



**Facoltà di Giurisprudenza  
Cattedra in European Internal Market**

**COLLECTIVE RIGHTS MANAGEMENT: THE DIRECTIVE 2014/26/UE  
PERSPECTIVE ACCORDING TO THE EUROPEAN INTERNAL MARKET  
DYNAMICS**

**Relatore  
Chiar.mo Prof.  
Daniele Gallo**

**Candidata  
Martina Petrucci  
Matr. 109273**

**Correlatore  
Chiar.mo Prof.  
Paolo Marzano**

**ANNO ACCADEMICO 2016-2017**

# INDICE

<b>OVERVIEW</b>	<i>pag. 4</i>
-----------------	---------------

## **CHAPTER 1:**

### **COLLECTIVE RIGHTS MANAGEMENT AND THE EUROPEAN INTERNAL MARKET**

1. <i>Collective rights management in EU: history and functions</i> .....	<i>pag. 7</i>
2. <i>EU acquis and international legal basis</i> .....	<i>pag. 12</i>
2.1 <i>Overview</i> .....	<i>pag. 12</i>
2.2 <i>The applicable law of regulating collective management:         TFEU</i> .....	<i>pag.15</i>
2.3 <i>The applicable law of regulating collective management:         Secondary legislation</i> .....	<i>pag. 18</i>
2.4 <i>The applicable law of regulating collective management:         International legal basis</i> .....	<i>pag. 21</i>
2.5 <i>Collecting societies as firms</i> .....	<i>pag. 23</i>
3. <i>Collective rights management and free movement of goods and     services</i> .....	<i>pag. 26</i>
4. <i>Art 167 TFUE: Collecting societies and the promotion of the     diversity of cultural expression</i> .....	<i>pag. 33</i>
5. <i>The regulatory approach</i> .....	<i>pag. 38</i>
5.1 <i>Introduction</i> .....	<i>pag.38</i>
5.2 <i>Function of collecting societies and rights territoriality</i> .....	<i>pag. 40</i>
5.3 <i>Rights management and local culture</i> .....	<i>pag. 43</i>
6. <i>Social cultural and economic dimension of collective rights     management in Europe</i> .....	<i>pag. 46</i>

## **CHAPTER 2:**

### **EU COLLECTIVE RIGHTS MANAGEMENT SCENARIO BEFORE THE ADOPTION OF THE DIRECTIVE 2014/26/EU**

1. *Collective rights management, monopolistic positions and competition in the EU market single market* .....pag. 50
  - 1.1 *Main Features of Collective Management and the Development of Joint Rights Management*.....pag.50
  - 1.2 *Collective Rights Management and Competition*.....pag. 52
  - 1.3 *Legal status of collecting societies in Europe and contrast between legal monopolies, de facto monopolies and competition*.....pag. 61
  - 1.4 *The US experience* .....pag.65
  - 1.5 *The IFPI simulcasting agreement: a prototype of competition* .....pag. 67
2. *The CISAC decision* .....pag. 70
  - 2.1 *Effects of CISAC decision and challenges* .....pag. 74
3. *The soft law approach before the proposal for a directive*.....pag. 77

## **CHAPTER 3:**

### **DIRECTIVE 2014/26 THE FUTURE OF THE DIGITAL EUROPEAN SINGLE MARKET**

1. *Adoption of the Directive 2014/26/EU* .....pag. 83
2. *General overview: Structure, contents scope and definitions* .....pag. 88
3. *Collective management organizations: right holders, relation with users, transparency* .....pag.95
4. *Multi-territorial licensing of online rights in musical works by collective management organisations*.....pag. 101
5. *Enforcement of the Directive* .....pag. 105

6. *Critical Analysis of the directive* .....pag. 108

**CHAPTER 4:**

**DIRECTIVE 2014/26/UE NEW PERSPECTIVES FOR THE DIGITAL  
EUROPEAN SINGLE MARKET**

1. *Competitive alternative models* .....pag. 116

3.2 *Monopolies and Possible solutions of Inefficiencies* .....pag. 124

3.3 *Monopoly is a overcome dogma ?* .....pag. 129

2. *The future scenario in the Digital single Market perspective* .....pag. 132

**Final Remarks** .....pag. 139

**Bibliography** .....pag. 144

## OVERVIEW

It is a widespread opinion that copyright is at the moment subject to a deep crisis and struggles to survive. Thus should suggest radical changes relative to the principles on which it is historically based on. Meanwhile there is a progressive distortion of copyrights which increasingly deprives Authors and favors other subjects such as the cultural Industry<sup>1</sup>. Subjects which are irreplaceable but often take all the advantages. As a result, there is a clash between creators and the cultural industry exploitation being on opposite positions with respect to the authors. It deals with a clash between creators and the cultural industry: a fracture not new but which had never existed in such clear terms<sup>2</sup>. In this sense one of the aspects on which the reflection on copyright was focused is due to globalization of legal rules, which in the field of collective management is characterized by particular nuances. Generally the author's rights, well before other branches of the legal system, were forced to face the problems of internationalization and of cross-border circulation of artistic works that do not tolerate narrow national borders.<sup>3</sup> Furthermore, the emergence of an information society<sup>4</sup> has also brought with it a new vision of copyright intended as an obstacle to the dissemination of knowledge. The crisis of copyright therefore seems to be part of a broader movement which opposes the closure of traditional and exclusive ones, thus reaffirming the social importance of knowledge and the rediscovery of common goods and consequently tends to establish itself in of the distortions of what is called the knowledge society.<sup>5</sup>

Today, more than ever, in a context such as the current one and with the advent of the information society, it is therefore necessary to harmonize the different legal systems and create rules that are as uniform as possible to allow minimum protection, not limited in the space.

---

<sup>1</sup> M. Spence, Intellectual property, oxford university. Press, 2007, p 74 ss

<sup>2</sup> D. Vaver recreating a fair Intellectual property System for the 21 st century, 15 Intell. Property J 123,135 ( 2001)

<sup>3</sup> cfr P. SPADA postfazione. Diagnosi e terapie di un disagio, in aa.vv., Gestione collettiva dell'offerta e della domanda di prodotti culturali.

<sup>4</sup> M. Castells The information age: Economy, society and culture, 1, the rise of network society, 2002

<sup>5</sup> A. gorz l'immateriale conoscenza, valore e capitale, ed it., torino 2003

This is the path that the European Union has undertaken, issuing directives to smooth the differences between different legal systems and reach the goal of establishing an efficient Internal Market creating a system that guarantees from distortions of competition.

The risk to be avoided is that national laws generate significant differences in terms of protection, regulatory inconsistencies and, consequently, restrictions on the free movement of goods and services, in particular those that contain or concern intellectual property.

In this sense in the recital number 4 of Directive 2001/29 / EC on the harmonization of certain aspects of copyright and related rights in the information society, it is stated that:

*“A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation”.*

Furthermore, in the Internet age, protecting copyrights and related rights and collecting the related fees becomes increasingly difficult.

Therefore, crisis of copyright has stimulated new reflections and initiatives at the institutional level also in the specific area of copyright collecting societies, namely the companies that deal with the administration and collective management of copyright.

Consequently, the harmonization process undertaken by the EU has necessarily concerned the scope of collective management of copyright and related rights.

These companies confirm the importance that services have within the post-industrial society<sup>6</sup>.

More specifically, in these companies created with the intention of protecting the interests of the authors, there is often a detachment between the statutory interests and

---

<sup>6</sup> D. Bell, *The coming of post-industrial society*, Boston Press, 1973, p.246 “ A post industrial society is based on services. What counts is not raw muscles and power energy, but information “

the use of collected proceeds, which point out inefficiencies and a substantial removal from the original purposes of the laws on author rights. The rethinking in this area is essentially due to two factors.

On the one hand the globalization of markets and the need to offer adequate answers in a sector traditionally relegated strictly within national borders<sup>7</sup>. Secondly, a push towards the modernization of existing entities has come from the technological development that has allowed the dematerialization of certain activities, focusing in the last decade the attention of the doctrine towards collecting societies.

The need to improve the functioning of these Entities has resulted first in Recommendation 2005/737 / EC of the European Commission and, subsequently, in the most recent Directive 2014/26 / EU of the European Parliament and Council of 26 February 2014 on the collective management of rights copyright and related rights and multi-territorial licensing of rights to musical works for online use in the Internal Market.

The recent directive therefore represents the point of arrival of a path undertaken for years and which constitutes a historic moment destined to mark a clear break with the past, freeing the field towards a radical transformation not of the role, but of the functioning and organization of the copyright.

This is an important step towards the creation of a single market for copyright and related rights on musical works accessible online. From the point of view of this single digital market, common rules are introduced on the functioning of collecting societies, in order to improve the standards of governance and transparency, and the requirements to grant multi-territorial licenses for the online use of musical.

---

<sup>7</sup> G. Dutfield- U suthersannen global intellectual property law, cheltenham, 2008

## CHAPTER 1: COLLECTIVE RIGHTS MANAGEMENT AND THE EUROPEAN INTERNAL MARKET

### *1. Collective rights management in EU: history and functions*

An evocative story recounts the visit of Ernest Bourget, a French composer, to the Paris Café *Ambassadeurs* in 1847 where his music and others authors' one was being played without permission. Mr. Bourget, driven by an honorable cause, refused to settle the bill, arguing: “you consume my music, I consume your wares”.<sup>8</sup> Thanks to this argument, he won before the *Tribunal de Commerce de la Seine*, which upheld a post- revolutionary law of 1793, affirming the existence of a right to public performance for the first time.<sup>9</sup>

Ernest Bourget, was enough acute to understand, as an individual composer he should not devote his life to chasing unauthorised performances of his music and *vice versa*, tracking and negotiating with various holders of the relevant performing rights it would have produced considerable costs. The solution to the failures of individual contracting was collective administration, therefore, Ernest Bourget and his colleagues Victor Parizot, Paul Henrion, 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 of collective rights management.<sup>10</sup>

---

<sup>8</sup> See generally Kretschmer M., *Access and Reward in the Information Society: Regulating the Collective Management of Copyright*, CIPPM Working paper, 2007.

<sup>9</sup> See generally Melichar F., *Die Wahrnehmung von Urheberrechten durch Verwertungsgesellschaften*, Schweitzer, 1983.

<sup>10</sup> See *supra* n 1.



The term “management of rights”, as communicated from the European Commission, refers to the means by which copyright and related rights are administered, it means, licensed, assigned, remunerated for any type of use.<sup>11</sup> In the light of this definition, individual rights management is the marketing of rights by individual right holders to commercial users, while collective rights management is the system under which collecting society as trustee jointly administers rights, monitors, collects and distributes the payment of royalties on behalf of several right holders.<sup>12</sup>

As can be noticed from the evocative story of the composer Ernest Bourget, in Europe during the nineteenth century, began to spread the need for a collective rights management of copyright and related rights, in order to lower the risk of not detailed check over those who exploit the works. The newborn french collecting societies early overstepped the national borders, and new agencies were settled down in Switzerland encouraged by the geographical proximity and linguistic identity: SACD in 1871, SACEM in 1876.<sup>13</sup>

At this stage the collective rights management showed its regulatory nature. It embodied the proper regulation of a national state<sup>14</sup> in order to maximize the offer of cultural heritage,<sup>15</sup> in order to lead *ad maiorem gloriam* the culture of a

---

<sup>11</sup> See *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 (Text with EEA relevance) /\* COM/2004/0261 final \*/*, European Commission.

<sup>12</sup> In these terms see *supra* n 4.

<sup>13</sup> See generally Riccio G.M., *Copyright collecting societies e regole di concorrenza*, Giappicchelli, 2012.

<sup>14</sup> In these terms Ricolfi M., *Figure e tecniche di gestione collettiva del diritto d'autore e dei diritti connessi*, in *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, Quaderni di AIDA, 2006.

<sup>15</sup> In these terms Sarti D., *Gestione collettiva e modelli associativi*, in *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, Quaderni di AIDA, 2006.

country. The collective rights management in its archetype has a territoriality quality since it take as point of subjective reference a whole area and its population, where the involved notions of territory and population find their operating range in research material of Constitutional law more than in private international law categories.<sup>16</sup> Therefore the registration was only limited to that subjects citizens of the State, coherently with the principle of the territorial nature of collecting societies, challenged only since 1983 trough a judgment of the ECJ concerning GVL.<sup>17</sup>

In the wake of this initiative, Copyright collecting societies were settled down even in Italy and Austria: SIAE in 1882, AKM in 1897. In 1903, under the German law arose the GDT and the AFMA, in 1909 the AMMRE and in 1914 in UK the first copyright collecting society was the *Performing Rights Society*, whose objective was to protect writers and music publishers.<sup>18</sup> Furthermore in those years a very strong impetus towards the model of collective rights management arose from the adoption of the first version of the Berne Convention<sup>19</sup>, milestone in the process of the internationalization of the Copyright law.

