bírság működésüket teljesen ellehetetlenítő következményétől, a közös jogkezelő szervezetek olyan vállalásokat tettek, amelyek néhány nagy közös jogkezelő érdekét és akaratát tükrözték. Ezekre a lépésekre a piaci körülmények s egyúttal a piaci szerkezet olyan mérvű megváltoztatásának következtében került sor, amely körülmények arra kényszerítették a közös jogkezelő szervezeteket, hogy az önös rövidtávú érdekeiket szem előtt tartva előremeneküljenek – amint az a játékelmélet logikája alapján várható is volt.

Ennek következtében az egész közös jogkezelés egyik alappillére került veszélybe: a világrepertoárhoz való egyablakos hozzáférés. Ez természetesen mindenekelőtt a felhasználókat sújtja, hiszen abba a reménytelen helyzetbe hozza őket, hogy adott esetben több tucat mono-repertoárral rendelkező közös jogkezelőtől kell megszerezniük a jogokat, de ezzel együtt is folyamatos jogbizonytalanságban kell működniük, hiszen kiküszöbölhetetlen a jogszerűtlen felhasználás veszélye. Ezenfelül szükségképpen a jogosítással együtt járó költségek is a többszörösére emelkednek, nem is beszélve adott esetben a jogok bíróság előtti érvényesítésével járó költségekről.

Ami a közös jogkezelők nemzeti monopol helyzetével kapcsolatos félelmeket illeti, az új helyzet a régit legfeljebb csak új monopóliumokkal váltja fel, azonban versenyszempontból lényegesen rosszabbakkal. Az egységesen mindenki számára elérhető világrepertoár helyett sok, külön-külön hozzáférhető repertoár jön létre, kizárólagos jogosítási jogosultsággal, amely igen nagymértékben torzítaná a piacot. Ez különösen igaz az úgynevezett „must-have” tartalmak tekintetében.

A felhasználók oldaláról egy további aggodalomra okot adó körülmény, hogy az Bizottság kifogásközlése csak a nyilvános előadási jogokra vonatkozik, jóllehet a nyilvános előadási jogok általában kéz a kézben járnak a többszörözési (mechanikai) jogokkal, így azokat is meg kell szerezni. Értelemszerűen a legkevésbé sem praktikus két különböző jogosítási séma olyan jogok esetén, amelyeket rendszerint egyszerre kell megszerezni.

Végül egy érv, ami számtalanszor elhangzott már: a kulturális sokszínűség fogja kárát látni, ha a kis repertoárok könnyű elérhetősége megszűnik. Ez persze csak egyike (bár kétség kívül a legjelentősebbike) azon fogyasztói sérelmeknek, amelyeket a Bizottság nem vesz figyelembe. Annak ellenére, hogy a versenypolitikai megfontolások végeredményben a fogyasztói jólét növelését célozzák, a Bizottság által elképzelt új jogosítási rendszer nem biztosít előnyöket a fogyasztók számára.

A hamisan remélt, de elérhetetlen előnyökért feláldozott tényleges előnyök szempontjából nem szabad figyelmen kívül hagyni a Wouters kivételt. Az egyablakos jogosítás, egyebek mellett, a közös jogkezelés egy olyan eleme, amelyet a piaci szereplők és a fogyasztók túlnyomó többsége szükségesnek és fontosnak tart. Ez a rendszer egyik legfontosabb alapeleme, amely egyértelműen ellensúlyozza a területiség és kölcsönös képviseleti szerződések negatívumait.

A versenykorlátozó hatások kapcsán az egyik kulcsfogalom a hatékonyság, már ami az online zenei közös jogkezelést illeti. Érdemes emlékezetünkbe idézni, hogy a Bizottság érvelésének egyik kulcsfogalma is a hatékonyság volt, aminek érdekessége az, hogy történetesen éppen ellenkező tartalommal nyer értelmet a jogosultak, illetve a felhasználók számára: míg az előbbieknek a hatékony piacfigyelést, felhasználás-ellenőrzést és jogdíjbeszedést, addig az utóbbiaknak éppen a nem megfelelő piacfigyelést, a nem kielégítő felhasználás-ellenőrzést és a nem eredményes jogdíjbeszedést jelenti.

Kétségtelen tény, hogy a piaci szereplők mindegyikére egyformán vonatkoznak a versenyszabályok, ugyanakkor vannak olyan helyzetek, amikor a fogyasztók (és a társadalom) számára nem feltétlenül a verseny kínálja a legmegfelelőbb megoldást egy adott (piaci) problémára. Ez a helyzet például, amikor egy összehangolt magatartás eredményeképpen jelenik meg a piacon egy új termék vagy szolgáltatás. Ez a logika jelenik meg a EUMSz. 101. cikk (3) bekezdésében, és a Bizottságnak a 81. cikk (jelenleg 101. cikk) (3) bekezdésének alkalmazásáról szóló közleményében. Ez utóbbi hivatkozik versenyt támogató előnyökre és pozitív gazdasági hatásokra. A 33. bekezdés kimondja, hogy a fogyasztói jólét növelését el lehet érni versenykorlátozó megállapodásokkal, amennyiben a versenyre gyakorolt pozitív hatások túlsúlyban vannak a negatív hatásokkal szemben, és azokat más módon nem lehet elérni. A hatékonyságjavulás többletértéket hoz létre az új termék megjelenése révén.

