

Paper for *Society for Economic Research on Copyright Issues*
SERCIAAC 2005
Montreal, 7-8 July 2005

**The Aims of European Competition Policy towards
Copyright Collecting Societies**

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Abstract: This paper provides an analysis of European Commission Communication COM(2004) 261 *The Management of Copyright and Related Rights in the Internal Market* from the perspective of EU Competition Policy. It is argued that the rules of competition (Articles 81 and 82, EC Treaty) provide an insufficient basis for the regulation of collecting societies as complex institutions that have evolved from conflicting “transaction cost” and “solidarity” rationales. COM(2004) 261, laying the ground for a Directive on collecting societies, implicitly acknowledges this but fails to provide an alternative framework. The paper concludes with such a proposal, placing the management of copyright and related rights in the context of innovation policy in culturally diverse societies (this may be at variance with current ECJ jurisprudence on collective societies, disapplying Article 86, EC Treaty on “services of general economic interest”). Implications for international copyright obligations under Berne and TRIPS are discussed.

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Introduction

Copyright collecting societies are complex institutions. Outsiders, and even insiders, have found it difficult to understand the rights they manage, their tariff and distribution structures, the principles governing the relationships between licensors and licensees. Copyright societies have been likened to joint ventures, trustees, mutual societies and collecting agents. In some countries, they are constituted as corporate non-profit organisations (UK), in others they may operate under a government monopoly grant (Italy, Japan). Most European societies are somewhat in the middle, constituted as private membership associations but subject to close regulatory supervision. This may include formal permissions to operate a collecting society, statutory obligations regarding membership rules, accounting procedures and licensing conditions, or tariffs set directly by government (e.g. levies on blank tapes, recordable discs and copying equipment).¹

In the UK, there are currently 13 collective licensing bodies, some managing very valuable primary rights, such as the music rights to public performance and broadcasting assigned to the Performing Right Society PRS, or the right to make and distribute recordings for which the Mechanical-Copyright Protection Society MCPS acts as exclusive agent. The largest societies exercise considerable economic clout. In 2003, PRS collected a total of £283 million in licence revenues, of which £242 million were distributed to its members; MCPS distributed £226 million in royalties.²

¹ For surveys of the different constitutions of European Collecting Societies see Doutrelepon [1995] and Katzenberger (1995). COM 261 is not particularly concerned about the legal status of collecting societies which “may be corporate, charitable, for profit or not for profit entities” (para 3.5.1).

² PRS Annual Report 2003; MCPS Annual Report 2003. The other UK collective licensing bodies are: Authors Licensing & Collecting Society (ALCS) - administers certain rights in the literary and dramatic copyright area; Christian Copyright Licensing International (CCLI) - licences the reproduction of songs and hymns; Copyright Licensing Agency (CLA) - licenses reprographic copying of literary works; Design and Artists Copyright Society (DACS) - administers reproduction rights for visual artists (turnover 2003: £3m); Educational Recording Agency Ltd (ERA) - licenses recording off-air by educational establishments; The International Federation of the Phonographic Industry (IFPI) - licenses use of foreign sound recordings not commercially available in the UK; Newspaper Licensing Agency (NLA) - issues licences for copying of newspapers; Performing Artists' Media Rights Association (PAMRA) - collects and distributes royalties to performers for use of sound

From the perspective of European competition law, collecting societies *prima facie* appear extremely problematic. “The Commission is generally hostile to any form of collective selling or sales ventures, selling the products of competing manufacturers, as they restrict competition between the parents on the supply side and limit the choice of purchasers. They are effectively horizontal price fixing agreements prohibited by Art. 81(1) when they have an appreciable effect on the market.” (Aitman and Jones 2004, p. 144)

Thus it may seem surprising that collecting societies feature heavily in EU copyright policies. Some rights harmonised by Directives, such as the rental right, and the *droit d’suite* may only be exercised by collecting societies.³ Recital (17) of the Information Society Directive singles out the need for efficient collective administration.⁴

The policy attraction of collective licensing in a digital environment appears to be:

- (1) From a user perspective, collecting societies may offer a single point licence providing easy and wide access. This can be a solution to innovation issues in the information society where major rightholders otherwise may dictate unfavourable terms.
- (2) Creators at the margins of commercial viability have access to a mechanism of collective bargaining against major rights exploiters, such as publishers, record labels and broadcasters. This may be an important support mechanism in fostering a culturally diverse society.

recordings; Phonographic Performance Limited (PPL) - licenses certain uses of copyright sound recordings; Publishers Licensing Society (PLS) - administers certain rights on behalf of publishers; Video Performance Limited (VPL) - licenses certain uses of music video recordings (details available at <http://www.intellectual-property.gov.uk>). Europe’s largest society is Germany’s GEMA (administering music performing and mechanical rights) with an annual turnover exceeding €800m (annual report 2003).