The territorial character of copyright and of traditional forms of mass uses of copyright works, as outlined above<sup>20</sup>, are reflected in the structure of the European collecting societies determining the organization of the collective

---

<sup>16</sup> see *supra* n 7.

<sup>17</sup> see generally *GVL v Commission* of 2 March 1983, case C-7/82 in Coll. 1983, 483.

<sup>18</sup> See *supra* n 6.

<sup>19</sup> See generally *Berne convention for the protection of literary and artistic works*, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967. (1967). Geneva: United International Bureaux for the Protection of Intellectual Property.

<sup>20</sup> See *infra*, in this § and in the following § 5.

management of copyright in Europe as *de facto* monopolies.<sup>21</sup> Under these circumstances, it naturally follows that collecting societies have been subject to competition law scrutiny and, since the beginning of the 1970s and the competition law practice of the Commission and the European Court of Justice (ECJ) has dealt with various aspects of collective management of copyright. Furthermore, many new forms of mass use of copyright works enabled by the emergence of new technologies, that for their intrinsic nature dealt with issues that are not confined to the territory of a specific state.<sup>22</sup>

Setting aside for now the subsequent evolutions of the market for collective management of copyrights in EU, it is useful taking into account some general remarks in order to better describe the functions of Collective Management of Copyright in EU<sup>23</sup>; Transaction cost economics recognizes that there are costs of using markets, such as information costs, contract costs and governance costs<sup>24</sup>. In the case of copyright individually administered, transaction costs in their case marking may include:

- a) identifying and locating the owner
- b) negotiating a price (this includes information and time costs)
- c) monitoring and enforcement costs<sup>25</sup>.

---

<sup>21</sup> On this issue see Drexler J., *Competition in the field of Collective Management: Preferring “Creative” Competition to Allocative Efficiency in European Copyright Law* in P. Torremans, *Copyright law A Handbook of Contemporary Research*, 2007.

<sup>22</sup> See generally Riis T., *Collecting societies, competition and the Service Directive*, in 6 *Journal of Intell. Prop. Law & practice*, 2011.

<sup>23</sup> See *infra*, the following §§.

<sup>24</sup> Williamson O.E., *The economic Institutions of Capitalism: Firms, markets, relational contracts*, in *New York Free Press*, 1985.

<sup>25</sup> see *supra* n 1.

Under collective administration, which replaces the individual in the activities listed above, originally, there was typically only one supplier of licenses 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 license.<sup>26</sup> 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<sup>27</sup>.

It outlined the typical feature of a monopolistic structure that leaves copyright collecting societies in control of the terms of access and royalty distribution in their particular rights domain.<sup>28</sup>

Subsequently, 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, this tendency turned into 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.<sup>29</sup>

This analysis suggests that in the past collective administration were represented as form of unionization. Authors in EU, no longer enter the market as individuals, since it enables them to extract better terms than contracting individually with music publishers and music users (such as labels and

---

<sup>26</sup> See *supra* n 1.

<sup>27</sup> On this point see Katz A., *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights* in, *Journal of Competition Law and Economics*, Vol. 1, No. 3, 2005.

<sup>28</sup> see *supra* n 1.

<sup>29</sup> See *supra* n 1.

broadcasters), and provides socio-cultural support to creators<sup>30</sup>.

## ***2. EU acquis and international legal basis***

### ***2.1 Overview***

An exhaustive account of the European and international case law and regulation on the subject of collective management societies would go far beyond the objectives of this work. The following pages are therefore limited to giving a broad overview of the main elements of the European acquis and international legal basis.<sup>31</sup>

Copyright in general has long been the subject of attention of international treaty law; in this sense the main Treaties related to the subject, receive a universal application and act as legal basis for the uniform application of the principles referred to the Copyright substantive law. In Europe the first harmonization efforts were concentrated on substantive copyright law, with the adoption of seven directives between 1991 and 2001 in order to harmonize rights and exceptions and certain other features of substantive copyright law.

This regulatory *momentum* has led to an alignment of the legal systems in Europe, with an ironing of the existing differences, made possible by European Union legislation even if fragmented.<sup>32</sup>

---

<sup>30</sup> See *infra*, §§ 4-6.

<sup>31</sup> For further reading, see: I. Govaere, *THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN E.C. LAW*. (London: Sweet & Maxwell, 1996), 337; D.G. Goyder, *EC COMPETITION LAW*, 4<sup>th</sup> Edition. (Oxford: Oxford University Press, 2003), 660; F.L. Fine, 'The Impact of EEC Competition Law on the Music Industry' (1992), *Entertainment Law Review* 6, at 11.

<sup>32</sup> On the topic see Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 96, "The birth of modern author's right has marked the separation among common law and civil law systems. Even in the European legal systems it is possible to find a

Preliminarily to any further discussion it has to be analyzed how the traditional and historical recognition of author's moral rights in the European legal systems, has been adduced as a justification for the exclusion of author's right from the scope of Community law. On this topic the Court intervened in 1981 about the case MUSIK-VERTRIEB vs GEMA<sup>33</sup> in which the Court has acknowledged the existence of author's moral rights, but at the same time stating that copyright lead to other faculties, particularly the right to put on the market copyright works, which constitute economic aspects of the copyright. The sentence of the Court has thus canceled *in nuce* the possibility to distinguish between copyright and rights related to commercial and industrial property.<sup>34</sup>

The acknowledgement of an economic value of copyright is enough to conclude that intellectual property rights, among which copyright plays an important role, can't be considered out of the application of the article 1 of the First additional Protocol of European Convention of Human Rights, which allows the States regulatory actions in order to limit the enjoyment of the property right.<sup>35</sup> Even if in this regard, it has to be beard in mind that articles 36 and 37 of TFEU<sup>36</sup>, in line with ECJ jurisprudential position, states that to be justified, a regulation measure

---

dichotomy between those who do not conceive a protection of the economic author's right separated from the moral right and those who support a pluralist theory which distinguish between moral and economic author's right."

<sup>33</sup> See generally *Musik-Vertrieb membran GmbH and K-tel International v GEMA* of 20 January 1981, Joined cases 55/80 and 57/80, European Court Reports 1981 -00147.

<sup>34</sup> On this point see Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli.

<sup>35</sup> Mastroianni R., *La tutela internazionale e comunitaria del diritto d'autore*, available at < <http://www.librari.beniculturali.it/opencms/export/sites/dgbid/it/documenti/DirittoAutoreOKpw.pdf>.

<sup>36</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

related to the disposal of a good, has to abide by the principle of legality and pursue a legitimate aim through proportionate means.<sup>37</sup>

However the clearest evidence of how copyright could be mentioned among the subjects protected by European Union legislation and included in the family of property rights, comes from the Charter of fundamental rights of the European Union, which recognizes in article 17<sup>38</sup> protection to intellectual property, stating that copyright has to be considered part of intellectual property.

Even if in this article copyright included among intellectual property rights, one more interpretation could be traced in The Universal Declaration of Human Rights, which mentions in article 27 (2) copyright among cultural rights.<sup>39</sup> The bipolar face of Copyright as property-economic rights and cultural rights is entirely embodied by the collective administration of rights which, as it follows in the next paragraphs<sup>40</sup>, if on one hand aims to achieve economic purpose on the other hand carries out cultural tasks.

---

<sup>37</sup> On this point see *Jokela c. Finlandia* of 21 May 2001 in recueil 2002 -IV, § 48. 18.

<sup>38</sup> See the article on Charter of fundamental rights of the European Union (2016/C 202/02) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016P/TXT>

<sup>39</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>40</sup> See on this point *infra* § 4.

## ***2.2 The applicable law of regulating collective management: TFEU***

Although a specific general jurisdiction of EU on intellectual property does not properly exist, in this specific context various sources of law contribute to affect the European regulation of Copyright and its special sector of collective administration of rights.

Among the sources, primarily article 36<sup>41</sup> of TFEU deserves attention, dealt with an analysis in the light of article 34<sup>42</sup> of TFEU, which concerns the fundamental principle of the European Internal Market of free movement of goods. According to the article 36<sup>43</sup>, the provisions of Articles 34 and 35<sup>44</sup> on quantitative restrictions and all measures having equivalent effect, shall not preclude prohibitions or restrictions on imports, exports or goods in transit, justified on grounds of the protection of industrial and commercial property. In addition, it has to be taken into account that such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Bearing this in mind, article 36 represents a fundamental instrument to achieve one of the typical goals of European Union: the protection of internal market free development. However a satisfactory elaboration of the free movement of goods principle related to the specific subject of collecting societies will be carried out in the paragraph three.

Secondly it is appropriate to mention articles 101 and 102 of TFEU which refer to the prohibition to conclude anti-competitive agreements and abuse of

---

<sup>41</sup> See n 27.

<sup>42</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>43</sup> See n 27.

<sup>44</sup> See n 31.



dominant position, behaviors which could affect and limit the exercise of intellectual property rights<sup>45</sup>. Articles 101 and 102 of TFEU concern mainly the protection of competition, but are indirectly designated to other objectives protection, such as scientific and technological development.

Continuing on the field of European jurisdiction influence on Copyright, article 114 of TFEU<sup>46</sup> has to be considered an important basis, which European institutions have often referred to while harmonizing the different national legislations. Some goals, traditionally linked to intellectual property regulation could be also achieved through the predispositions of articles 151 and 157<sup>47</sup> of TFEU, which concern the dissemination of culture and industrial progress, which legal practice rarely refers to.

Furthermore in the specific case of collecting societies and in the light of the directive 2014/26/ EU specific object of this work, important basis have to be found in Articles 50(2)(g), 53 and 62 TFEU<sup>48</sup> as facilitating the free provision of services. The introduction of key governance and transparency standards in collecting societies would protect the interests of members and users and also thereby facilitate and encourage the provision of collective management services across borders, in particular as societies usually manage rights of right holders from other Member States (and cross-border royalty flows). Moreover, addressing the fragmentation of rules applicable to collective rights management

---

<sup>45</sup>See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>46</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>47</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>48</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

across Europe will facilitate the free movement of all those services which rely upon copyright and related right-protected content.<sup>49</sup>

---

<sup>49</sup> See *infra*, the following chapters.

### ***2.3 The applicable law of regulating collective management: Secondary legislation***

Setting apart the primary legislation, actually the secondary legislation has represented the main instrument through which the exploitation of intellectual property rights has been conducted, proving to be helpful instruments for the achieving of European Union goals. In many instances, the Directives of the Acquis Communautaire on copyright and related rights contain references to rights management by collecting societies.

Directive 92/100/EEC, when harmonizing the right to equitable remuneration, addresses in Articles 4(3)<sup>50</sup> and (4) collective management as a model for its management.

Furthermore under Article 9 of the Directive 93/83/EEC collective management is obligatory for cable redistribution rights. Article 1 (4)<sup>51</sup> of that Directive contains a definition of the term "collecting society" . It reads as follows: "For the purposes of this Directive, 'collecting society' means any organization which manages or administers copyright and right related to copyright as its sole purpose or as one of its main purposes".

Moreover even if the Directive 2001/29/EC on Copyright in the Information Society does not mention collective management in its articles with regard to the making available right, Recital (26) addresses the desirability of encouraging collective licensing arrangements in order to facilitate the clearance of the rights concerned in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral

---

<sup>50</sup> See article on 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 available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31992L0100>

<sup>51</sup> See article on 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 available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083>

part. As well as, the fact that collective management is relevant for the operation of the Directive is also apparent from its Recitals (17) and (18).<sup>52</sup>

- Recital (17) reads as follows: "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 rationalization and transparency with regard to compliance with competition rules.";
- Recital (18) reads as follows: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses."

Finally, Collective management appears also to be the *de facto* basis for the operation of the artists' resale right under Directive 2001/84/EC,<sup>53</sup> even if it is not mandatory. The Directives of the *acquis communautaire* have left it to Member States to regulate the activities of collecting societies, and only the two most recent Directives 2001/29/EC and 2001/84/EC include appeals to ensure greater transparency and efficiency in relation to the activities of collecting societies.

However in the field of collective rights management there is not much 'acquis' to report or scrutinise if we take in account the scenario before the adoption of Directive 2014/26/ EU, thus the most important sources of European Union law in this field are the *ad hoc* decisions of the Commission and subsequent ECJ

---

<sup>52</sup> See recitals on Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

<sup>53</sup> Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0084:EN:HTML>

decisions applying the rules of EU competition law.<sup>54</sup>

---

<sup>54</sup> See on this point Hugenholtz, P. Bernt and van Eechoud, Mireille and Gompel, Stef van and Helberger, Natali, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (March 8, 2012). Report to the European Commission, DG Internal Market, p. 308, November 2006; Amsterdam Law School Research Paper No. 2012-44; Institute for Information Law Research Paper No. 2012-38. Available at SSRN: <https://ssrn.com/abstract=2018238> at 81.