A közös jogkezelés terén az online zenei jogosítás esetében ez az új termék lehetne a világrepertoárt több területre jogosító rendszer. Ez az, amit mindezidáig nem sikerült megvalósítani. A 2005-ös Ajánlást és a CISAC döntést megelőzően a világrepertoár volt a sztenderd, jóllehet területi alapon. A 2005-ös Ajánlás és a CISAC döntés eredményeképpen ugyan történt egy-két páneurópai jogosítás – számtalan bizonytalansággal terhelten –, de ennek nagy ára volt: az egyablakos rendszer elkezdett széthullani. Több repertoárt magukban foglaló jogosítás helyett mono-repertoárokat jogosítanak. Ennek megfelelően egy multi-repertoár multi-territoriális jogosítása valóban új termék/szolgáltatás lenne a piacon, amely olyan előnyökkel járna, amelyek semlegesíteni tudnák az esetleges versenyhátrányokat.

A közös jogkezelés lényege a jogosítás zökkenőmentes biztosítása, azaz, hogy egy egyszerű és megbízható kapcsolat jöjjön létre a jogosultak és a felhasználók között, továbbá hogy a jogdíjak beszedését és felosztását egy olajozottan működő rendszer biztosítsa. Az egyablakos jogosítás elengedhetetlen eleme egy ilyen rendszernek. Ez nemcsak, hogy szükséges a fenti célok elérése végett, mintegy természetes tartozéka a rendszernek, de e célok más módon történő megvalósítása erősen kétséges. Azaz ez a megoldás nem megy túl a szükségesség határán, így nem is aránytalan a kölcsönös képviseleti szerződések negatív hatásaihoz képest.

7. A zenei közös jogkezelés jelenlegi helyzete az Európai Unióban

Összefoglalva elmondható tehát, hogy a Bizottság Ajánlása, valamint a CISAC döntés következtében a piacon negatív folyamatok indultak be. A közös jogkezelő szervezeteket ért kétfrontos támadás egy olyan bizonytalanságokkal teli helyzetet teremtett, amiben a nagy zeneműkiadók, pontosabban a négy major (a világrepertoár hozzájuk tartozó kb. 70%-ával) a gazdasági erejüket kihasználva elkezdték visszavonni a repertoárjukat a közös jogkezelőktől, abból a célból, hogy teszteljék tárgyalási pozíciójukat, illetve hogy éljenek is vele. Így hát a négy nagy nemzetközi zeneműkiadó 2007 és 2008 folyamán az angolszász zenei repertoárjára, az online felhasználás tekintetében, visszavonta a többszörözési (azaz mechanikai) jogok közös jogkezelési képviseleti jogát.

A játékelmélet logikájának megfelelően a nagy közös jogkezelők elkezdtek versenyezni a páneurópai jogosítás lehetőségéért (és az azzal együtt remélt, bár teljesen bizonytalan előnyökért), aminek következtében a kis közös jogkezelőket, valamint azok repertoárjait az ellehetetlenülés fenyegeti. Tették mindezt annak ellenére, hogy gyakorlatilag mindenki számára világos, hogy az egyablakos jogosítási modell megszűnése minden piaci szereplőre hátrányos következményekkel fog járni.

A közös jogkezelés újjáépítésében kiindulási alap kell, hogy legyen a közös jogkezelés fent említett céljainak összeegyeztetése a zenei piac szereplőinek érdekeivel. Az érdekek megfelelő kiegyensúlyozása során a megfelelő policy döntéseknek kulcsszerepük van: mely érdekeket kell előnyben részesíteni másokkal szemben, és milyen közérdek figyelembevétele alapján. A megfelelő policy kidolgozása során a két jogterület sajátosságai, történeti adottságai, céljai és korlátai figyelembevétele mellett, illetve azokon túlmenően a kulturális sokszínűség szempontjaira, továbbá szociális és technikai kérdésekre is tekintettel kell lenni.