³ Article 4, Council Directive 92/100 *on the rental right and lending right and on certain rights related to copyright in the field of intellectual property*; Article 6, Council Directive 2001/84 *on the resale right for the benefit of the author of an original work of art*.

⁴ Council Directive 2001/29 *on the harmonisation of certain aspects of copyright and related rights in the information society*, Recital (17): “It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.” The ambition to incorporate the regulation of copyright societies into the Information Society Directive was indicated in the 1995 Green Paper *Copyright and Related Rights in the Information Society* (COM(95) 382) but later dropped.

Collecting societies clearly provide an economic, social and cultural function beyond private joint ventures between right owners aimed at minimising their own transaction costs. The Commission has seen these advantages but cannot easily place them within the framework of community competencies. (i) Copyright as a territorial right is asserted and enforced nationally. Limitations on the exclusive nature of intellectual property can only be placed where the exercise of intellectual property rights conflicts with the free movement of goods and the rules of competition.

(ii) A common cultural policy is not a recognised Community activity under Article 3 EC Treaty, although the Maastricht additions to Article 3 (1992) recognise “a contribution ... to the flowering of cultures of the Member States”. A new Article 151 provides that cultural aspects must be “taken into account” in Community actions, including developing single market and competition policies.

In this paper, I analyse the position advanced by the Commission in the Communication *The Management of Copyright and Related Rights in the Internal Market* COM(2004) 261, preparing the ground for a Directive.⁵ In identifying the need for a “legislative instrument on certain aspects of collective management and good governance of the collecting societies” (para 3.6), is the Commission advocating a *sui generis* regulatory regime beyond the rules of competition, or is the Commission simply translating the rules of competition into a more effective instrument for a particular sector of economic activity?

COM 261 sets off by immediately recognising non-economic aims: “Besides the more general economic aims of stimulating investment, growth and job creation, copyright protection serves non-economic objectives, in particular creativity, cultural diversity, cultural identity” (para 1.1.1). The description of collecting societies that follows in paragraph 3.1.2 gives a cautious welcome to the role of collecting societies in providing user access and bargaining benefits to niche creators:

“Most societies form part of a network of interlocking agreements, by which rights are cross-licensed between societies in different Member States. From the users’ viewpoint, therefore, collecting societies function as a one-stop-shop of licensing. Collective management also allows particular rightholders,

⁵ COM 261 was published on 16 April 2004, and the consultation process closed in June 2004. A draft directive is scheduled for early 2005.

whether corporate or not, within a less lucrative or niche market, or who do not dispose of sufficient bargaining power, to manage their rights efficiently. From this perspective, collecting societies carry the joint social responsibility of rightholders to make sure that all of them benefit from their intellectual property rights at a reasonable cost.”

However the rationale of the legislative measures proposed at the end of the Communication is couched entirely in the competition language of “efficiency and transparency and a level playing field” (COM 261, para 3.6 Conclusions).

The argument in this paper is structured to expose the roots of this tension. In section two, I briefly introduce the historical shape of collecting societies, in particular a transaction cost explanation of their origins is advanced, and the dilemma of joint author and investor (e.g. publisher) representation is explicated. In section three, I review the jurisprudence of Commission and European Courts over three decades with respect to the collecting societies. In a nutshell, collecting societies are dominant economic undertakings subject to the rules of competition. They have to provide user licences on reasonable terms, and give their members maximum freedom to administer their rights individually consistent with the societies’ function. However, I show that the societies’ function cannot be easily articulated in competition terms. In section four, the measures proposed in COM 261 are set in this context. Some alternative principles for the regulation of collecting societies are proposed.

Characteristics of Collecting Societies⁶

The origins of collective administration may appear as a straightforward response to a problem of transaction costs. An evocative story recounts the visit of Ernest Bourget, a French composer of popular musical *chansons* and *chansonnettes comiques*, to the Paris café *Ambassadeurs* in 1847 where, among other pieces, his music was being played without permission. He then refused to settle the bill for his drink of sugared water, at the time a fashionable beverage. In the resulting brawl, M. Bourget argued ‘you consume my music, I consume your wares’ – an argument he won before the

⁶ This section draws on Kretschmer (2002).

Tribunal de Commerce de la Seine which upheld a revolutionary law of 1793, recognising a right to public performance for the first time (cf. Melichar 1983).

Ernest Bourget understood that as an individual composer he should not devote his life to chasing unauthorised performances of his music. *Vice versa*, each *établissement* performing popular music would incur considerable costs in tracking the various holders of the relevant performing rights. The solution to the failures of individual contracting was collective administration, combining a comprehensive monitoring service of music usage with a facility to issue licenses, i.e. permissions to play against remuneration. Ernest Bourget, his colleagues Victor Parizot and Paul Henrion as well as the publisher Jules Colombier founded an *Agence Centrale*, the direct predecessor of the first modern collecting society *Société des Auteurs et Compositeurs et Editeurs de Musique* (SACEM). SACEM, established in 1851, became the European model, collecting at times even in Switzerland, Belgium and the UK.