## ***2.4 The applicable law of regulating collective management: International legal basis***

In addition to the Treaty provisions and the secondary legislation, even international sources and Court jurisprudence deserve a brief examination.

In reference to international sources, there are several agreements related to collective management, concluded both by the Community on its own and jointly with the member States; first of all, in terms of worldwide deployment, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.

In the specific context of the rights management at international level, Articles 11 bis (2) and 13 (1) of the Berne Convention<sup>55</sup> and article 12 of the Rome convention<sup>56</sup> deal with collective management and state that member States may determine the conditions under which certain rights may be exercised. Furthermore Article 2 (6)<sup>57</sup> of the Berne Convention touches upon rights management as it provides that “*protection shall operate for the benefit of the author and his successors in title*”. In the end Article 14 bis (2)(b)<sup>58</sup> of the Berne Convention provides that certain authors of a cinematographic work cannot exercise their rights separately.

In closing a specific mention has to be reserved to the jurisprudence and the actions of European Court of Justice (ECJ). The ECJ makes EU system unique,

---

<sup>55</sup> *Berne convention for the protection of literary and artistic works*, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967. (1967). Geneva: United International Bureaux for the Protection of Intellectual Property. See articles available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693)

<sup>56</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, October 26, 1961 See articles available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=289795](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=289795)

<sup>57</sup> See articles available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693)

<sup>58</sup> See articles available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693).

distinguishing it by other national legal systems due to an emphasized innovative activity, which acts as an instrument of rules substitution. In this sense the ECJ activity becomes instrumental not in protecting the one or the other intellectual property right, but in pursuing goals established by the Treaty and in ensuring a free and efficient internal market.

This is the interpretation key through which understand not just the intervention of ECJ on the matter, but the intervention of the entire regulatory system organized by the European Union, even for this subject.

## ***2.5 Collecting societies as firms***

In order to complete a close examination of the framework of normative sources and to have a normatively oriented reading of the topic, it is necessary to introduce and analyze the entity “collecting society”.

The Treaty does not provide a strictly definition of firm, making the concept of firm pliant, because it acquires specific characters, but these are not crystalized in a legislative provision.

In the light of this, it looks complicated a comparison between European Union law and national law of the Member states.

Generally it is possible to assume that in EU the concept of firm is functional to the goals set with the establishment of a single market. For this reason the Court of Justice has many times defined the term firm, comprehending any entity which pursues an economic activity, which consist of supply of goods and services in a given market, apart from the legal status of the entity and it’s mode of operation<sup>59</sup>

Therefore firm results as a notion from the very wide boundaries, regardless of a particular organizational formula and the pursuit of profit<sup>60</sup>.

According to the collective administration of rights the jurisprudence has many times spoken on this topic, recognizing collecting societies as part of the firms to not excluded from the applicability of article 101 TFEU.

In particular in the case IFPI SIMULCASTING<sup>61</sup> the following was stated: “Collecting societies are undertakings within the meaning of Article 81 TCE of

---

<sup>59</sup> See on this point *Selex Integrated Systems v. European Commission and Eurocontrol*, of 26 March C 113/07.

<sup>60</sup> See on this point the conclusions of General Lawyer presented on December 1, 2005 in the cause C-5/05, concluded with the ECJ sentence of November 23, 2006 *Joustra*; See also on this point *European Commission v. Italy* of 9 November 2007, cause C-119/06.



the Treaty because they participate in the commercial exchange of services and are therefore engaged in the exercise of economic activities”. In this case has been attempted to invoke the article 86 (2) TCE as being entrusted by the state with the operation of services of general economic interest, trying to enjoy the derogations this article allow in some circumstances in regard to the rules of competition. Nevertheless the Court of Justice did not consider collecting societies to be undertakings entrusted with the operation of services of general economic interest in the sense of Article 86 of the TCE. The same position has been reaffirmed by the sentences *BRT v. SABAM* (1974)<sup>62</sup> in which the ECJ characterized 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”.

As it will be analyzed in the following chapters of this work collecting societies take sometimes the form of public entities , thus the following question comes natural: will be these articles the same to be taken into account in the case of collecting societies considered as public entities? From an analysis of the jurisprudence and from how it is concerned by interpretation, “the potential accessory exercise of a public power by an entity which conducts an economic activity, has not be an obstacle for the qualification of the collection society as a firm“.<sup>63</sup>

This point is even restated by article 106 TFEU<sup>64</sup> which states that “Undertakings entrusted with the operation of services of general economic interest or having

---

<sup>61</sup> *IFPI Simulcasting*, Case COMP C-2/38.014, Decision of 8 October 2002.

<sup>62</sup> See on this point *BRT v. SABAM* of 21 march 1974, Case 127/73.

<sup>63</sup> See on this point *Selex Integrated Systems v. European Commission and Eurocontrol* of 12 December 2006 T-155/04 in Racc. 2006, II, 4797.

<sup>64</sup> See article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union”.

### *3. Collective rights management and free movement of goods and services*

As outlined in the previous chapter, the process of harmonisation of copyright and related rights in the EU has been primarily informed by the desire to remove disparities between national laws that might pose barriers to the free movement of goods and services. However before dealing with the interaction between collecting societies and free movement of goods it is necessary a general foreword of the topic.

The matter of free movement of goods respect underlies the traditional harmonization policy matter so far. Usually the law applicable to the act of exploitation of any of the rights related to a work is the law of the place of exploitation. This principle is expressed in article 5(2) of the Berne Convention<sup>65</sup> and recognized at national level. For the European Union, this means that copyright protection is granted by each Member State, even if there is no yet a European Union copyright.

European Court of Justice and the European Union legislature, infact, recognized the principle of territorial exploitation, although it has been embraced in a mitigated form. The court, has thus placed limitations on its exercise only in respect of the European Union exhaustion of the distribution right in circumstances where this conflicts with the free movement of goods and in respect of the competition rules. Differences in the level and scope of protection, in the entities enjoying protection and in the duration of copyright terms, for example, caused considerable problems with the free movement of goods, and

---

<sup>65</sup> *Berne convention for the protection of literary and artistic works*, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967. (1967). Geneva: United International Bureaux for the Protection of Intellectual Property. See articles available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283693](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283693)

thus ran counter to the establishment of the Internal Market<sup>66</sup>, as codified in the article 26 TFEU<sup>67</sup>.

With the rise of high technology as a component, the tension between national copyright and the fundamental treaty provisions is even more emphasized. Despite the harmonization described above, the efforts and the gradual emergence of an European intellectual property regime, there is still tension between national copyright law and regional integration process.<sup>68</sup>

In this direction, the founders of the European treaties left intellectual property to the national laws and focused instead on the formation of a common market. The EEC Treaty, effectively, sought to eliminate quantitative restrictions on the free movement of goods, while ensuring that competition is not distorted and without discrimination of Member State nationals<sup>69</sup>.

On this path, actual articles 34 through 36 of the TFEU, are concerned with the free movement of goods and services within the EU<sup>70</sup>. In particular, article 34 prohibits quantitative restrictions on imports between Member States and “*all measures having equivalent effect*”, providing a broad interpretation of “*all measures having equivalent effect*”, in order to include almost any limitation on imported goods or services protected by intellectual property<sup>71</sup>. The consequence

---

<sup>66</sup> See generally Tilman Luder *The Next Ten Years in E.U. Copyright: Making Markets Work* Autumn, 2007 18 Fordham Intell. Prop. Media & Ent. L.J. 1.

<sup>67</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>68</sup> Ruping K., *Copyright and an Integrated European Market: Conflicts with Free Movement of Goods, Competition Law, and National Discrimination*, Temple International and Comparative Law Journal. 1997;11 :1.

<sup>69</sup> Treaty establishing the European Economic Community, Mar. 25, 1957, 28 U.N.T.S. 11.

<sup>70</sup> See n 31 to 34.

<sup>71</sup> See on this point *Procureur du Roi v Dassonville* Case 874. See also *Danske Supermarkte v Imerco*,

of this provision is that a national law, which apparently does not seem to be discriminatory, but which frustrates cross border trade, is contrary to article 30.<sup>72</sup>

In the light of this general premise, it has to be understood if the topic under analysis, the rights administered by collecting societies, falls under the obligations regarding the free movement of goods ( art 34 -36 TFEU), or not.

During the 1970s a case was made that author rights do not constitute industrial or commercial property within the meaning of article 30 CE and therefore treaty obligations regarding the free movement of goods would not apply.<sup>73</sup> For example the nature of Copyright under international treaties includes non-economic author rights that cannot be transferred as property, such as the right to paternity (which is the right to be recognized as the author) and the right to integrity (which protects from modifications of a work which would prejudice the Author's reputation).<sup>74</sup>

However, it is enough clear nowadays how the free movement of goods is a key element in creating and developing the internal market, preventing Member States from adopting and maintaining unjustified restrictions on intra-community trade, as quantitative restrictions, and measures which have an effect equivalent to quantitative restrictions in intra-community trade.

Nevertheless, these provisions do not preclude prohibitions justified on grounds of public morality, public policy or public security, the protection of health and life of humans, or the protection of industrial and commercial property (an imprecise expression used in Article 36 of the TFEU which covers intellectual property, in general, including copyright). Even if, such prohibitions must remain

---

Case 58/80.

<sup>72</sup> See on this point n 57.

<sup>73</sup> See on this point Kretschmer M., *Access and Reward in the Information Society: Regulating the Collective Management of Copyright*, CIPPM Working paper, 2007 at 10.

<sup>74</sup> See n 62.

proportionated and must not refer to arbitrary discrimination or a disguised restriction on trade between Member States.

As stated in the decision of the European Court of Justice (ECJ) of June 8, 1971 in the *Deutsche Grammophon v. Metro* case <sup>75</sup>, the exercise of an industrial property right falls under the prohibition set out in Article 81 of the TEC – now Article 101 of the TFEU – each time it manifests itself as the subject, the means or the result, of an agreement which, by preventing imports from other member states of products lawfully distributed there, has as its effect, the partitioning of the market.

The provisions of Article 30 of the TEC – now Article 36 of the TFEU – of the Treaty may be relevant to a right related to copyright, in the same way as to an industrial or commercial property right. It is clear from the same Article 30 that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State, with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. The essence of an exclusive right is the possibility of exercising it by authorization or prohibition, but at this point it is relevant to understand if the possibility to exercise this right could be truly separated from its exercise by authorization or prohibition.

For example, it is in conflict with the rules providing for the free movement of products within the common market for the owner of a legally recognized exclusive right of distribution, to prohibit the sale on the national territory of products placed by him or with his consent on the market of another Member State, on the ground that such distribution did not occur within the national territory.

The owner of a legally recognized exclusive right of distribution does not occupy a dominant position within the meaning of Article 82 of the TEC – now Article

---

<sup>75</sup> See *Deutsche Grammophon v. Metro*, C 78/70 of 8 June 1970.

102 of the TFEU – merely by exercising that right. It is necessary that the owner, alone or jointly with other undertakings in the same group, should have the power to impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence of any producers marketing similar products and to their position on the market.

The difference between the controlled price and the price of the product re-imported from another member state does not necessarily suffice to disclose an abuse of a dominant position; it may, however, if unjustified by any objective criteria and if it is particularly marked, be a determining factor in such abuse.

The issue has been resumed by the ECJ in the case 351/12, stating that article 102 TFEU has to be interpreted with the following meaning: have to be considered evidences of dominant position abuse the fact that a management entity impose, for the services it provides, rates considerably higher than the ones imposed in the other Member States (under the hypothesis that the rates comparison has been effectuated on an homogeneous basis) or rates which have not any reasonable correlation with economic value of the service provided<sup>76</sup>.

This specific verdict assumes relevance for the reason that it addresses another important issue, which is the connection of collecting societies with the several fundamentals of freedom of establishment service providing.

The Court concludes that articles 16 of Directive 06/123/CE issued by European Parliament<sup>77</sup> and the Council on 12.12.2006, related to the services in the internal

---

<sup>76</sup> See on this point Riccio G.M., *Copyright collecting societies e regole di concorrenza*, Giappicchelli, 2012 at pag. 1.

<sup>77</sup> See article on Directive 2006/123/EC on services in the internal market of 12 December 2006 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>

market, together with articles 56 e 102 TFEU<sup>78</sup>, have to be considered compatible with the internal legislation of a Member State, which reserves the exercise of copyright collective management related to works protected in its territory to a single entity, preventing this way the possibility for the user of those works to turn to services provided by management entities established in another Member State.