Az események alakulása egy olyan ponthoz érkezett, amikor egy hosszútávra szóló, működőképes megoldás megtalálása minden szereplőnek – ideértve mind az érintett bizottsági igazgatóságokat, mind pedig az Európai Parlamentet – létkérdés, így egyformán érdeke, ellenkező esetben fennáll annak a veszélye, hogy működésképtelenné válik a rendszer. A megoldáskeresésben az alapelvek mentén való érdekegyeztetés, és a jogterületek és azok kapcsolatának megértése és figyelembevétele elkerülhetetlen lesz. Vajon sikerül-e visszatalálni a helyes útra, és vajon sikerrel fog-e járni egy minden érdeket figyelembe vevő, és egyúttal netán egy eddiginél jobb közös jogkezelési rendszer felépítése; nos, ennek a kérdésnek a megválaszolása még várat magára.

APPENDIX – TIMELINE

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
1977		Communication - Community Action in the Cultural Sector			
1982		Communication - Stronger Community Action in the Cultural Sector			
1985		White Paper - Completing the Internal Market			
1988		Green Paper - Copyright and the Challenge of Technology			
1991		Follow-up - working programme			
1994. 07. 19.		Communication - Europe' Way to the Information Society			
1995. 07. 19.		Green Paper - Copyright and the Related Rights in the Information Society			
1996. 01. 08.		Hearing			
1996. 06. 02-04.					Conference - Copyright and Related Rights on the Threshold of the 21st Century, organised by the Commission with the Italian Presidency and the Tuscany Region in Florence
1996. 08. 09.	Written Question to the Commission on the 1995 Green Paper				

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
1996. 11. 12.	Answer from the Commission				
1996. 11. 20.		Follow-up - Commission's Single Market policy in the area of copyright and related rights			
1998. 07. 12-14.					Conference - Creativity & Intellectual Property Rights: Evolving Scenarios and Perspectives, organised by the Commission in Vienna
1998.		The Commission commissioned a study from Deloitte & Touche			
2000. 05. 11.		Deloitte & Touche - Study on collective management of copyright in the European Union			
2000. 03. 22-23.					Colloquium on the Collective Management of Copyright and Neighbouring Rights in the Digital Environment - Situations and Perspectives, organised by the Portuguese Presidency in Evora

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2000. 07. 09-11.					Conference on the Management and Legitimate Use of Intellectual Property, organised by the Commission in cooperation with the French Presidency in Strasbourg
2000. 11. 13-14.		Follow-up to the Strasbourg conference: hearing on collective management			
2000. 09. 26.				Santiago Agreement - the agreement is signed	
2000. 11. 16.				Simulcasting Agreement - IFPI applies to the Commission for negative clearance	
2000. 11. 30.				CISAC-case - RTL files a complaint against GEMA	
2001. 04. 17.				Santiago Agreement - the five member societies notify the Commission	
2001. 05. 17.				Santiago Agreement - Commission publishes a Notice on the agreement	
2001. 06. 21.				Simulcasting Agreement - IFPI notifies the Commission of the amendment of the agreement	
2001. 09. 28.				Barcelona Agreement - the agreement is adopted	

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2002. 02. 28.				Barcelona Agreement - the agreement is notified to the Commission	
2002. 05. 22.				Simulcasting Agreement - Second amendment is notified	
2002. 06. 16-18.					Conference - European Copyright Revisited in Santiago de Compostela
2002. 10. 08.				Simulcasting - the Commission exempts the agreement	
2003. 01.16.	The Committee on Legal Affairs and the Internal Market was authorised to draw up an own-initiative report on a Community framework for collecting societies for authors' rights				
2003. 04 .04.				CISAC-case - Music Choice files a complaint against CISAC	
2003. 12. 11.	Echerer Report				
2004. 01. 15.	Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights				
2004. 02. 17.					SABAM - BUMA/STEMRA
2004. 04. 16.		Communication - rights management			
2004. 04. 21.		Consultation letter: comments till 07. 21.			

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2004. 04. 29.				Santiago Agreement - Commission issues a Statement of Objections	
2004. 05.				Santiago Agreement - undertakings submitted by the parties	
2004. 06. 20-22.					Conference - Copyright for the creativity in the enlarged European Union in Dublin
2004. 06. 21.		Comments to the Communication			
end of 2004		Senior management changes within the copyright unit of the DG MARKT			
2004. 12. 31.				Simulcasting Agreement - the agreement expires Santiago Agreement - the agreement expires Barcelona Agreement - the agreement expires	
2005. 01. 26.		Commission Work Programme for 2005			
2005. 07. 07.		Working Document - Study on a Community Initiative on the Cross-Border Collective Management of Copyright			
2005. 07. 28.		Consultation on the Study			
2005. 10. 05-07.					Conference - The Creative Economy, organised by the UK Presidency in London