Transaction cost economics recognises that there are costs of using markets, such as information costs, contract costs and governance costs (Williamson 1975; 1985). Thus, under certain conditions, non-market structures (such as integrating economic activities into the hierarchy of a firm) can be more efficient than individual contracting. In the case of copyright, transaction costs may include (a) identifying and locating the owner, (b) negotiating a price (this includes information and time costs), (c) monitoring and enforcement costs. The economic literature on collecting societies tends to accept a transaction cost rationale for their existence (e.g. Kay 1993; Towse 1997; Thorpe 1998).

Under collective administration, there is typically only one supplier of licences to the user of copyright works in one particular domain of rights (such as public performances). Reciprocal agreements with sister societies in other countries ensure that access to ‘the world repertoire’ can be granted through one licence. From the perspective of individual owners of copyright works, there may be no alternative provider of a rights administration infrastructure. In consequence, market prices cannot form either for licenses to users nor for services to right holders.

This monopolistic structure leaves copyright collecting societies in control of the terms of access and royalty distribution in their particular rights domain. In many areas of collective licensing, administrative costs are extremely high. The cost of collection may amount to a quarter of revenues distributed - while for other complex services (such as health insurance) administrative deductions of 5% are seen as high.⁷

The tendency of collective administration to evolve into self-serving bureaucracies sheltered from competition has led to increasing state involvement in the supervision of collecting societies. As a general rule, collecting societies in all EU Member States cannot refuse to license their repertoire; they have to admit members subject to certain threshold rules; and they have to give some kind of public account of their finances.

In the case of music performing right and mechanical reproduction societies, the most intriguing feature of collective administration is the representation of both authors (composers and lyricists) and publishers – enforced by a governance structure under which changes to membership and distribution rules can only be implemented by mutual consent of both groups. Despite market pressures to the contrary, author members of German society GEMA receive 70% (compared to 30% of the publisher) of any performing right royalty distribution, and 60% of the mechanical rights. PRS distributes 50:50 between publishers and creators, while MCPS leaves the distribution shares to individual contracts between the parties. In addition, large rightholders whose works are easier to monitor and account for, in effect subsidise small members. These distribution decisions are treated as internal matters, and will not be publicised.

⁷ To give some examples: PRS performing right income is roughly equally split between income from broadcasting and from general performance (i.e. music at pubs, clubs, shops, aircrafts, concerts). Unsurprisingly, the costs of collecting are much higher for the latter. For 1999, the PRS reported income of £75.54m from general licensing (of which 24.5% disappeared as administrative commission) and £79.58m from broadcasting (with 14.6% deducted for administrative expenses), leaving a net distribution of £57m and £68m respectively (PRS Yearbook 2000/01). The Design and Artists Copyright Society (DACS) administers reproduction rights for visual artists (painters, printmakers, sculptors, and photographers). Of the turnover of £3m in 2003, 25% are charged as administration costs (Annual Report 2004).

Many European collecting societies also weigh their distribution per copyright work according to a value judgment, including the amount of skill involved, and the cultural contribution of a genre or composer.⁸ Finally, under the guidelines of CISAC (*Confédération Internationale des Sociétés d'Auteurs et Compositeurs*), the international umbrella organisation of the author rights societies, up to 10% of collected licence fees may be channelled into socio-cultural funds.⁹

The analysis suggests that collective administration can also be viewed as a form of unionisation. Authors no longer enter the market as individuals (cf. Peacock and Weir 1975, p. 41). This enables them to extract better terms than contracting individually with music publishers and music users (such as labels and broadcasters), and provide socio-cultural support to creators.

In summary, the features of European Collecting Societies are:

Characteristics under transaction cost rationale

- two fold monopolists (towards users and members)
- administration cannot be refused
- licence cannot be refused

Characteristics under solidarity rationale

- publisher's control below market expectations
- socio-cultural deductions for the benefits of domestic creators
- cross-subsidy between big and small rightholders
- discrimination between genres

⁸ At GEMA, so-called 'evaluation committees' weighs the distribution of royalties to authors from considerations of length of membership, past income, artistic personality and overall contribution of an *œuvre*. In the UK, the classical music subsidy in the royalty distribution formula was finally phased out following the MMC report of 1996. In 1999, a PRS foundation was established for the support of new music, regardless of genre.

⁹ The German law regulating copyright societies (*Urheberwahrnehmungsgesetz*) explicitly demands that they should foster 'culturally important works and contributions' (§7) and set up pension and social funds (§8). Anglo-American right holders are enraged by these deductions. They feel that their exported property subsidises foreign social and cultural policy (Harcourt 1996).