Despite the Court here deals with the thorny topic of national monopoly's compatibility with the European law, an issue which will be addressed further in the treatment, it is useful to mention it, in order to trace the ideal borders into which set out the following elaborations.

To better understand the applicability of article 16 of Directive 2006/123 and articles 56 TFEU, related to free services providing, it is important to verify if a management entity could be considered a service supplier for the user of a protected work.<sup>79</sup> On this point it has to be considered that, as it results from article 4, point 1, of Directive 2006/123, the notion of «service», coincide with the one of article 57 TFEU. Therefore, the activities of the management entities are subject to the provisions of articles 56 TFEU and followings, which refer to free service providing<sup>80</sup>. This kind of management entity eases a user in obtaining an authorization for the usage of protected works and in the distribution of the rewards coming from the same usage and due to the author's right holders. In the light of this, the management entity has to be considered a

---

<sup>78</sup> See articles on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>>

<sup>79</sup> See on this point Case C-351/12 of 27 february 2014 par 57.

<sup>80</sup> In this regard see *Greenwich Film Pro- duction*, 22/79, Racc. pag. 3275, at (12); *GVL/Commissione*, 7/82, Racc. pag. 483, at 38.



service provider both towards the users<sup>81</sup> and the right holders, as it results from the mentioned jurisprudence.

In particular article 56 TFEU, establishes the prohibition for restrictions to free service providing throughout Union, and the European jurisprudence have never hesitated in attributing the services provided by collecting societies in the scope of that provision.<sup>82</sup>

Finally the Directive related to the services<sup>83</sup> excluded the possibility for the authorized regimes of a Member State to obstacle the cross-border service providing (in other words the restriction to competition), by collecting societies established in other Member States. (Example: this would permit a society established in Germany to provide its intermediation and collective management services in Italy, even in the presence of a legally based monopoly, as the one stated by article 180 Law on Author's Right). The same principle is now reaffirmed by Directive 26/2014 EU<sup>84</sup> which – on the behalf of the well-known decision CISAC of the Commission<sup>85</sup> – establishes the possibility for a collective management society to operate into international markets, an aspect which will be examined in depth in the following chapters.

---

<sup>81</sup> See on this point Case C-351/12 of 27 february 2014 par 59-62.

<sup>82</sup> See generally Case C-351/12 of 27 february 2014.

<sup>83</sup> See on this point T. Riis, *Collecting societies, competition and the Services Directive*, 6 *Journal of Intellectual Property Law & Practice* 482, 483 (2011).

<sup>84</sup> See generally Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0026>

<sup>85</sup> See *infra* Chapter 2.

#### ***4. Art 167 TFUE: Collecting societies and the promotion of the diversity of cultural expression***

If in the previous paragraphs it has been analyzed the economic aspect of the collecting societies in their dynamic perspective according to the development of the internal market, they actually carry out, inside this frame, a further important cultural function. In that regard, among other things, the Proposal's "Explanatory Memorandum" starts with the important statement that collecting societies "*also play a key role in the protection and promotion of the diversity of cultural expressions by enabling the smallest and less popular repertoires to access the market*"<sup>86</sup>.

To deeply understand the meaning of the statement it is necessary to analyze its prerequisites, which have to be researched in the cultural function of Copyright law in general.

In contrast to the United States Constitution and its Copyright Clause (Section 8 clause 8 of the Constitution of 1787), most constitutions of European countries do not expressly guarantee copyright law, intellectual property generally, or provide a constitutional guarantee of the cultural function of copyright law. Therefore this lacuna has been resolved, at least politically by a series of recitals within the European copyright directives, which underline in various aspects the importance of copyright law for the development of creativity and culture. Here follow some examples traced by the analysis of Directive 2001/29/EC<sup>87</sup>:

- (9) Any harmonization of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual

---

<sup>86</sup> See Doc. 2012/0180 (COD), p. 2; in the same sense recital 2 (at the end) of the Proposal see Doc. 2012/0180 (COD), p. 13.

<sup>87</sup> See recitals on Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. ...

- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. ...
- (11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safe-
- (12) Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.
- (22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

From the analysis of the Directive, it arises that European legislator takes to heart the cultural function of Copyright and that the basis of its political action is clearly the willingness to promote culture and creativity as well as cultural diversity via copyright law, in the light of the main principles held by the Council of Europe in cultural matters: respect of identity and promotion of intercultural dialogue.<sup>88</sup>

The importance of this topic is reaffirmed by the recital (12) in the article 151 TEU 167 (4) TFEU<sup>89</sup>, which requires the Union to take cultural aspects into account in its action, in particular to respect and promote the diversity of its

---

<sup>88</sup> See generally John Street, Dave Laing and Simone Schroff, *Collective Management Organisations, Creativity and Cultural Diversity*, CREATE Working Paper 2015/03 ( May 2015).

<sup>89</sup> See article on Consolidated version of the Treaty on European Union available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT>

cultures. This aspect is provided with more persuasive strength, since even the Charter of Fundamental Rights of the European Union of December 7, 2000<sup>90</sup> refers to culture and cultural diversity. This is particularly evident in the third paragraph of the charter's preamble, as follows: "*The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels*".

Within this framework, when doing legislative work in the field of copyright law and particularly in the field of collecting societies legislation, the Commission (as with all other EU bodies) is strictly bound to respect the principle of cultural diversity, hopefully should have introduced far more concrete and explicit explanations and provisions to demonstrate how the principle of respect for cultural diversity would be realized, endowing the principle with compulsory power.

The cultural purpose of copyright law certainly applies to the collecting societies, in relation to which the cultural mission is embodied in their role: efficient organized entities in order to administer relevant rights and ensure the impartial and quick distribution of the revenues they have generated<sup>91</sup>. It is by fulfilling that role effectively and transparently, that the collecting societies almost automatically fulfill the general aims of copyright law, namely, to promote creativity and culture and, as far as possible, to generate corresponding revenues for the creators. Compared to possible results from individual management, the income collecting societies collect for right holders is bigger, because there is a significant advantage in cost

---

<sup>90</sup> Charter of Fundamental Rights of the European Union of December of 18 December 2000 C 364/3 available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>91</sup> See in this regard Adolf Dietz, *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, International Journal of Music Business Research, April 2014, vol. 3 no. , at 15.

effectiveness. Clearly, the more efficient collecting societies are in terms of maximizing revenue collection and minimizing the costs associated with rights management, the more money is paid to artists. This improves artists' ability to earn a living and therefore facilitates cultural creation.

In this sense it is important that copyright legislator adopt a positive attitude towards the collecting societies, assisting them in carrying out their tasks, rather than undermining them.<sup>92</sup> This is the case concerning certain cases, especially as far as societies in smaller countries are concerned, in which has been considered the public financial assistance, at least during the formation of such societies, without which they would perhaps never be founded. This is even the reason why in a number of countries institutions of public law and/or multi-competent societies have been allowed or even prescribed by the law, at least in the past.<sup>93</sup>

Nevertheless the cultural function of collecting societies does not just play a significant role in the analysis of their origin, but even influences their own management model. Therefore controls and supervision of collecting societies must come from within the system and should ensure that collective management of copyright achieves its aims, which are intimately related to the aims of copyright law itself, including, of course protection and promotion of creativity and, through it, of culture and cultural diversity.<sup>94</sup>

---

<sup>92</sup> See in this regard Adolf Dietz, *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, *International Journal of Music Business Research*, April 2014, vol. 3 no. , at 14.

<sup>93</sup> See generally Adolf Dietz, *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, *International Journal of Music Business Research*, April 2014, vol. 3 no.

<sup>94</sup> See generally Adolf Dietz, *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, *International Journal of Music Business Research*, April 2014, vol. 3 no.

According to some opinions<sup>95</sup> controls exercised from outside the system, for example through rigorous application of anti-trust rules, appear too negative. These external controls, effectively, push the societies to compete, which is not appropriate in this sector . These controls weaken them and, at the same time, inhibit them from fully complying with their mission, namely to strengthen protection for all creative people and to procure adequate revenues for them as compensation for their creative input.<sup>96</sup> In this sense Adolf Dietz (2014), another critic of the Directive, argues that the Commission is insufficiently concerned for the cultural (as opposed to the commercial) role of the collecting societies. He argues (2014: 11) that the European Parliament has shown much more interest in the cultural impact of copyright than has the Commission. The latter is more interested, he suggests, in matters of competition and antitrust, and these do not necessary serve the EU's commitment to creativity and cultural diversity. According to him one consequence of this will be the diminution and down-playing of the social and cultural contributions made by collecting societies.

Economic and cultural aspects of collecting societies are two sides of the same question that refers in general to the more general aim of Copyright as instrument to develop an efficient and competitive European internal market.

97

---

<sup>95</sup> See in this regard S. Nérisson, *La légitimité de la gestion collective des droits des auteurs en France et en*

*Allemagne*, PhD thesis, Paris and Berlin 2011.

<sup>96</sup> See n 84.

<sup>97</sup> See *supra* § 2.1.

## 5. The regulatory approach

### 5.1 Introduction

Collecting societies regardless of their double nature<sup>98</sup> have the authority to license copyrighted works and collect royalties as part of compulsory licensing or individual licences negotiated on behalf of its members. However the loss of territoriality due to the Internet, as well as the digital format of products such as music files, barely reconcile with traditional copyright licensing schemes, which are based on purely national procedures.<sup>99</sup>

Since when the treaty founding the European Union was signed<sup>100</sup> each one of its Member States has progressively lost elements of its sovereignty, in a process that smoothened the European Union's internal frontiers, until it reached a point where people and goods benefited from a general "freedom" of moving, living, working and trading in different countries. However, as Hugenholtz *et alia* point out, the harmonization process in Europe has faced a serious barrier to the creation of an internal market: the territorial nature of copyright and related rights.<sup>101</sup>

A natural question thus emerges: is it the nature of copyright that is blocking the harmonization process, or is the harmonization process itself which fails to set

---

<sup>98</sup> See *supra* §.

<sup>99</sup> Press Release, Europa, Commission Opens Proceedings into Collective Licensing of Music Copyrights for Online Use (May 3, 2004), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/586>

<sup>100</sup> See generally Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321E) 37, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf> [hereinafter EC Treaty].

<sup>101</sup> See generally BERNT HUGENHOLTZ ET AL., INST. FOR INFO. LAW, THE RECASTING OF COPYRIGHT AND RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY 22 (2006), available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_eport\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_eport_2006.pdf)

copyright free from its old territorial chains? Hugenholtz believes that the right answer implies both theories: “[i]ndeed, for as long as the territorial nature of copyright and related rights is left intact, harmonization can achieve very little”<sup>102</sup>, but on the other hand, “the EU legislature has been aiming . . . at the wrong target”.<sup>103</sup> The harmonization process is paradoxical, because while broadening the protection, by a limitation of Member States sovereignty, it generates detrimental effects in the internal market. This negative effect consists in the creation of a plethora of microscopic rights diffused at the national level, thus impairing the free movement of goods and services.<sup>104</sup>

The territoriality and the cultural nature which characterize the goods and services subject to copyright protection, lead to complication in the definition of a specific regulatory approach in this matter.<sup>105</sup> Particularly, in the regulatory approach to collecting societies, a tension arises between rights territoriality and the internal market.

---

<sup>102</sup> See n 88.

<sup>103</sup> See n 88.

<sup>104</sup> See n 88.

<sup>105</sup> The Collective Management of Rights in Europe - the Quest for Efficiency of 1 July 2006, *KEA - European Affairs*.



## ***5.2 Function of collecting societies and rights territoriality***

As previously analysed, the principal function of collecting societies is to licence and collect revenues from the exploitation of the copyright of the members they are required to administer rights for, regardless for how small the market for their works is the rights managed collectively are as follows:

- a) The *mechanical right*, which is the right to mechanically reproduce a musical work on a sound recording
- b) The *private copying exception*. This is an exception to the reproduction right for certain purposes.
- c) The *public performance right*. This right is licensed collectively through societies by performers, producers, authors/composers, publishers, to discotheques, bars, restaurants and other public places playing music
- d) The *communication to the public right* which is a right licensed for example to radios and TV, but which includes even webcast or simulcast
- e) The *making available to the public right or the on-demand right*, which is the right to communicate to the public a work, by wire or wireless means, in such a way that the public may access the work at any time and from any place (interactivity).

In the Study presented by KEA European Affairs<sup>106</sup>, it comes to light how, on one hand, that according to the listed kind of rights the main advantages of collective licensing for users are to:

- create a one stop shop to access local and/or worldwide repertoire thus avoiding multiplication of negotiations with right holders, and lowering transaction costs for users.
- provide legal security against copyright claims.

---

<sup>106</sup> See n 92.