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2005. 10. 11.		Working Document - Impact Assessment			
2005. 10. 18.		Recommendation - collective cross-border management of copyright and related rights for legitimate online music services			
2005. 11. 16.					GESAC Model
2006. 01. 20.					eLOS
2006. 01. 31.				CISAC-case - Statement of Objections	
2006. 06. 14-16.				CISAC-case - Oral Hearing	
2006. 07.	KEA Study on collective management of rights in Europe - Quest for Efficiency				
2006. 07. 28.			Content Online in Europe's Single Market		
2006. 09. 12.					eMusic
2006. 10.			Study on Interactive Content and Convergence		
2007. 01.					ARMONIA
2007. 01. 17.		Call for comments till 07. 01.			
2007. 03. 05.	Lévai Report				
2007. 03. 07.				CISAC-case - proposed commitments	

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2007. 03. 13.	Resolution on the 2005 Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services				
2007. 03. 29.					ICE
2007. 05. 30-31.					Copyright Summit, Brussels
2007. 06. 09.				CISAC-case - Notice: commitments - invitation for comments	
2007. 07. 01.		Comments on the Recommendation			
2007. 12. 12.					CELAS
2007. 12.					SOLEM
2008. 01. 03.			Communication: Creative Content Online in the Single Market		
2008. 01. 28.					SACEM-UMPG
2008. 01. 30.					PEDL
2008. 04. - 2009. 01.			Content Online Platform		
2008. 06. 17.				CISAC-case - Advisory Committee	
2008. 07. 16.				CISAC-case - Commission Decision	
2008. 07.					PACOL
2008. 07. 15.					Alliance Digital

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2008. 07. 17.			Content Online Platform - meeting on management of copyright online		
2008. 09. 17.				Online Commerce Roundtable - Neelie Kroes meets with senior industry representatives to discuss the opportunities and barriers to increased online retailing	
2008. 09. 17.				Issues Paper: Opportunities in Online goods and Services	
2008. 09-10.				CISAC-case - Appeals to the CFI	
2008. 09. 25.	Resolution on collective cross-border management of copyright and related rights for legitimate online music services				
2008. 11. 21.				Contributions submitted by interested parties on the Issues Paper	
2008. 12. 04.				Contributions submitted by Round Table participants	
2009. 04. 20.	Written Question to the Commission on the 2005 Recommendation				
2009. 05.			Final Report on the Content Online Platform		

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2009. 05. 26.				Online Commerce Roundtable Report on opportunities and barriers to online retailing	
2009. 06. 16.	Answer from the Commission				
2009. 08. 21.				Contributions submitted by interested parties on the Online Commerce Roundtable Report	
2009. 10. 19.				Joint Statement from EMI, PRS for Music, SACEM, STIM and Universal on a "Working Group on a Common Framework for Rights Ownership Information"	
2009. 10. 19.				Joint statement from the Online Commerce Roundtable participants on "General principles for the online distribution of music"	
2009. 10. 20.				Competition Press Release: Commission's Online Roundtable on Music opens way to improved online music opportunities for European consumers	
2009. 10. 21.				Neelie Kroes speech: Consumer welfare: more than a slogan	

Date	European Parliament	European Commission DG MARKT	European Commission DG INFSO	European Commission DG COMP	Industry Events
2009. 10. 22.			Reflection Paper on a Digital Single Market for Creative Content Online, and launching of a public consultation		
2009. 12. 09.	ELIAMEP Study - Collecting Societies and Cultural Diversity in the Music Sector				

TABLE OF EC CASES

Decision of the European Court of Justice and the Court of First Instance

Alphabetical list

- Belgische Radio en Televisie v SV SABAM and NV Fonior 127/73 [1974] ECR 313
- Centrafarm BV v Sterling Drug Inc. 15/74 [1974] ECR 1147
- Centrafarm BV v Winthrop BV 16/74 [1974] ECR 1183
- Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR I-2549
- Consten and Grundig v Commission 56 and 58/64 [1966] ECR 299
- David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991
- Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. 78/70 [1971] ECR 487
- François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others 110/88, 241/88 and 242/88 [1989] ECR 2811
- Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities 7/82 [1983] ECR 483
- Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA [1994] ECR I-5641
- J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577
- Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) [2000] ECR I-2681
- Ministère public v Jean-Louis Tournier 395/87 [1989] ECR 2521
- Métropole télévision SA v Commission T-528/93, T-542/93, T-543/93 and T-546/93 [1996] ECR II-649
- Musik-Vertrieb membran GmbH et K-tel International v GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte 55/80 and 57/80 [1981] ECR 147 (GEMA IV)
- Parke Davis & Co. v Probel and Centrafarm 24/67 [1968] ECR 55
- Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH. C-92/92 and C326/92 [1993] ECR I-5145

- Procureur du Roi v Dassonville 8/74 [1974] ECR 837

- Pronuptioa de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis 161/84 [1986] ECR 353