Commission and ECJ Jurisprudence

General: The exclusive territorial nature of intellectual property rights

The exercise of exclusive intellectual property rights in itself should not give rise to competition concerns, since it is the purpose of intellectual property laws to provide for dynamic efficiencies through periods of exclusive territorial protection. The early jurisprudence of the ECJ¹⁰ developed a distinction between the existence of intellectual property rights (which was seen as outside the EC Treaty) and their exercise (which can be reviewed under Community law). As AG Fennelly correctly argues in *Merck II*¹¹, this doctrine is fallacious. Intellectual property rights are provided in order to be exercised. Otherwise there would be no point to their grant, since the incentives to create and innovate would disappear. In the more recent line of jurisprudence emanating from *Coditel II*¹², the Court recognised that absolute territorial protection under exclusive copyright licence agreements does not in itself infringe Article 81(1). In *Magill*¹³ the Court stressed that the exercise of intellectual property rights would be examined under Article 82 only under exceptional circumstances: in this case findings of a dominant position plus failing to meet demand for a new product in a secondary market for which there is no substitute.

Thus, the collective administration of copyright would have to be shown to be beyond the normal exercise of intellectual property rights. Before considering the case law in detail, two arguments need to be considered placing collecting societies beyond *acquis communautaire* examination under the prohibition on quantitative restrictions (Articles 28-30), and under the competition rules applying to undertakings (Articles 81-82).

¹⁰ Cases 56 and 58/64: *Consten & Grundig v. Commission* [1966] ECR 229, [1966] CMLR 418; Case 78/70, *Deutsche Grammophon Gesellschaft v. Metro-SB-Großmärkte GmbH* [1971] ECR 487, [1971] CMLR 631.

¹¹ Cases C-267 and 268/95: *Merck v. Primecrown* [1996] ECR I-6285, [1997] 1 CMLR 83.

¹² Case 262/81, *Coditel v. SA Ciné Vog Films* [1982] ECR 3381, [1983] 1 CMLR 49.

¹³ Cases C-241&2/91, *RTE & ITP v. Commission* [1995] ECR I-743; [1995] 4 CMLR 586.

Do the rights administered by collecting societies fall under the obligations regarding the free movement of goods (Articles 28-30, EC Treaty)?

During the 1970s, a case was made that author rights do not constitute “industrial or commercial property” within the meaning of Article 30, and therefore Treaty obligations regarding the free movement of goods would not apply. For example, the nature of copyright under international treaties includes non-economic author rights that cannot be transferred as property: chiefly the right to paternity (the right to be named as the author) and the right to integrity (the right to object to modifications of a work that would prejudice the author’s reputation).¹⁴ The ECJ has consistently refused to distinguish literary and artistic property in this way, asserting that “the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community.”¹⁵

Do collecting societies fall under the rules of competition (Articles 81-82, EC Treaty)?

When the behaviour of collecting societies was first challenged under Articles 81 and 82, they attempted to invoke Article 86(2) as being entrusted by the state “with the operation of services of general economic interest”, a provision that permits in certain circumstances derogation from the rules of competition. In *BRT v. SABAM*¹⁶ (1974), the first collecting society case before the European Courts, the ECJ characterised the Belgian performing right society as “an undertaking to which the state has not assigned any task and which manages private interest, including intellectual property rights protected by law”. This was confirmed in 1979 and 1983 in the *Greenwich*¹⁷ and *GVL*¹⁸ cases.

¹⁴ So-called *droit moral*: Berne Convention, Art. 6bis.

¹⁵ Case C-92/92, *Phil Collins v. IMTRAT Handels GmbH*, [1993] 3 CMLR 773 (para. 22). See also discussion of the *Membran* and *Dansk Supermarked* cases in Cornish & Llewelyn (2003, s. 18-2).

¹⁶ Case 127/73, *Belgische Radio en Televisie v. SV SABAM and NV Fonior*, [1974] ECR 313, [1974] 2 CMLR 238.

¹⁷ Case 22/79, *Greenwich Film Production, Paris v. SACEM*, [1979] ECR 3275, [1980] 1 CMLR 629.

¹⁸ Case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v. Commission*, [1983] ECR 483; [1983] 3 CMLR 645.

Agreements and concerted practices (Art. 81 issues)

In one reading, collecting societies are joint ventures creating a super-dominant market position in at least two respects: towards users and rightholders. Thus it is surprising that their very existence has not been challenged under Article 81.¹⁹

Three lines of reasoning could be constructed.

- (1) The agreements constituting collecting societies form part of a process of collective bargaining. The leading cases here are *Albany International* and *Brentjens*²⁰ in which the ECJ ruled that agreements on compulsory pension schemes fall outside the scope of Article 81. To my knowledge, this argument has not been tried on collective administration agreement.