Further advantages are even for right holders:

- to increase royalty payments and provide remuneration to creators and artists.
- to increase trade in rights, including rights that individually would not be economic to trade.
- Mutualise risk and costs in managing rights in a way that supports smaller right owners.
- Create solidarity between well-off and poorer artists and between larger and smaller companies.

On the other hand the disadvantages of collective management are as follows:

- Creation of a national monopoly which sits uncomfortably with EC rules on competition
- reduction of competition on price
- absence of reciprocal representation agreements it fragments the internal market
- promotion of territorial licensing as opposed to pan-European licensing.

It is clear at this point that collective rights licensing deals with fragmented activities in line with languages and geographies (repertoire is administered along linguistic frontiers). Nevertheless this linguistic and cultural fragmentation is difficult to accommodate with the aim of the internal market. Territoriality is indeed a strange notion in the days of Internet, but despite its obsolescence, it has positive effects:<sup>107</sup>

---

<sup>107</sup> See n 92.

- territorial exploitation is often economically more convenient. This position could be explained by the situation of a licensee, which would not want to pay the price of a pan-European licence whilst the exploitation will take place in only one territory.
- there is the possibility for right holders to licence or assign rights to different licensees in consideration of their relative commercial skill and muscle which may vary from one territory to another.
- right holders may want to licence a service provider on an exclusive basis in one territory and licence others for other territories. They cannot be obliged to license internationally – this would affect the nature of their rights. Licensees would also expect exclusivity in return for their investment (e.g. in promoting an unknown artist).
- this fragmentation could be even exceeded by other tools, such as the reciprocal representation agreements, or other tools that can be developed to mitigate the impact of territoriality. An example of the potential paths has been provided by the Spanish society SGAE, which suggested the setting up of one pan-European collecting society with shareholding from all the national societies.
- rights territoriality is the basis of the international legal regime enshrined in the international conventions governing copyright and neighbouring rights as well as in the EU directives on copyright.

There are tensions indeed between the concept of territoriality and the vision of an internal market and those need to be factored in new ways of dissemination. This evokes the setting up of structures to accommodate cross border usage, in addition to the difficult question whether are these changes market-led more than a regulatory-led.

### 5.3 Rights management and local culture

A collective licensing system, in addition to be favourable to users and right holders, as it has been examined above, it is even convenient for public interest objectives:

- collective licensing bodies allow governments to channel funds collected but sometimes not distributable, for cultural or general interest objectives (for instance funding pension funds for artists or advancing production money to new bands).
- these bodies constitute a tool to promote cultural diversity and a variety of offers to consumers. This is done via the representation of local repertoire through reciprocal representation agreements between societies. This enables the user to offer local as well as international artists to its consumers.
- collecting societies provide incentives for new artists, publishers, performers and record companies to keep on producing and being creative. They participate in Europe's drive to competitiveness in the growing "content" sector.

Thus territorial aspects of collecting societies activity, must be taken into account to appreciate to the full their cultural purpose. The societies do not operate as if were in a neutral area nationally, regionally (i.e. European) or internationally, but their primary responsibility is for the creative people of "their" country or of

"their" linguistic culture.<sup>108</sup> It is in this direction that the debate on rights management also acquires a political dimension and the specificity of this type of collective structure should be recognised by the regulator.<sup>109</sup> The characteristics of the European cultural market should be even taken into account, due to its linguistic fragmentation. Before the adoption of the Directive 2014/26/UE the opponents to change highlighted that the Recommendation<sup>110</sup> risked favouring two or three major collecting societies (established in the larger countries) to the detriment of the societies in the smaller countries which will become mere agents. Consequently, the most affected by the changes are likely to be local artists and music companies or local users seeking a local licence only, as well as other small users, because artists are encouraged to switch to a better managed collecting society in Europe. Many believe that in practice few will be able to switch to another more "efficient" society because of language, proximity and tax or social security reasons.<sup>111</sup>

The Commission and ECJ have partially provided a response to these arguments, starting from case GEMA, referring to reciprocal agreements, which consist in agreements stipulated among national collecting societies in order to allow one managing in its territory the repertoire of the others and vice versa. This path allows to achieve an important goal: the possibility to submit the set of protected works, independently of their origin, to same conditions for the user established in the same State. Furthermore, as many times restated by the Court<sup>112</sup>, reciprocal

---

<sup>108</sup> See in this regard Adolf Dietz, *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, International Journal of Music Business Research, April 2014, vol. 3 no. , at 15.

<sup>109</sup> See n 92.

<sup>110</sup> Commission recommendation 2005/737/CE of 18 October 2005.

<sup>111</sup> The Collective Management of Rights in Europe - the Quest for Efficiency of 1 July 2006, *KEA - European Affairs*.

<sup>112</sup> See in this regard ECJ C- 395/87 at par. 24.

representation agreements, even representing an exclusive, which lead to the refusal of each society, for a direct access to its repertoire towards the users established in a different Member State, must be considered contrary to the competitive regulation.<sup>113</sup>

---

<sup>113</sup>On this aspect see C. Stothers, *Parallel trade in Europe. Intellectual Property Competition and Regulatory law*, Hart Publishing, 2007, at 268.

## ***6. Social cultural and economic dimension of collective rights management in Europe***

In the first paragraph of this chapter it has been anticipated how collecting societies provide a socio-cultural support to creators. Collecting societies, from a socio-economical point of view, represent an additional demonstration of how the services are important in a post-industrial society.<sup>114</sup>

More specifically collecting societies pledge efficiency in the management of economic author's rights<sup>115</sup>, in fact, without their services it would be economic disadvantageous to manage and intermediate individually on authors' rights. Under the hypothesis of a non-existence of collecting societies, even the users would face difficulties while attempting to obtain single licenses for the works protected by copyright law.

A critical point is represented by the extended range of rights acknowledged by the legal systems of the Member States regarding author's rights, and by the interrelated difficulties in managing jointly and globally those rights towards the potential users<sup>116</sup>.

A single negotiation between the right-holders and the users would even be inefficient, especially regarding works which have not a high level of diffusion, due to the presence of transactional costs higher than the potential economic benefits.<sup>117</sup>

---

<sup>114</sup> In these terms Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 5.

<sup>115</sup> See in this regard C. Handke – R. Towse, *Economics of Copyright Collecting Societies*, in 38 *Int. Rev. Of Intell. Prop. and Competition Law*, 937 (2007).

<sup>116</sup> On this point see Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 66.

<sup>117</sup> See generally A. Hollander, *Market Structure and Performance in Intellectual Property: The Case of Copyright Collectives*, 2 *Intern J. Of Industrial Organization*, 199 (1984).

In this way collecting societies facilitate the establishment of unified methods for collecting and dispersing royalties as well as negotiate licensing arrangement for works. Even though this function plays a fundamental role, is not the only preoccupation of collective management societies. Over time the role of collective societies has evolved to oversee copyright compliance, fight piracy and perform various social and cultural functions.<sup>118</sup> An evidence is provided by much of EU countries which lay down in their copyright legislation provisions regarding collecting rights societies allocating sums for social and/or cultural activities. It is a recommendation in Estonia, Latvia, Malta and Finland. It is an obligation in Austria, Czech Republic, Belgium, Denmark, Germany, France, Italy, Luxembourg, Portugal, Slovakia and Spain. In some Countries, such as Portugal, France, Spain, Austria and Belgium, the regulator goes so far as to stipulate the percentage of revenues that shall be allocated to cultural and social activities. Countries with no provisions on social or cultural funds are Cyprus, Greece, Hungary, Ireland, Lithuania, Poland, Slovenia, Sweden, the Netherlands and the United Kingdom.<sup>119</sup>

When the welfare protection and the promotion of cultural activities are provided for, they may take the form of a deduction that the collective management organization makes from the royalties collected. There is no an unanimous view among collective management organizations on the idea of a deduction, which according to the rules of CISAC should not represent more than 10% of net income<sup>120</sup>.

Therefore, in the field of cultural activities, collective management societies welcome the idea of becoming sponsor for cultural activities and of promoting the national repertoire of works at home and abroad.

---

<sup>118</sup>As outlined by M. Ficsor, *Collective Administration of Copyright and Neighboring rights* ( Geneva: WIPO, 1990) at 80-83.

<sup>119</sup> See generally *The Collective Management of Rights in Europe - the Quest for Efficiency* of 1 July 2006, *KEA - European Affairs*.

<sup>120</sup> See in this regard <http://www.copynot.org/Pages/Collective%20copyright.htm>



Solutions differ from country to country and include, among others, the following activities: music competitions, prizes and festivals, action to promote music publishing, launching of publication series and sets, disc or cassette production, recording facilities, provision of recording studios, publications on musical subjects, biographies, manuals and catalogues, financing of music gazettes and a press service for musical matters.<sup>121</sup>

In the light of this frame, the socio-economic and cultural dimensions intersect and feed each other; consequently, according to the European Commission, the new digital distribution platforms and the international appeal of some artists legitimise the establishment of a new paradigm promoting the emergence of a new kind of collecting society<sup>122</sup>.

In that regard, the right holders are concerned that the impact assessment of the European commission<sup>123</sup> is limited to the economic and social impact of its recommendation and fails to address its cultural impact. This is despite two vital considerations:

- First, 11 Member States of the European Union assign a specific cultural and/or social role to collecting societies.
- Second, article 167(4) TFEU<sup>124</sup> obliges a cultural impact assessment providing that: "*The Community shall take cultural aspects into account in*

---

<sup>121</sup> See in this regard <http://www.copynot.org/Pages/Collective%20copyright.htm>

<sup>122</sup> See generally The Collective Management of Rights in Europe - the Quest for Efficiency of 1 July 2006, *KEA - European Affairs*.

<sup>123</sup> Commission staff working impact assesment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market Brussels, 11.7.2012 SWD(2012) 204 final available at <http://eur-lex.europa.eu/legal-content/it/TXT/?uri=CELEX%3A52014SC0124>

<sup>124</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

*its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures”.*

Article 167(4) TFEU becomes the interpretation key through which analyse each aspect concerning collecting societies and any decision regarding rights management should be taken in light of Article 167 of TFEU, due to the following provision it gives: *“Community shall contribute to the flowering of the cultures of Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”*.<sup>125</sup>

---

<sup>125</sup> See generally *The Collective Management of Rights in Europe - the Quest for Efficiency* of 1 July 2006, *KEA - European Affairs*.

## **CHAPTER 2 : EU COLLECTIVE RIGHTS MANAGEMENT SCENARIO BEFORE THE ADOPTION OF THE DIRECTIVE 2014/26/EU**

### ***1. Collective rights management, monopolistic positions and competition in the EU market single market***

#### ***1.1 Main Features of Collective Management and the Development of Joint Rights Management***

The *Communication from the Commission to the Council, the European Parliament and the European Economic and Social - Committee* of 2004<sup>126</sup> provides an important cause for reflection to deeply understand the role historically assumed by collecting societies. The *Communication* underlines how the extent of uses, users and rightholders involved, make licensing certain rights individually impractical. This occurs particularly while managing rights of remuneration, pushing the rightholders to appoint agents to engage in the joint licensing of their works. Similarly, users would rather have a single interface when trying to obtain a licence, both for the authorisation and the payment.

In the light of the disadvantages in managing copyright on an individual basis, especially regarding remuneration rights, several legislatures require mandatory collective management<sup>127</sup>, stating that such rights may only be administered by collecting societies.

Therefore collecting societies, playing as trustees, administer, monitor, collect and distribute the payment of royalties for an entire group of rightholders, under the national law of the territory where the society has been established.

---

<sup>126</sup> 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 (Text with EEA relevance)\* COM/2004/0261 final \*/

<sup>127</sup> See in this regard the Slovenian Copyright and related rights act of 30 March 1995. See in this regard also the Hungarian Copyright Act provides for the mandatory collective administration of a number of exclusive rights of the author.

Collecting societies administer rights related to music, literary, audiovisual works, productions and performances for activities such as communication to the public and cable retransmission of broadcasting programmes, but also mechanical reproductions, reprography, public lending, artist's resale right private copying or certain educational uses. The importance of a collective management of these rights is even highlighted by the establishment of interlocking agreements, through which rights are cross-licensed among societies in different Member States.

From the users' point of view, collecting societies are essential for the licensing of certain rights, even by providing access to a global catalogue of rights. Collecting societies operate in this case as a one-stop-shop of licensing. Collective management also solves inefficiency problems related to the right management for rightholders which operate within a less lucrative or niche market, or who do not dispose of sufficient bargaining power. 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.<sup>128</sup>

---

<sup>128</sup> See *supra* n 119.