- Radio Telefis Eireann v Commission T-69/89 [1991] ECR II-485

- Simmenthal SpA v Ministère des finances Italian 35/76 [1976] ECR 1871

- Sirena Srl v Eda Srl 40/70 [1971] ECR 69

- Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921

- Windsurfing International Inc. v Commission 193/83 [1986] ECR 611

Numerical list

- 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299

- 24/67 Parke Davis & Co. v Probel and Centrafarm [1968] ECR 55

- 40/70 Sirena Srl v Eda Srl [1971] ECR 69

- 78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. [1971] ECR 487

- 127/73 Belgische Radio en Televisie v SV SABAM and NV Fonior [1974] ECR 313

- 8/74 Procureur du Roi v Dassonville [1974] ECR 837

- 15/74 Centrafarm BV v Sterling Drug Inc. [1974] ECR 1147

- 16/74 Centrafarm BV v Winthrop BV [1974] ECR 1183

- 35/76 Simmenthal SpA v Ministère des finances Italian [1976] ECR 1871

- 55/80 and 57/80 Musik-Vertrieb membran GmbH et K-tel International v GEMA – Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte [1981] ECR 147 (GEMA IV)

- 7/82 Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities [1983] ECR 483

- 193/83 Windsurfing International Inc. v Commission [1986] ECR 611

- 161/84 Pronuptioa de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis [1986] ECR 353

- 395/87 Ministère public v Jean-Louis Tournier [1989] ECR 2521

- 110/88, 241/88 and 242/88 François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others [1989] ECR 2811

- T-69/89 Radio Telefis Eireann v Commission [1991] ECR II-485

- C-92/92 and C326/92 Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH. [1993] ECR I-5145

- C-250/92 Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA [1994] ECR I-5641

- T-528/93, T-542/93, T-543/93 and T-546/93 Métropole télévision SA v Commission [1996] ECR II-649

- C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921

- C-51/96 and C-191/97 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR I-2549

- C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) [2000] ECR I-2681

- C-309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577

- C-519/04 P David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991

Decisions of the European Commission

Alphabetical list

- Banghalter & Homem Christo v SACEM, Commission Decision of 12 August 2002 (COMP/C2/37.219) non-official publication (Daft Punk)

- BIEM Barcelona Agreements – COMP/C2/38.377

- CISAC, Commission Decision of 16 July 2008 (COMP/38.698) non-official prublication

- CECED, Commission Decision 2000/475/EC of 24 January 1999 (IV.F.1/36.718.) OJ L 187, 26.7.2000, p. 47

- ENIC/UEFA – COMP/37.806

- GEMA Decisione della Commissione 71/224/CEE del 2 giugno 1971 (IV/26.760), GU L 134, 20.6.1971, pag. 15 (GEMA I)

- GEMA Decisione della Commissione 72/268/CEE del 6 luglio 1972 (IV/26.760), GU L 166, 24.7.1972, pag. 22 (GEMA II)

- IFPI 'Simulcasting' Commission Decision 2003/300/EC of 8 October 2002 (COMP/C2/38.014) OJ L 107 30.4.2003, p. 58

- Santiago Agreement (COMP/C2/38.126)

- Universal/BMG Music Publishing Commission Decision of 22 May 2007 (COMP/M.4404)

Numerical list

- Banghalter & Homem Christo v SACEM, Commission Decision of 12 August 2002 (COMP/C2/37.219) non-official publication (Daft Punk)

- BIEM Barcelona Agreements – COMP/C2/38.377

- CISAC, Commission Decision of 16 July 2008 (COMP/38.698) non-official prublication

- ENIC/UEFA – COMP/37.806

- 71/224/CEE, GEMA Decisione della Commissione del 2 giugno 1971 (IV/26.760), GU L 134, 20.6.1971, pag. 15 (GEMA I)

- 72/268/CEE, GEMA Decisione della Commissione del 6 luglio 1972 (IV/26.760), GU L 166, 24.7.1972, pag. 22 (GEMA II)

- 2000/475/EC, CECED, Commission Decision of 24 January 1999 (IV.F.1/36.718.) OJ L 187, 26.7.2000, p. 47

- 2003/300/EC, IFPI 'Simulcasting' Commission Decision of 8 October 2002 (COMP/C2/38.014) OJ L 107 30.4.2003, p. 58

- Santiago Agreement (COMP/C2/38.126)

- Universal/BMG Music Publishing Commission Decision of 22 May 2007 (COMP/M.4404)

EC MATERIALS

Regulations

- Council Regulation (EEC) No. 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, OJ L 182, 2.7.1992, p. 1

- Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.1.1994, p. 1

Directives

- First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11.2.1989, p. 1

- Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23

- Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30.7.1998, p. 13

- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42

- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61

- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15

- Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9

- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10

- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32

- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45

- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12

- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28

Resolutions, reports and other materials of the European Parliament

- Parliament resolution of {13-05-1974} 13 May 1974 on the protection of the European cultural heritage OJ C 62, 30.5.1974, p. 5