- (2) In the 1989 *Tournier* and *Lucazeau* cases²¹, French Discothèques challenged SACEM's reciprocal representation agreements with other collecting societies (ensuring domestic exclusivity) that prevented direct access to the Anglo-American repertoire the appellants were interested in. The ECJ held that the

¹⁹ This point was made by Temple Lang, then a director in DG Competition (1998, cited from 1997 typescript p. 46): "The assumption that no member or group of members of a society could negotiate licences is no longer true, if it ever was, of big sound reproduction companies which can do and do, enter into individual negotiations, in particular for reproduction rights, when the size and importance of the licensee makes it worthwhile to do so. It seems to follow that as far as such companies are concerned the main reason for ignoring Article [81(1)] is no longer convincing, and such companies need exemption under Article [81(3)] for their participation in these societies, at least in their relations with licensees which are important enough to make individual negotiations appropriate. It is surprising that this issue has not been raised before now." Arguably, the old jurisprudence that Article 81(1) did not apply if there would be no activity without the restriction on competition (e.g. oil exploration cases: Case 258/78 *Nungesser*, [1982] ECR 2015; Cases 42/84 *Remia*, [1985] ECR 2566) is now obsolete anyway.

²⁰ Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, [2000] 4 CMLR 446; Cases C-115 to 117/97, *Brentjens v. SBVHB*, [1999] ECR I-6025, [2000] 4 CMLR 566. AG Jacobs opinion in *Albany* laid down four conditions for disapplying Art. 81. The collective bargaining agreement (i) was made as part of normal collective bargaining, (ii) was made in good faith, rather than to conceal anti-competitive restrictions, (iii) dealt with core aspects of collective bargaining, such as wages or other conditions of work, and (iv) did not affect third parties (for discussion, see Goyder 2003, pp. 104-5)

²¹ Cases 110/88, 241/88, 242/88, *Lucazeau and others v. SACEM*; Case 395/87, *Ministère Public v. Tournier*. All at [1989] ECR 2811, [1991] 4 CMLR 248. At paragraph 11, the reciprocal representation contract is specified: "each society is to apply, with respect to works in the other society's repertoire, the same scales, methods and means of collection and distribution of royalties as those which it applies for works in its own repertoire."

reciprocal agreements between societies may not fall under Art. [81(1)] provided no concerted action was evidenced, and there was another reason for these agreements. “Such a reason might be that the copyright-management societies in 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.” (*Lucazeau* at para 18; *Tournier* at para 24)

- (3) A third line of reasoning would concede that both, agreements constituting collecting societies, and reciprocal representation contracts fall within Art. 81(1) and seek exemption under Art. 81(3). This would be consistent with the view taken by the Commission in other instances of collective licensing agreements, such as sport broadcasting and joint film distribution. In a statement of objections to the English Premiere League broadcasting rights arrangements²², the Commission argues that the characteristics of sport, such as the need for solidarity, can be taken into account under Art. 81(3). However, restrictive provisions that foreclose the market would not be indispensable to the benefits of the agreement (guaranteeing solidarity between clubs). Similarly, in the UIP decision ([1989] OJ L226/356), a joint film distribution agreement was exempted under Art. 81(3) as it produced economic benefits for the production and distribution of motion pictures and for consumers.

It turns out that there are a number of agreements between collecting societies and users that have been treated in this way under the old notification procedure (Regulation 17). They all respond to Internet demands for a single pan-European licence while attempting in some ways to safeguard a role for national collecting societies. The models proposed fall into three broad categories.

- (a) Agreements where licence conditions are harmonised (each society can issue a single pan-European licence but under fixed terms).²³

²² A provisional settlement was announced in IP/03/1748. For discussion, see Aitman and Jones 2004, p. 146, n. 66.

²³ There is currently no operational example of this type of agreement. COM 261 refers to the OnLineArt Agreement initiative (at para 1.2.4) for a Community-wide licence for on-line uses of works of art and photography.

- (b) Agreements where each participating society can issue a single pan-European licence but the tariff applied is that of the country of destination (*Simulcasting* agreement).²⁴
- (c) Agreements where each participating society can issue a single pan-European licence but the licence will be granted by the society of the country where the content provider is operating (*Santiago* agreement).²⁵

The Commission advocates the *Simulcasting* model of competition between collecting societies. This will be further discussed below.