## *1.2 Collective Rights Management and Competition*

The general economic functioning of collecting societies described above<sup>129</sup> is relatively simple: a massive use of copyright works has created a need for a huge number of separate licensing transactions between right holders and users; this has generated a need for collective management of copyrights, in order to reduce transaction costs and permit more transaction to take place.<sup>130</sup>

Together with the advantages already mentioned, collective management also enables potential market power and this is obvious in Europe, where collecting societies have been organized as *de facto monopolies*<sup>131</sup>. Even if users have the possibility to choose among alternative collecting societies, as it is stated for performing rights organizations in the USA, this does not prevent the development of potential market power positions. The reason is that, normally, collective management by the right holders is organized as a price-fixing scheme, with uniform licensing and pricing terms for all works covered by the licence; this is the way the collecting society eliminates competition between individual copyright holders.<sup>132</sup>

The unavoidable analysis of a regulatory framework which allows for a certain

---

<sup>129</sup> See *supra* par 1.1.

<sup>130</sup> On the economic function of collecting societies in general see C Handke and R Towse, 'Economics of Copyright Collecting Societies' (2007) 38 IIC 937.

<sup>131</sup> See in this regard Thomas Riis, *Collecting Societies, Competition and The Services Directive*, 6 J. of Int. Prop. & Pract. (2011).

<sup>132</sup> See generally on this point SM Besen, SN Kirby, and S Salop, 'An Economic Analysis of Copyright Collectives' (1992) 78 Va L Rev 383, 383–4; RA Posner, *Antitrust Law* (2nd edn 2001), 30 – 1; G Lunney, 'Copyright Collectives and Collecting Societies: The United States Experience' in D Gervais (ed), *Collective Management of Copyrights and Related Rights* (2006), 312–3; A Katz, 'The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights' (2005) 1 J Competition L and Econ 541, 544–5; C Handke and R Towse, above, n 15, 943 and 945.

degree of competition between collecting societies, appears complex because, among other things, competition takes place at more different levels. First, collecting societies might compete for members (especially the major music publishers) and in case no membership restrictions have been established, allowing right holders to freely choose a collecting society, right holders would choose the collecting society that provides the best service quality at the best price. From the right holder's perspective, the price should be as high as possible and the quality of the service should be optimized in relation to negotiations with users, market monitoring, enforcement of the rights etc. Secondly, collecting societies can compete at a commercial user level: end users search for the lowest price possible for a license, while service quality primarily refers to the repertoire, which often is intended to be the widest possible (the world repertoire).<sup>133</sup>

These two levels of competition are interrelated. Under the hypothesis of a possible competition on both levels, each user would prefer licences at the lowest price; at the same time, this price determines how much money will eventually be allocated to the right holders. In case this amount is considered irrationally inadequate by the right holders, they will withdraw their rights from the collecting society, seeking alternative and more profitable way of managing the same rights. Due to the withdrawal of rights from the collecting society, the repertoire shrinks, causing a decrease of the license value to the user and a reduction of his willingness to pay for the license.<sup>134</sup>

Competition at the level of commercial users can constrain the exercise of the collecting society's market power. A typical example is represented by the strong

---

<sup>133</sup> See in this regard C. Handke and R. Towse, 'Regulating Copyright Collecting Societies: Current Policy in Europe' (paper presented at Society for Economic Research on Copyright Issues (SERCI) Annual Congress 2007 at Humboldt-Universität zu Berlin/Centre for British Studies, 12–13 July 2007) 8 <http://www.seroci.org/documents.html> accessed 13 December 2010.

<sup>134</sup> See on this point R. Watt "Copyright and Economic Theory. Friends or Foes?" (2000) at , n 18, 168–9.

bargaining position of a collecting society, while negotiating with a music broadcaster which has no alternative providers of music repertoire and when the collecting society is entitled to deny the music broadcaster access to the music repertoire. In this regard the intervention by the Court of Justice and the Commission, which have developed an important body of jurisprudence over the years, have been focused on the following three main issues: (i) the relationship between collecting societies and their members, (ii) the relationship between collecting societies and users and, lastly, (iii) the reciprocal relationship between different collecting societies.

- (i) From the rightholders' point of view, collecting societies act as trustees<sup>135</sup>, managing their rights and interests. The basic framework of the relationship between collecting societies and their members remains as it has been stated by the Commission in the three GEMA decisions<sup>136</sup>, with particular regard to the compatibility with Articles 101 and 102 of the TFEU<sup>137</sup> for societies to require the assignment of rights by their members in respect of all utilisation forms of a musical work. The opinion of the Commission is that technological evolution (e.g. online services) could generate a need for reconsideration of the "GEMA categories" established in the 70's. In a more recent decision, the Commission considered that any statute of a collecting society which mandatory requires for the assignment of all the rights of an author, including their on-line exploitation, should provide case of abuse of a dominant position,

---

<sup>135</sup> On this point see further lecture Cerna, // L. (2014), working paper "Trust: What it is and Why it Matters for Governance and Education", *OECD Education Working Papers*, No. 108, OECD Publishing, Paris at <http://dx.doi.org/10.1787/5jxswcg0t6wl-en>

<sup>136</sup> GEMA I, Decision of 20.06.1971, OJ L134/15; GEMA II, Decision of 06.07.1972, OJ L 166/22; GEMA III, Decision of 04.12.1981, OJ L 94/12.

<sup>137</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

within the meaning of Article 102(a) of the TFEU, due to the conformity of such a practice to the imposition of an unfair trading condition<sup>138</sup>. According to the concept of membership of a collecting society, the Commission has also stated that a collecting society in a dominant position is not allowed to exclude rightholders from other Member States<sup>139</sup>. In the light of the Commission position, such practices must automatically be considered infringements of Article 102 of the TFEU, as they conflict with the principle of equal treatment which results from the prohibition of "*any discrimination on grounds of nationality*" stated in Article 18 TFEU<sup>140</sup>. Moreover, the rejection of a membership requested by nationals of other Member States, runs counter to the special prohibition of discrimination under Community competition law, as contained in Article 102(c) of the EC Treaty. In this direction, the European Court of Justice confirmed, in the *Phil Collins* case,<sup>141</sup> the invalidity of any domestic provision which contains reciprocity clauses aimed to deny nationals of other EU Member States rights conferred on national authors.

- (ii) The relationship between collecting societies and users is characterized by three main issues: the potential effects on trade between Member States; the material scope of the licences granted to users; the

---

<sup>138</sup> Banghalter et Homem Christo v Sacem (so-called "Daftpunk" Decision), case COMP/C2/37.219, decision of 06.08.2002, available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf>

<sup>139</sup> GEMA I, Decision of 20.06.1971, OJ L134/15; GVL, Decision of 29.10.1981, OJ L370/49.

<sup>140</sup> See the article on *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* 2012/C 326/01 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

<sup>141</sup> See generally *Phil Collins v. Imtrat Handelsgesellschaft mbH* (Case C-92/92), decision of 20 October 1993.



level of fees charged to licensees. As dominant (when not monopolistic) undertaking, a collecting society cannot deny - under Article 102- the license for a user in its own territory, except in case a legitimate reason exists. The Court made it clear that for collecting societies it is forbidden to take part in any concerted action which causes a systematic refuse to grant direct access to their repertoires by users located in foreign territories. At the same time the only justification considered valid for such a refusal has been established in the impossibility to set up a monitoring system in the foreign territory<sup>142</sup>. This principle has been set out in the case *Ministère public v Tournier* of 1989<sup>143</sup>, which represents a seminal case in the area. According to it, a french discothèque owners had complained that the fees charged by the French collective management society SACEM were unjustifiably high, especially because they were calculated for the use of the worldwide repertoire, although the discothèque owners were used to play mainly popular dance music of Anglo-American origin. To face these excessive fees, the discothèque owners attempted, without success, to obtain a licence directly from the relevant foreign collective management societies. The *Tournier* case delivered a ruling on at least three important points. First, the ECJ ruled that the refusal by a national collective management society to grant direct access to its own national repertoire to users established in other EU Member States, may be only based on efficiency reasons. An example of this case could be when organizing its own management and monitoring system in such foreign countries would have been too burdensome for the collecting society. However, the refusal cannot be the result of agreements or concerted practices between the national collecting societies in the Member States in which the users are established, in case it generates

---

<sup>142</sup> *Ministère public v Tournier*, case 395/87, 13 July 1989, ECR (1989) p.2521.

<sup>143</sup> Vedi *supra* n 124.

restrictions to the competition in the common market, contrary to Article 81 of the EC Treaty<sup>144</sup>. Second, the Court considered the possibility for collective management societies to refuse to grant licenses for only parts of their repertoire. Instead of a blanket licence, the discothèque owners had asked SACEM to grant them licenses for only the part of its repertoire that they were effectively using (popular dance music of Anglo-American origin), but SACEM refused. The Court ruled that the refusal by a collective management society to grant national users authorization, if limited solely to the foreign repertoire which under its administration in the territory in question, would not be prohibited under Article 101 TFEU. This exception is valid just provided that the access to a part of the protected repertoire could entirely safeguard the interests of the right holders, without increasing the costs of managing contracts and monitoring the use of protected works.<sup>145</sup> Third, in relation to SACEM's tariffs, the Court observed that one of the most marked differences amongst collective management societies in the Member States could be attributed to the level of operating expenses. The discothèque owners complained that SACEM charged excessive, non-negotiable and unfair royalties. Therefore the Court considered that a national collective management society is imposing unfair trading conditions in the meaning of Article 102 of the EC Treaty, if the royalties charged are appreciably higher than those charged in other Member States, unless the differences were justified by objective and relevant factors<sup>146</sup>. In relation to the fees, the Court observed that one of the most pronounced differences amongst collecting societies in the Member States lies in the level of operating expenses. It has been recognized that it could be the lack of competition in

---

<sup>144</sup> See also *Lucazeau v. SACEM*, (1989) E.C.R. 2811 at paras. 10 – 20 [*Lucazeau*].

<sup>145</sup> See *Tournier*, *supra* note 125 at paras. 27 – 33.

<sup>146</sup> *Ibid.* at paras 34 – 36; *Lucazeau*, *supra* note 137 at paras. 21 – 33.

the market that accounts for high administrative costs and the high level of royalties<sup>147</sup>. The Court said also that Article 82 of the Treaty must be interpreted on the basis that a collecting society in a given Member State abuses its dominant position if it imposes unfair conditions on its trading partners by, namely, imposing appreciably higher tariffs than those applicable in other Member States unless the differences were justified by objective and relevant factors<sup>148</sup>.

- (iii) Concerning the reciprocal agreements between collecting societies, the Court of Justice addressed the reciprocal relationship between collecting societies in the *Tournier and Lucazeau* cases<sup>149</sup> back in 1989. The ECJ concluded that reciprocal representation agreements signed among European collecting societies did not fall under Article 81(1) of the Treaty, unless there was evidence of concerted action or exclusivity. Accordingly, the birth of reciprocal representation agreements appeared economically justified by a context where physical monitoring of copyright usage was required. The more recent Commission decision "Simulcasting"<sup>150</sup> adapts the existing principles to the online environment, creating a new framework under EC competition rules related to rights management activities. The on-line environment introduced by the internet and the digital format of the products are featured by the absence of territorial boundaries, a situation that enables users to choose any collecting society in the EEA<sup>151</sup> which is a member of the one stop shop

---

<sup>147</sup> See *supra* n 127.

<sup>148</sup> *Lucazeau v SACEM*, cases 110/88, 241/88 and 242/88, 13 July 1989, ECR(1989) p.2811.

<sup>149</sup> See *supra* note 137.

<sup>150</sup> Case COMP/C2/38.014 IFPI Simulcasting, Decision of 8 October 2002, OJ L107 of 30.04.2003, p.58.

<sup>151</sup> *i.e.* European Economic Area (EEA). The European Economic Area (EEA) consists of all the EU Member States plus Norway, Iceland and Liechtenstein.

mechanism for the delivering of the licence. Furthermore, the parties involved started to increase transparency with regards to the payment charged by separating the tariff which covers the royalty itself from the fee meant to cover the administrative costs. This split allows commercial users to recognise the most efficient societies in the EEA and, consequently, to seek their licences from the collecting societies that provide them at lower cost. At first, the European Commission lines up for the creation of competition amongst collective management societies in the different Member States, at least in certain areas. In 1985, however, the Commission held that the practices of GEMA, who was charging royalties on sound recordings manufactured in Germany, even in case the licensee had obtained a mechanical licence from a collective management society in another Member State, constituted an abuse of a dominant position. According to the Commission's Press Release in which the settlement of this case was announced,<sup>152</sup> a licence granted by a collective management society in a Community Member State is valid throughout the Community and authorizes manufacture of sound recordings in any Member State. This statement means that, once a mechanical licence has been granted in a Community Member State, this exhausts the right of a collective management society in a Member State where the sound recordings are imported to charge another licensing fee. As a consequence, collective management societies in Europe now have to compete against each other for so-called "Central European Licensing" deals, which allows any user to acquire a mechanical licence from one collective management society which is valid throughout the Community.<sup>153</sup> As examined above, in the *Tournier* and *Lucazeau* cases,

---

<sup>152</sup> See generally Commission's Press Release of 6 February 1985, 2 *Common Market Law Review* 1.