- European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI)) 15 January 2004

- European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), P6_TA(2007)0064

- European Parliament resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, P6_TA(2008)0462

- European Parliament Report on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), FINAL A6-0053/2007, 5.3.2007

- KEA European Affairs, 'The Collective Management of Rights in Europe: The Quest for Efficiency'. A report commissioned by the European Parliament. Available at http://www.europarl.europa.eu/comparl/juri/study/default_en.htm

- ELIAMEP Study – Collecting Societies and Cultural Diverity in the Music Sector. A report commissioned by the European Parliament. Available at http://www.europarl.europa.eu/studies

- Written Question E-2255/96 by Klaus-Heiner Lehne (PEE) to the Commission (9 August 1996) OJ C105 Volume 403 April 1997

- Answer given by Mr Monti on behalf of the Commission (12 November 1996) OJ C105 Volume 403, 3 April 1997

- Written Question E-2702/09 by Jan Cremers (PSE), Ieke fan den Burg (PSE) and Bert Doorn (PPE-DE) to the Commission (20 April 2009). Not yet published in the Official Journal

- Answer given by Mr Figel' on behalf of the Commission (16 June 2009). Not yet published in the Official Journal

White and green papers, recommendations, notices, policy statements, reports and other materials of the European Commission

- White Paper from the Commission to the European Council, Completing the Internal Market, COM(85) 310 final, Brussels, 14 June 1985

- White Paper, Growth, Competitiveness, Employment: The challenges and ways forward into the 21st century, COM(93) 700, 5 December 1993

- White Paper from the Commission to the European Council, Completing the Internal Market, COM(85) 310 final, 14 June 1985

- Green Paper, Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action, Communication from the Commission, COM(88) 172 final, Brussels, 7 June 1988

- Green Paper, Copyright and Related Rights in the Information Society, COM(95) 382 final, Brussels 19.7.1995

- Green Paper, Combating Counterfeiting and Piracy in the Internal Market, COM(98) 569 final, 15 October 1998

- Follow-up to the Green Paper, Working programme of the Commission in the field of copyright and neighbouring rights, COM(90) 584 final, 17 January 1991

- Follow-Up to the Green Paper, Working programme of the Commission in the field of copyright and neighbouring rights, Communication from the Commission COM(90) 584 final, 17 January 1991

- Follow-up on the Green Paper, Copyright and Related Rights in the Information Society, Communication from the Commission, Brussels, 20.11.1996

- Follow-up to the Green Paper, Combating counterfeiting and piracy in the Single Market. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. COM(2000) 789 final, Brussels, 30.11.2000

- Community action in the cultural sector, Commission Communication to the Council, sent on 22 November 1977, COM(77) 560, 2 December 1977

- Stronger Community Action in the Cultural Sector, Commission Communication to Parliament and to the Council, COM(82) 590 final, Brussels, 16 October 1982

- Action Plan on Europe's Way to the Information Society, Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions, COM(94) final, Brussels, 19.7.1994

- The Management of Copyright and Related Rights in the Internal Market, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, COM(2004) 261 final, 16.4.2004

- Commission Staff Working Document, Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Brussels, 7.7.2005

- Commission Staff Working Document, Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services, SEC(2005) 1254, 11.10.2005

- Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), OJ L 276, 21.10.2005, p. 54

- Issues Paper: Opportunites in Online Goods and Services

- Online Commerce Roundtable Report on Opportunites and Barriers to Online Retailing

- Final Report on the Content Online Platform

- Creative Content Online in the Single Market, Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 836 final, Brussels, 03.01.2008

- Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document on DG INFSO and DG MARKT, 22 October 2009. Available at http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm

- Contributions submitted on the Commission Communication The Management of Copyright and Related Rights in the Internal Market

- Contributions submitted on the Commission Staff Working Document, Study on a Community Initiative on the Cross-Border Collective Management of Copyright

- Contributions submitted on the Issues Paper: Opportunites in Online Goods and Services

- Contributions submitted on the Online Commerce Roundtable Report on Opportunites and Barriers to Online Retailing

- Communication from the Commission – Notice – Gudielines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p 97

- Europe and the global information society, Recommendations of the high-level group on the information society to the Corfu European Council. Bulletin of the European Communities, Supplement 2/94

- Study on Interactive Content and Convergnece; Implications for the Informationsociety. A Study for the European Commission (DG Information Society and Media), October 2006. Available at http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/interactive_content_ec2006.pdf