Abuse of a dominant position (Art. 82 issues)

There is widespread consensus that collecting societies occupy a dominant position in their national markets. In many cases, single national markets have been ruled to be a “substantial part” of the common market within the meaning of Article 82.²⁶

²⁴ Case COMP/C2/38.014, *IFPI Simulcasting*, [2003] OJ L107/58: Agreement between national record producers’ collecting societies, licensing sound recordings for pan-European simultaneous Internet transmissions of broadcasts (notified by IFPI: International Federation of the Phonic Industry). The Commission decided that Art. 81(3) was met, as the agreement created a new product that would improve the distribution of music to the benefit of consumers. The clause applying the tariff of the country of destination was ruled to be restrictive, going beyond what is necessary for the existence of the agreement. However, societies would not participate without that clause. The agreement also would create competition between societies. Transparent separation of administrative costs was agreed: “This way, commercial users will be able to recognise the most efficient societies in the EEA and seek their licences from the collecting societies that provide them at lower cost.” (COM 261 3.4(iii))

²⁵ The Santiago agreement is an agreement between the major music performing right author societies to license community-wide transmission by electronic means, including web-casting and on-demand services. It was notified to the Commission under Regulation 17 in April 2001. The Commission opened proceedings in May 2004, transforming the process into an “own initiative procedure” under Regulation 1/2003. The Commission believes that users should not be forced to choose a licence from the collecting society controlling their territory, if an alternative licence was viable (Speech by Herbert Unger, Head of Media Division, DG Comp at European Cable Communication Association (ECCA), Brussels, 23 June 2004).

²⁶ Collecting societies have been characterised as dominant by numerous national competition authorities: cf. German Bundeskartellamt, Verfügung vom 18.11.1960: GEMA as ‘marktbeherrschendes Unternehmen’; Hübner and Stern [1978] 1997, p. 225; British Office of Fair Trading (OFT) (referral of the PRS to the Monopolies and Mergers Commission, 30 November 1994. In *GVL v. Commission* (Case 7/82, [1983] ECR 483, [1983] CMLR 645), German music performers’ and record producers’ society GVL made an unsuccessful attempt to argue that the market for rights exploitation services should be defined to include promoters and record companies. The EJC ruled that for the management of secondary rights vested in performing artists and record manufacturers, GVL had a *de facto* monopoly. Dominance in a single member state was deemed to be a substantial part of

The Article 82 case law on collecting societies falls into two groups: abusive conduct towards members, and abusive conduct towards users. These will be summarised in turn.

Members

- Collecting societies cannot discriminate on grounds of nationality.²⁷
- There can be no preferential treatment for groups of members, but threshold conditions to full membership, and distribution variations according to genre and cultural value have been tolerated.²⁸
- There must be maximum freedom for members to decide which repertoire to inject into collective administration. However, collecting societies can insist on transfer of whole groups of rights, and rights in future works if that is indispensable to the operation of the society.²⁹
- Rightholders must be able to withdraw from membership, and assign their repertoire elsewhere. Collecting societies can insist on lengthy notice periods.³⁰
- Collecting societies can limit the influence of members who are economically dependent on users (i.e. if a publisher is part of the same parent company as a record label). However the least restrictive measure has to be adopted.³¹

the common market in *BRT v. SABAM* (Case 127/73, *Belgische Radio en Televisie v. SV SABAM and NV Fonior*, [1974] ECR 313, [1974] 2 CMLR 238).

²⁷ Membership and collection cannot be restricted to domestic citizens or residents (*GEMA I*, OJ L134/15, decision of 20 June 1971; *Phil Collins v. IMTRAT Handels GmbH*). Foreign members (authors and publishers) cannot be excluded from participating in the governance of a society, nor from socio-cultural benefits (*GVL*).

²⁸ *GEMA II* (decision of 6 July 1972, OJ L166/22). However, there is a recent policy trend requiring that royalty distribution must match actual use as closely as possible (MMC report on PRS, 1996; COM 261). There is no case law to that effect.

²⁹ A required blanket assignment of all present and future rights was ruled to be abusive in *BRT v. SABAM*. In *GEMA I*, the Commission identified seven categories of rights members may assign separately: (1) public performance, (2) broadcasting, (3) film performance, (4) mechanical reproduction, (5) film synchronisation, (6) video reproduction and performance, (7) new categories of right. The MMC report on the PRS (1996) added for the UK the rights to live performances. A mandatory requirement to assign on-line exploitation was held to be an unfair trading condition under Art. 82(a) (*Dafipunk* decision, Case C2/37.219, *Banghalter et Homem Christo v. SACEM*, 6 August 2002). Authors also must be able to assign different groups of rights to different societies in different countries (Case 22/79, *Greenwich Film Production, Paris v. SACEM*, [1979] ECR 3275, [1980] 1 CMLR 629). However, collecting societies can resist cherry-picking (for example, only having those rights assigned that are expensive to administrate).

³⁰ In *GEMA II*, the commission allowed a minimum membership term of three years. Retaining right for five years after a member's withdrew is likely to be unfair (*BRT v. SABAM*).

³¹ For example, conditions on the exercise of votes are acceptable, exclusions from membership are not (*GEMA I*). Restrictions can be imposed that strengthen a society's negotiation power toward users (*SABAM*, para. 9). In *GEMA III* (OJ L94 /12, decision of 4 December 1981), the Commission

- There is no ECJ case law on the legitimacy of socio-cultural deductions.