<sup>153</sup> See on this point M. Kretschmer, 'The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments' (March 2002), 24 *European Intellectual Property Review* 126, 133, online: [http://www.cippm.org.uk/pdfs/kretschmer\\_eipr\\_032002.pdf](http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf)

the ECJ labelled the reciprocal relationship between collective management societies, concluding that such reciprocal agreements did not, as such, fall under Article 101(1) of the TFEU Treaty, under the condition that no concerted action was demonstrated. Accordingly, the reciprocal representation agreements appeared in those days to be economically justified in a context where physical monitoring of copyright usage was required.<sup>154</sup> Within a more digital environment, the Commission investigated two sets of reciprocal representation agreements, known as the "*Santiago Agreement*" and the "*BIEM Barcelona Agreement*".<sup>155</sup> According to these agreements, each of the participating societies has the right to issue multi-territorial licences for the on-line use of copyrighted works, which are part of their repertoires, only to on-line users established in their own territory.<sup>30</sup> In the *IFPI Simulcasting* decision, the Commission ordered the parties to amend their reciprocal agreement to allow users established in the territory of the European Economic Area<sup>156</sup> to approach any collective management society, established within the territory and party to the agreement, to seek and obtain a multi-territorial simulcasting licence.<sup>157</sup>

---

<sup>154</sup> See on this point *Tournier*, *supra* note 135 at paras. 34 – 46; and *Lucazeau*, *supra* note 137 at paras. 21 – 33. See also in this regard, Riccio G.M., *Copyright collecting societies e regole di concorrenza*, Giappicchelli, 2012.

<sup>155</sup> Notification of "*IFPI Simulcasting agreement*" (COMP/C2/38.014), *OJ C* 231/18 (2001), Notification of "*Santiago agreement*" (COMP/C2/38.126), *OJ C* 145/02 (2001) and Notification of "*BIEM Barcelona agreement*" (COMP/C2/38.377), *OJ C* 132/18 (2002).

<sup>156</sup> See in this regard L.Guibault, "When will have a cross border licensing of copyright and related rights in Europe?" April- June 2005, Copyright Bulletin, UNESCO.

<sup>157</sup> *IFPI Simulcasting*, Commission Decision of 8 October 2002 Case No COMP/C2/38.014— IFPI 'Simulcasting' [2003] *OJ L* 107/58 at paras. 27 and 28.

### ***1.3 Legal status of collecting societies in Europe and contrast between legal monopolies, de facto monopolies and competition***

Collecting societies can be constituted under different legal forms, such as associations, public organisations or private companies. In many EU countries they cannot have any lucrative purpose. Most of the EU countries state in their national copyright law the legal form requested to constitute a collecting society.

From the study “*The Collective Management of Rights in Europe - the Quest for Efficiency*” of July 2006, conducted by KEA - European Affairs, it emerges that the national copyright laws of Cyprus and Germany do not specifically request a particular legal form to constitute a collecting society, or whether they can or cannot have a lucrative purpose. The national copyright legislation of 13 countries - Austria, Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia and Spain – provide instead that collecting societies must be not for profit organisation. In conclusion, the legal status of collecting societies varies in these different countries:

- Austria, Hungary, Portugal, Slovenia and Spain forbid collecting societies to be profit legal entities.
- A collecting society is asked to be an association in the Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia, while in France collecting societies are civil law associations, which cannot have any lucrative purpose.
- In Italy the collecting society representing authors, composers and music publishers (SIAE) is a public body and the Italian legislation has no provisions on the legal status of other collecting societies.
- In Belgium, Denmark, Finland, Greece, Ireland, Italy (regarding collective societies other than SIAE), Malta, the Netherlands and UK, national legislation does not require the absence of profit aim for the collecting societies and they can be commercial organisations or legal entities of any

kind.

In certain countries, the legislation has provided a *de iure* monopoly for the collecting societies. In eight Member States (Austria, Belgium, Czech Republic, Denmark, Hungary, Italy, Latvia and the Netherlands), collecting societies are legal monopolies designated by the State for the management of the same category of rights and the same group of right holders. Amongst these countries there are two special cases:

- Italy, as the SIAE is the only society explicitly designated by the law to manage the rights of any type of author, such as visual, musical or audiovisual.
- Latvia, where the law states there can be several collecting societies with respect to those rights, which may be managed individually. Yet there cannot be competition for the management of those rights, which may be managed only collectively.

In nine Member States (Cyprus, Estonia, Greece, Lithuania, Malta, Poland, Slovenia, Slovakia and Spain) the law provides for competition among collecting societies working in the same area and regarding the management of the same rights. In eight Member States (Finland, France, Germany, Ireland, Luxembourg, Portugal, Sweden and the UK) the law does not specifically state if collecting societies are legal monopolies or not and at the same time it does not provide whether there can or cannot be competition between collecting societies which manage the same type of rights. In the light of these national frameworks examined above, in all other EU countries apart from Spain, the societies which manage the rights of the authors, generally benefit from a *de facto* monopoly on the national territory irrespective of the monopolistic status granted by the legislation. In this context, it is worth mentioning the Commission's proposal for a Directive on Services in the Internal Market. As proposed, the Services Directive does not exclude collecting societies from its scope of application;

consequently any society from any Member State should be capable of offering its services in any EU country. Consequently, those countries which are now providing a monopolistic status for their collecting societies, might be forced to adequate their legislation with the entry into force of the Directive, opening the possibility of establishment to any EU society for the collective management of rights. It should also be noted that collecting societies are subject in all EU countries to the jurisdiction of the competent antitrust authority as regards the possible infringement of competition rules, in particular for cases of abuse of dominant position.<sup>158</sup>

According to some scholar the collecting societies before representing legal monopolies, are ‘natural’ monopolies, in the sense that as monopoly suppliers, they have lower costs than it could be possible in an environment characterized by competition.<sup>159</sup> But this is not the vision of the Commission, which many times emphasises the merits of competition<sup>160</sup>. As some scholars strongly support, Commission may believe that the size of a European market is so large that two or more competing Collective Rights Management providers could administer the same rights to different repertoires but it is questionable how much competition there would be. Even in the largest integrated markets for copyrights, namely, the US and Japan, there is no effective competition between CRM providers and it is due to the network effects in the market for CRM which will favour the largest collecting society, even if it does not have a real cost advantage. The competition in the market for rights management, is also affected by the high fixed costs of entry. A natural development of the market, even if there were competition in the short run, would be represented by mergers took in

---

<sup>158</sup> See in this regard “The Collective Management of Rights in Europe - the Quest for Efficiency” of 1 July 2006, *KEA - European Affairs*.

<sup>159</sup> See in this regard Towse, Ruth, and Christian Handke. "Regulating copyright collecting societies: current policy in Europe." *Society for Economic Research on Copyright Issues (SERCI) Annual Congress*. 2007.

<sup>160</sup> See *infra* § 3.



place to benefit from economies of scale and network effects as defined above, reasserting this way a natural monopoly.<sup>161</sup> It has been many times demonstrated how competition provides benefits in terms of higher quality and lower prices for goods and services.<sup>162</sup> As long as collective copyright management is organized by national monopolies, there will be no incentives to costs reduction for the collecting societies, as they could emerge under a competitive pressure; this situation causes internal inefficiencies to persist, resulting in high administrative costs. Taking this line of reasoning, the Court of Justice in *Tournier* speculated whether the relatively high level of operating expenses of the French collecting society SACEM was due to the lack of competition on the market in question.<sup>163</sup> The Commission (DG COMP) is very much focused on the efficiency of collecting societies and how competition between them can facilitate the most efficient means of rights management.<sup>164</sup> The issue, however, is complicated by the fact that while a certain degree of competition can provide benefits, too much competition can be harmful to the whole systems.<sup>165</sup>

---

<sup>161</sup> See on this point Towse, Ruth, and Christian Handke. "Regulating copyright collecting societies: current policy in Europe." *Society for Economic Research on Copyright Issues (SERCI) Annual Congress*. 2007 at 12.

<sup>162</sup> See in this regard Maurice E. Stucke; Is competition always good?. *J Antitrust Enforcement* 2013; 1 (1): 162-197. doi: 10.1093/jaenfo/jns008

<sup>163</sup> Case 375/87 *Minist'ere Public v Tournier* [1989] ECR 2521, para 42.

<sup>164</sup> See the CISAC decision, para 212.

<sup>165</sup> See in this regard Thomas Riis, *Collecting Societies, Competition and The Services Directive*, 6 J. of Int. Prop. & Pract. (2011).

## 1.4 The US experience

In the USA, competition between the three performing rights societies ASCAP, BMI, and SESAC has existed for a long time.<sup>166</sup> According to law professor Robert Merges, the competition has been beneficial for the American market. He highlighted how from the history of ASCAP-BMI it appears clear how songwriters have benefit from the competition between these organizations. Merges has held up two main reasons to explain the benefits of competition: at first the general benefit of competition, which regards the possibility to have a better deal when a potential different trading partner exist; secondly, because a single organization may remain stable and fail to adapt to changing circumstances without the spur of outside competition.<sup>167</sup>

Not all scholars, however, share Merges' positive view on the competitive environment of the American performing rights organizations, calling for even more competition: "*The tale of the [copyright management organizations] in the United States is...a sad one...[W]e have spent some sixty-four years unsuccessfully trying to rein in the collectives' monopolistic excesses*"<sup>168</sup> In contrast to American point of view, European scholars are more sceptical of the possible beneficial effects of competition between collecting societies.<sup>169</sup> The

---

<sup>166</sup> Current competition between the US American collecting societies is not free competition but a sort of administered competition. The two largest American performance rights societies ASCAP and BMI have been governed by consent decrees for decades. See on this point MA Einhorn, 'Intellectual Property and Antitrust: Music Performing Rights in Broadcasting' (2001) 24 Colum. VLA J L and Arts 349.

<sup>167</sup> See in this regard P Merges, 'The Continuing Vitality of Music Performance Rights Organizations' (2008 UC Berkeley, Public Law and Legal Theory Research Paper Series 26-7 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266870#\\_accessed](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870#_accessed)> 13 December 2010.

<sup>168</sup> See in this regard G Lunney, 'Copyright Collectives and Collecting Societies: The United States Experience' in D Gervais (ed), *Collective Management of Copyrights and Related Rights* (2006), 338. Katz suggests that more competition in the management of copyrights will lead to social benefits, cf A Katz (2005) 'The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights' (2005) 1 J Competition L and Econ 541, 544-5.

<sup>169</sup> See in this regard ; C Handke and R Towse, above, n 8, 955-6; See also *Collective Administration of Copyright and Neighboring Rights* (WIPO, Geneva 1990) 68: ' . . . it seems advisable to avoid

competition whose beneficial effects Merges refers to, is the one for members, while it is not clear whether he held up even the competition between collecting societies at the level of commercial users beneficial or not. The actual degree of competition in the USA at the level of commercial users is debatable. Within current framework, it is not possible for the authors to register or publish a work with more than one performing rights society, so consequently the three American performing rights societies license different repertoires. A commercial user is free to choose a licence from one of the societies, which in theory might be enough to meet the user's needs, but in reality many (and the most significant) users of musical works have no choice: they need access to the full repertoire of music and that requires licences from all three performing rights societies. The societies are not offering licenses that are perfect substitutes for each other, despite the licenses offered are complementary. It is hard to imagine, for example, a broadcaster who can avoid obtaining licences from all three societies and remain successful in the market place.

---

parallelism and rather to establish only one organization for each category of rights'.

### ***1.5 The IFPI simulcasting agreement: a prototype of competition***

In case of collecting societies offering homogenous products, such as, licences of the same repertoire covering the same territories, which compete solely on price, economic reasoning suggests that licences will be priced at marginal cost. The marginal cost in collective management of copyrights is relatively low, and pricing at marginal costs implies that collective licensing of copyright is unprofitable to authors.<sup>170</sup> This scenario results in a gradual decrease of the prices and consequently in the erosion of the value of the copyrights. Neither the Commission nor the Parliament wants the actual copyright royalties to be affected by competition. In the light of this, the Commission puts forward the IFPI simulcasting agreement<sup>171</sup> as a prototype of competition in collective management of copyrights. The simulcasting agreement enables competition at the level of administration fees charged by collecting societies, and the CISAC decision encourages this particular form of competition.<sup>172</sup> The original simulcasting agreement foresaw that each collecting society was free to determine its national simulcasting tariff within the framework of its national legislation and commercial needs. The same agreement stated that multi-territorial tariffs to be charged by the grantor society would therefore have to be the aggregate of all the relevant national tariffs. The result of this provision is that multi-territorial licence would be the same, with no regard to which of the participating societies grants the licence. It is evident how such a pricing structure, do not leave space for competition.