Competition Policy Reports

- First Report on Competition Policy 1971, Brussels – Luxembourg 1972

- Fourteenth Report on Competition Policy 1984, Brussels – Luxembourg 1985

- Fifteenth Report on Competition Policy 1985, Brussels – Luxembourg 1986

- Report on Competition Policy 2006, Brussels – Luxembourg 2007

Speeches

Kroes

Commissioner Neelie Kroes' speech of 21 October 2009, SPEECH/09/486

McCreevy

Commissioner Charlie McCreevy's speech of 7 October 2005, SPEECH/05/588

Reding

Commissioner Viviane Reding's speech of 9 July 2009, SPEECH/09/336

Toft

Torben Toft, Collective Rights Management in the Online World, A review of recent Commission initiatives, The Conrad Hotel, Brussels, 8 June 2006. Available at http://ec.europa.eu/comm/competition/speeches/text/sp2006_008_en.pdf

Ungerer [2003]

Herbert Ungerer, Application of competition law to rights management in the music market – some orientations, Independent Music Companies Association (IMPALA), Brussels, 11 June 2003. Available at http://europa.eu.int/comm/competition/speeches/index_2003.html

Ungerer [2004]

Herbert Ungerer, *European music cultures and the role of copyright organisation – competition aspects*, European Music Cultures – Sound or Silence, The Hague, 5 October 2004. Available at http://ec.europa.eu/comm/competition/speeches/text/sp2004_020_en.pdf

Wood

David Wood, *Collective Management and EU Competition Law*, V SGAE Conference on Intellectual Porperty, Competition and Collective Management, Madrid, 12, 13 and 14 November 2001. Available at http://ec.europa.eu/comm/competition/speeches/text/sp2001_025_en.pdf

Others

Glossary

Glossary of terms relating to European integration and the institutions and activities of the EU. Available at http://europa.eu/scadplus/glossary/index_en.htm

BIBLIOGRAPHY

Books

Bellamy & Child

Bellamy & Child, *European Community Law of Competition*, 6th edn Oxford University Presss, United States 2008

Bently and Sherman

Lionel Bently and Brad Sherman, *Intellectual Property Law*, 2nd edn Oxford University Press, United States 2004

Boytha Györgyné

Boytha Györgyné (ed.), *Versenyjog*, Szent István Társulat, Budapest, 2006

Copinger

Copinger and Skone James, *Copyright*, 15th edn Sweet & Maxwell, London 2005

Cornish

William Robert Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet and Maxwell, London 1999

Craig and de Búrca

Craig and De Búrca, *EU Law: Text, Cases and Materials*, 3rd edn Oxford University Press, 2002

Davies

Gillian Davies, *Copyright and the Public Interest*, Sweet & Maxwell, London 2002

Eklöf

Dan Eklöf, *Upphovsrätt I konkurrens – särskilt om artikel 82 coh tvångslicensiering*, Författaren och Iustus Förlag AB, Uppsala 2005

Ficsor

Mihály Ficsor, *Collective Management of Copyright and Related Rights*, World Intellectual Property Organization, Geneva 2002

Guibault and Gompel

Lucie Guibault and Stef van Gompel, *'Collective Management in the European Union'* in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International, The Hague 2006, chapter IV, pp. 117-152

Lessig

Lawrence Lessig, *The Future of Ideas – The Fate of the Commons in a Connected World*, Vintage Books, New York, 2001

Motta

Massimo Motta, *Competition Policy – Theory and Practice*, Cambridge University Press, 2004

Oliver

Peter Oliver, *Free Movement of Goods in the European Community, under Articles 28 to 30 of the EC Treaty*, 4th edn Sweet & Maxwell, London 2003

Schepens

Paula Schepens, *Guide to the Collective Administration of Authors' Rights*, UNESCO 2000. Available at http://unesdoc.unesco.org/images/0012/001206/120677e.pdf

Schovsbo

Jens Schovsbo, *Afgrænsningen mellem konkurrence- og immaterialretten*, in Konkurrens på reglerade marknader (ed. Ulf Bernitz and Eva Edwardsson), Stockholm 1999, p. 129

Sterling

J.A.L. Sterling, *World Copyright Law*, Sweet & Maxwell, London 1998

Tóth

Tóth Tihamér, *Az Európai Unió versenyjoga*, CompLex Kiadó (Wolters Kluwer), Budapest 2007

Tritton

Guy Tritton, *Intellectual Property in Europe*, 3rd edn, Sweet & Maxwell, London 2008

Whish

Richard Whish, *Competition Law*, 6th edition, Oxford University Press, Great Britain, 2009

Articles

Dietz [2002]

Adolf Dietz, *The Five Pillars of Modern European Copyright [Authors' Rights] Protection*, Statement by the author at the "Literature today and tomorrow – Shaping the profile of Europe at large, The 25th anniversary of the European Writers' Congress/EWC", Budapest, 24-27 October 2002

Dietz [2004]

Adolf Dietz, *European Parliament Versus Commission: How to Deal with Collecting Societies?*, IIC – International Review of Intellectual Property and Competition Law 35(7):809-820, 2004

Geiger

Christphe Geiger, *„Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, IIC – International Review of Intellectual Property and Competition Law, 37(4):371-406, 2006