Users

- As a dominant, and often monopolistic undertaking, a collecting society cannot refuse to license a user in its own territory without a legitimate reason.³²
- Refusal to licence only part of the repertoire is acceptable if necessary for functioning of a society.³³
- Excessive pricing of licences is abusive but hard to prove.³⁴
- Price discrimination between large scale and small users has been raised as an abusive trading condition, but the Court did not rule on the point.³⁵
- There is no ECJ case law on the nature, or lack of an appeals procedure making tariffs contestable.³⁶
- There is no ECJ case law requiring introduction of competition between societies.³⁷

It appears that the European Courts accept trading conditions with respect to collecting societies that would be considered abusive in many other contexts. The main line of reasoning is a familiar principle of proportionality: restrictive conditions are justified if they are required for the society to carry out its activities on the

authorised the societies statutes imposing uniform effective rates of remuneration (thus preventing members from making payments to users).

³² There are no specific rulings on refusal to license with respect to collecting societies. The general Article 82 case law on refusal to supply applies (e.g. Cases 6 and 7/73, *ICI and Commercial Solvents v. Commission*, [1974] ECR 223, [1974] 1 CMLR 309; *Magill*: Cases C-241&2/91, *RTE & ITP v. Commission* [1995] ECR 1-743; [1995] 4 CMLR 586).

³³ In the French *Discothèques* cases (*Lucazeau, Tournier*), the impracticability of setting up a monitoring system in the foreign territory was deemed an acceptable reason.

³⁴ If tariffs in other member states are appreciably different, the collecting society needs “to justify such a difference by reference to objective and relevant dissimilarities between copyright management” (*Lucazeau*, para 33). Including a mechanical fee for public performances in a discotheque is acceptable in the context of differences in national licensing systems (*Case 402/85, Basset v. SACEM*, [1987] ECR 1747, [1987] 3 CMLR 173).

³⁵ In the French *Discothèques* cases, the appellants complained that large scale users, such as radio and TV broadcasters, obtained lower tariffs. Stamatoudi argues that the line of cases on price discrimination looks at clients in competition to each other, not treating customers in different situations in the same way (1997, p. 295).

³⁶ According to AG Jacobs in *Tournier*, the fact that there is no regulatory control of the price charged by a society is relevant. For discussion, see Temple Lang 1998, p. 57. For analysis of the UK Copyright Tribunal, see Bently and Sherman 2004, pp. 286-7.

³⁷ The French *Discothèques* cases hint at problems with SACEM’s administrative overheads due to lack of competition, but left the issue to national regulation.

necessary scale. Yet, there is no explication about the function of collective administration beyond managing private interest. What are the activities that are necessary? The ECJ has tolerated, not always consistently, a number of practices relating to collective bargaining and redistribution of royalties that can only be justified on social and cultural policy grounds.

Proposals for a Council Directive

The Communication *The Management of Copyright and Related Rights in the Internal Market* COM(2004) 261 identifies the need for a Directive on certain aspects of collective management and good governance of the collecting societies.³⁸ The pertinent points are:

1. Community-wide licensing

For the so-called Internet right (“communication to the public, including making available on demand”, Art. 3 Info Soc Directive 2001/29) two options are considered and rejected: (i) compulsory licences, (ii) legislating that a licence issued in any member state on the Internet right covers all territories.³⁹

The Commission indicates it will use competition case law to develop pan-European licences: “The IFPI [*Simulcasting*] Decision indicates the main lines that we intend to follow with regard to the restrictions inherent in traditional nationally based collective rights management systems. It makes it clear that in the new technology fields, territorial restrictions in the management of those rights are generally not acceptable, and must be reviewed.” (Ungerer, 2004)

2. Individual Licensing and Digital Rights Management (DRM)

Based on a transaction cost assessment of licensing, widespread deployment of individual licensing schemes using DRM technologies may replace collective administration in certain areas, and render existing remuneration schemes (such as levies) redundant.

No intervention is proposed.⁴⁰

³⁸ “A lack of common rules regarding the governance of collecting societies may potentially be detrimental to both users and rightholders, as it may expose them through different conditions applying in various Member States, as well as to a lack of transparency and legal certainty. The more divergence exists on such rules, the more difficult it is in principle to license across borders and to establish licensing for the territory of several or all Member States.” (COM 261, para 1.2.3)

³⁹ According to COM 261, such prescriptions would be at variance with the intellectual property principles on territoriality and possibly with international obligations (e.g. WIPO 1996 Treaties, establishing the Internet right as an exclusive right).

⁴⁰ But COM 261 at 1.2.5: “DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations”.

3. Membership terms
Blanket assignments of "all utilisation forms" (including various on-line exploitations) are deemed not necessary (COM 261 at 3.4). The Communication proposes to revisit the *GEMA I* categories of rights, owners may withhold.

This is an affirmation of existing competition case law.

4. Transparency
"Societies should be obliged to publish their tariffs and grant a licence on reasonable conditions." (COM 261 at 3.5.2)

These proposed obligations are a typical competition law remedy to abusive conduct.

5. Appeals procedure
"It is essential for users to be in a position to contest the tariffs, be it through access to the courts, specially created mediation tribunals or with the assistance of public authorities which supervise the activities of collecting societies."

This is national best practice in regulated industries.

6. Deposit in escrow
If a tariff is contested, users would have to deposit licence fees in an escrow account: "use without payment should not be permitted" (COM 261 at 3.5.2).

The Communication concludes:

"While competition rules remain an effective instrument for regulating the market and the behaviour of the collecting societies, an Internal Market in the collective management of rights can be best achieved if the monitoring of collecting societies under competition rules is complemented by a framework of good governance." (COM 261, para 3.5)

Evaluation

Collective administration in effect replaces exclusive intellectual property rights with a right to remuneration. For users, this can provide easy access to a wide variety of contents (although not at a market rate). The system also provides important bargaining benefits to niche creators, and some redistribution of royalty income from big to small, and foreign to domestic rightholders. The difficulty for policy makers is how to regulate such a monopolistic, potentially inefficient system.

One option is the introduction of market choices in the form of competition between collecting societies:

- “- Right owners must have a choice in selecting their protector. They should have the choice of the collecting society they select to license their rights.
- Users should have the choice of the one stop shopping platform when acquiring the licences for the rights for regional and global operation.” (Ungerer 2004)

The decision to use competition law principles in order to revamp collective administration may succeed in pressing collecting societies into speedier and more accurate business processes, lowering overheads – thus increasing productive efficiency. However, offering a choice to licensors and licensees (who continuously assess the transaction costs of multiple contracting) may support *not* a universal service system (to which all right holders have access on equitable terms), but a system where the major right holders and users selectively decide, supported by sophisticated information technology, whether administering collectively is worthwhile – and if so, which collecting society to use. Niche repertoire may be abandoned, as it is more expensive to monitor, collect and distribute than broadcasters’ play lists. Distribution shares in favour of authors will come under market pressure from publishers.

COM 261 is not explicit whether competition in the market for rights exploitation services is an aim in itself, or a means to shake up the bureaucracy of collecting societies while preserving non-economic goals. In recent years, European competition policy has recognised other policy goals only to the extent that they can be “subsumed” under economic efficiency.⁴¹ One proposal, still within the remit of competition law, would be to recast collective administration as an “essential facility” (Temple Lang 1998, p. 59): “A single Community society could achieve the same results more efficiently than the present over-complex structure, and might not be significantly less competitive.”⁴²

⁴¹ Cf. *Guidelines on Application of 81(3)*; for discussion, see Monti (2002).

⁴² It may be possible to characterise compulsory representation and compulsory assignments as efficient following, for example, a model of component pricing (Baumol and Sidak 1994). Bypassing a system of collective administration would be a socially efficient solution only if the saving in costs in the collecting society was greater than the increase in costs that would have to be incurred if the

At Community level, increasing the transparency of collective administration, using competition law tools, is a credible option (and probably worthy of a Directive). It is not a solution to the most pressing issues in collective administration, which is the increasing influence of major users and rightholders. As part of a wide variety of national systems, under the cultural competencies of Member States, the following propositions should be considered:

- Collecting societies extract too heavily from fragmented users (such as clubs, concerts and websites) where the societies' bargaining power is high and collection is expensive.
- Collection should concentrate on the major commercial users (where the societies' bargaining power and fees are lower).
- Distribution should include a socio-cultural element (e.g. cross-subsidy big-small; mainstream-niche).
- Licences permitting free use must be possible (the *Creative Commons* problem).
- Culturally desirable activities should be cheap or even free (e.g. live performances in small venues).
- Consumers and users should be involved in the governance of collecting societies.

The limitations European and international obligations place on the freedom of Member States to advance such measures will be discussed in a final section [to be written]. In conclusion to the question posed at the beginning of this paper, contrary to its intentions the Commission in COM 261 does not advance a *sui generis* regulatory regime but concentrates on traditional competition law remedies. While this may make copyright management services more (productively) efficient in the short run, it also threatens the socio-cultural benefits many creators derive from collecting societies. It is also less than clear that exclusive right owner choice in

individual owner was to deal directly with the user (i.e. 'cherry picking'). Measures of substitutability may be used in the assessment of tariffs, such as audience ratings, advertisers willingness to pay, broadcasters willingness to pay, viewers under pay-per-view (Temple Lang (1998, p. 20).

exercising copyright and related rights will benefit the development of new digital markets.

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