Gyertyánfy

Gyertyánfy Péter, *A Szerzői jogi jogharmonizáció eredménye az EU-ban*, Jogtudományi Közlöny, issue 2002/6 p 271

Hardin

Garrett Hardin, *The Tragedy of the Commons*, in Science, 13 December 1968

Himma

Kenneth Himma, *The Justification of Intellectual Property: Contemporary Philosophical* Disputes, (June 12, 2006). Berkeley Center for Law and Technology. Law and Technology Scholarship (Selected by the Berkeley Center for Law & Technology). Paper 21. Available at http://repositories.cdlib.org/bclt/lts/21

Kaufmann

Thomas Kaufmann, 'Competition issues relevant to copyright and the information society' presented in his speech before the European Commission on 26 April 1995

Kreile and Becker

Professor Dr. Reinhold Kreile and Professor Dr. Jürgen Becker, 'GEMA (2003)'. Available at http://www.gema.de/en/press/publications/papers/gema-2003/

Riley

Alan Riley, The EU Reform Treaty and the competition Protocol: Undermining EC Competition Law, E.C.L.R. 2007, issue 12

Rincón

Alfonso Rincón, *EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal*, Journal of Contemporary European Research, Vol. 3 No. 3, 2007

Wallis *et al.*

Roger Wallis, Charles Baden-Fuller, Martin Kretschmer and George Michael Klimis, *Contested Collective Administration of Intellectual Property Rights in Music: The Challenge to the Principles of Reciprocity and Solidarity*, European Journal of Communication 1999. Available at http://ejc.sagepub.com/cgi/reprint/14/1/5

Wood

David Wood, 'Collective Management and EU Competition Law' (speech at the V SGAE Conference on Intellectual Property, Competition and Collective Management, Madrid 12th, 13th and 14th of November 2001) Available at http://ec.europa.eu/comm/competition/speeches/text/sp2001_025_en.pdf

OECD materials

- OECD Economic arguments for protecting intellectual property rights effectively, Paris, 1989

- OECD Report, Digital Broadband Content: Music, DSTI/ICCP/IE (2004) 12/FINAL, Working Party on the Information Economy, 13 December 2005. Available at http://www.oecd.org/dataoecd/13/2/34995041.pdf

- Presentation of Mr Barney Wragg, Vice President, eLabs, Universal Music International (UMI) during the OECD Digital Broadband Content Panel. OECD Working Party on the Information Economy, Digital Broadband Content, Panel and government session: Summary and Directions for Work, Meeting of 3 June 2004, Internal Working Document, Paris: Organisation for Economic Co-operation and Development, p 17, panel agenda and presentations can be found at http://www.oecd.org/dataoecd/53/39/34579763.pdf

- Glossary of Industrial Organisation Economics and Competition Law, OECD. Available at http://www.oecd.org/dataoecd/8/61/2376087.pdf

WIPO materials

- WIPO Intellectual Property Handbook: Policy, Law and Use, 2nd ed., Geneva 2004. Available at http://www.wipo.int/about-ip/en/iprm/index.html

- WIPO Intellectual Property Handbook: Policy, Law and Use. Available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf

Conference materials

- Conference – Copyright and Related Rights on the Threshold of the 21st Century, organised by the Commission with the Italian Presidency and the Tuscany Region, in Florence, 2-4 June 1996

- Conference – Creativity & Intellectual Property Rights: Evloving Scenarios and Prospectives, organised by the Commission in Vienna, 12-14 July 1998

- Colloquium on the Collective Management of Copyright and Neighbouring Rights in the Digital Environment – Situations and Perspectives, organised by the Portuguese Presidency in Evora, 22-23 March 2000

- Conference on the Management and Legitimate Use of Intellectual Property, organised by the Commission in cooperation with the French Presidency in Strasbourg, 9-11 July 2000

- Conference – European Copyright Revisited, Santiago de Compostela, 16-18 June 2002

- Conference – Copyright for the creativity in the enlarged European Union, Dublin, 20-22 June 2004

- Conference – The Creative Economy, organised by the UK Presidency in London, 5-7 October 2005

- Copyright Summit, Brussels, 30-31 May 2007

News

- Intellectual Property Watch, article by Monika Ermert, 14 March 2007. Available at http://www.ip-watch.org/weblog/index.php?p=565&res=1024_ff&print=0

- BMI News, 'Worldwide Internet Licenses To Be Granted by Five Copyright Organizations: BMI, BUMA, GEMA, PRS and SACEM' (Santiago de Chile, 25 September 2000). Available at http://www.bmi.com/news/entry/232770

- How and Why Major Labels and Independent Labels Work Together, Indie-Music.com, 11 September 2004. Available at http://www.indie-music.com/modules.php?name=News&file=article&sid=3235