---

<sup>170</sup> See in this regard A Katz, above, n 43.

<sup>171</sup> Commission Decision of 8 October 2002 Case No COMP/C2/38.014— IFPI ‘Simulcasting’ [2003] OJ L 107/58. The IFPI simulcasting agreement is a model agreement for the collective administration of record producers’ rights to simulcasting. It is intended to facilitate the grant of multi-territorial, multi-repertoire licences to radio, and TV broadcasters who wish to engage in simulcasting, affording each participating collecting society the right to grant licences in all territories of participating societies.

<sup>172</sup> See on this point Andries and B Julien-Malvy, ‘The CISAC decision—creating competition between collecting societies for music rights’ (2008) No. 3 Competition Policy Newsletter 56.

As a response to the Commission's concern regarding the unification of the copyright royalty and the administration fee, the parties amended the agreement in order to separate the copyright royalty from the administration fee and to identify them separately when charging a licence fee to a user. The amended agreement has also specified that the administrative fee shall be determined independently by each grantor collecting society, in accordance to the administrative cost of its service to the multi-territorial user. In order to avoid any concern of possible collusion under the agreement, it has been stipulated that the parties shall not exchange information regarding the level of the administrative fee they charge users. *Prima facie*, it makes sense to distinguish between the administration fee and the copyright royalty and to promote competition in respect of the administration fee only. In this way, competitive pressure forces collecting societies to reduce administration costs, and, consequently, there should be the lowest cost for license fees, provided by the most efficient societies. The copyright royalty which is allocated to the right holders will be, however, unaffected by competition. This last point, is part of the several problems associated with this model of competition.

First, collecting societies claim that it is difficult to separate the administration fee from the copyright royalty, for instance in relation to the allocation of overheads that relate to traditional forms of licensing as well as to multi-territorial licensing. In the light of this claim, it should be possible to construct an accounting standard to allocate the relevant cost components. On this point Ernst-Joachim Mestmacker observes that if collecting societies are required to specify their cost structure, their ability to compete will be impaired, depriving them of bargaining power in relation to users.<sup>173</sup> Secondly, when collecting societies compete on the level of the administration fees, it will have a direct

---

<sup>173</sup> See in this regard E-J Mestmacker, 'Agreements of Reciprocal Representation of Collecting Societies in the Internal Market' (2005) RIDA 63, 123 et seq.

impact on the quality of the administration services provided.<sup>174</sup> In order to be competitive in relation to users, a collecting society must reduce administration costs and it could be achieved by cutting down on activities relating to the enforcement of rights and the monitoring of the market.<sup>175</sup> The simulcasting agreement refers to a necessary monitoring activity on users that have their commercial establishment within the parties' respective territories, but actually it does not provide any level requirement for monitoring activities. However, a party to the agreement undertakes to enforce within its territory the rights of the right holders of the other contracting party in the same way and to the same extent as it does for its own right holders. If it is clear users seek for the lowest administration costs, it is not the same for the right holders. Agreeably, right holders have different preferences about the level of enforcement of rights and monitoring of the market. In theory, free competition in the administration fees of the collecting societies would then enable right holders to choose a collecting society with the preferred level of enforcement and monitoring. In reality, it does not happen, due to asymmetric information which give the right holder no possible way of acquiring reliable information on the levels of enforcement and monitoring of each collecting society. Despite the criticism that can be raised against the IFPI simulcasting agreement, it has two indisputable positive features: it enables multi-territory and multi- repertoire licensing.

---

<sup>174</sup> See in this regard P Giliéron, 'Collecting Societies and the Digital Environment' (2006) 37 IIC 950.

<sup>175</sup> See in this regard P Giliéron, above, n 49, 962 et seq.

## 2. *The CISAC decision*

In July 2008<sup>176</sup> the European Commission spoke out with a substantial decision on the way of managing and licensing copyright related to public execution of musical works, as they were adopted by the collective management societies operating within EEA and taking part in CISAC (a non-governmental association that represents the main European and worldwide collecting societies)<sup>177</sup>. The so-called "CISAC Case" was properly a competition law case, brought by the EU Commission and related only to performance rights in music repertoire and the relationship between authors' societies managing rights in music content.

The analysis conducted by the Commission mainly concerned the structure and the clauses of the contract usually used to build up reciprocal representation agreements among the societies member of CISAC. Each collective management society operating in the EEA is part of a reciprocal representation agreement with all the other CISAC members. This builds up a network which allow each collecting society to grant licenses on its territory, with regard to its territory and the ones where the other associates are established (i.e. global repertoire), and, at the same time, to collect the revenues due to the rights exploitation in its relative country. It has to be considered that the CISAC model sample agreement, approved for the first time in 1936, is not mandatory for all the categories of music works exploitation that request a license for public performing.<sup>178</sup>

The case commenced with two separate complaints filed with the EU Commission by commercial users. The first complaint was filed in 2000 by RTL Group (German broadcaster) and the second complaint was filed in 2003 by

---

<sup>176</sup> Commission decision of 16.07.2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC).

<sup>177</sup> See to have further description on CISAC, Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 59.

<sup>178</sup> See in this regard Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 134.

Music Choice (digital music provider). RTL complained against German authors' society GEMA which refused to grant a community-wide license for the performing rights it administers on behalf of its members and foreign authors. The Music Choice complaint, instead, was against CISAC. It argued that certain provisions in the CISAC Model Contract for reciprocal representation prevented societies from granting multi-territory licenses and therefore violated EU competition rules.

More specifically, the Commission was focused on some restrictions contained in the CISAC model sample agreement:

- The clause limiting the possibility for the right-holders to choose and stipulate contracts with any society part of the organisation<sup>179</sup>
- Clauses and practices granting to each CISAC member an unconditioned protection in the territory where it has been established and operating towards collecting societies, with regard to licenses grant to commercial users<sup>180</sup>

In theory, each collecting society has the right to grant licenses to exploit in other States the repertoire of its members (i.e. mono-repertoire license), but this possibility has been often limited and contrasted by the wide diffusion of reciprocal representative agreements. During the long path to the CISAC decision, the Commission had deeply analysed both the aspects of limitations to member affiliation and territorial restrictions which could have represented barriers for the competition among CISAC members regarding the licensing of executing rights to commercial users. In particular, article 11 (II) of CISAC model sample agreement, stated the impossibility for one of the two parties of the agreement to accept the affiliation of new members without the consensus of the other party, in case those members would have been established in one of the

---

<sup>179</sup> art. 11 ( II) CISAC model contract in effect until 2004.

<sup>180</sup> art. 1 CISAC model contract in effect until 2004.



countries where that other party was operating. The Commission stated that article 11 (II) of CISAC model sample agreement, was constraining for the freedom of authors to choose which collecting society affiliate to, and whether being simultaneously member of different societies or not. The Commission, in July 2008, finally issued its decision. The decision addressed 24 authors' societies in Europe, stating that these societies had engaged in concerted practices and illegally reached an arrangement on the territorial scope of their respective reciprocal representation agreements. This arrangement, according to the Commission, had given the societies the possibility to compete with one another in the grant of multi-territorial, multi-repertoire licences for digital rights exploitation of performing rights. In conclusion, the Commission found that societies avoided authors to join the society of their choice and prevented each other from issuing licences for their own repertoire outside the territory in which they are based. The basic tenet of the Decision was that, given the nature of EU as a single market, no artificial barrier could be built up to avoid its integration and the borderless provision of music. Through the removal of restrictions in the system of bilateral representation agreements between collecting societies, the decision encourages collecting societies to bring their business practices up to speed with the borderless nature of satellite, cable and internet exploitation. This decision has also provided a framework for the collecting societies, to create a more competitive market which should benefit authors, collecting societies and commercial users. The Commission will ensure a full and effective implementation of the decision.<sup>181</sup>

CISAC and the European societies strongly disagreed with the Commission's allegations and appealed the Decision before the EU General Court. The focal point of these appeals was the allegation that societies had engaged in a concerted practice by coordinating the territorial scope of their reciprocal

---

<sup>181</sup> See in this regard A. Andries, B. Julien-Malvy, The CISAC decision – creating competition between collecting societies for Music rights, Competition policy newsletter.

representation agreements. CISAC and the societies denied that any such arrangement ever existed.

On 12 April 2013, the General Court of the EU issued its ruling in the appeal. This landmark judgement annulled the 2008 decision of the EU Commission, and was a major victory for CISAC and creators alike.

The Court concluded that the Commission did not have sufficient evidence to prove its allegation of the societies engagement in a concerted practice and coordination of the territorial scope of their agreements. Although the lack of evidence was sufficient to accept the appeal, the Court did not stop and chose to look into the arguments put forward by CISAC and its members to support the position that the existence of similar territorial restrictions in different reciprocal agreements is the result of a logical and independent decision of each society.

The court considered the explanations for the parallel conduct of EU societies with respect to their mandates and decided that the Commission could not prove that these explanations were not plausible. In examining the explanations put forward by CISAC, the court provided important statements on the benefits of appointing a single society in a foreign market.

## ***2.1 Effects of CISAC decision and challenges***

The CISAC decision raised conflicting reactions, even at an institutional level. An important example is the resolution of September 25, 2008, in which the European Parliament stated: *“The effect of the decision taken in this regard will be to preclude all attempts by the parties concerned to act together in order to find appropriate solutions – such as, for instance, a system for the clearing of rights at the European level – and to leave the way open to an oligopoly of a number of large collecting societies linked by exclusive agreements to publishers belonging to the worldwide repertoire; believes that the result will be a restriction of choice and the extinction of small collecting societies to the detriment of minority cultures”*.<sup>182</sup>

This resolution represents a Parliament’s severe criticism towards the Commission’s 2005 Recommendation, and for this reason Parliament commissioned a study to examine how EU policy on music rights licensing affects (or might affect) cultural diversity in the music sector. The study, completed in June 2009, concluded that in case of a decrease in revenues for local artists and publishers, there will be a detrimental effect on cultural diversity, which will be also impaired if smaller, specialized, or less popular repertoires become less available on the market.<sup>183</sup> The repertoire fragmentation, in fact, influence how much cultural diversity could be affected. In a new market

---

<sup>182</sup> European Parliament resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services available at <<  
[<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN>>](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN)>>

<sup>183</sup> See in this regard a study commissioned by the Parliament and published in 2006, it was concluded that Commission’s actions primarily benefited international, Anglo-American artists to the detriment of local artists and regional diversity in general; cf ‘The Collective Management of Rights in Europe. The Quest for Efficiency’, KEA European Affairs (June 2006). See also C Handke and R Towse, ‘Regulating Copyright Collecting Societies: Current Policy in Europe’ (paper presented at Society for Economic Research on Copyright Issues (SERCI) Annual Congress 2007 at Humboldt-Universität zu Berlin/ Centre for British Studies, 12–13 July 2007) <http://www.serci.org/documents.html> accessed 13.

composed of a few competing pan-European collecting societies, each one with individual repertoire (a low degree of repertoire fragmentation, like the market structure in the USA), most significant users of copyright works will presumably obtain licences from all the collecting societies, so no significant harm of any repertoire will result.<sup>184</sup> At the opposite, if the new market consists of many competing pan-European collecting societies, each with individual repertoire (a high degree of repertoire fragmentation), probably many users will choose not to license the smaller and more specialized repertoires. This conclusion is based on two main: first, a need for repertoires sufficiently small and specialized exist only in niche markets, so most users of copyright works can offer attractive services in the market without access to these repertoires; secondly, transaction costs increase with the number of licences, creating incentives for users to reduce the number of licences.

Part of the tenet highlighted the operative difficulties related to the obtainment of licenses for the users<sup>185</sup>. Although this is a well-founded critique, it is not possible to deny the positive effects of the possibility to choose for the right holders, who are able to choose which collecting society assign the management of their rights to; at the same the collecting societies, having the possibility to stipulate different agreements within the same territory, could find the occasion to differentiate their potential offer.<sup>186</sup> In fact the decision also allows collecting societies to licence their repertoire to more than one other collecting society per territory. For internet, satellite and cable exploitation, the decision improves the chances of commercial users (broadcasters and content providers) being able to obtain a licence covering more than one territory. By opening increasing the

---

<sup>184</sup> Whether it is sufficient for music providers to have access to a smaller repertoire than the world repertoire is discussed by A Katz, 'The Potential Demise of Another Natural Monopoly: New Technologies and the Administration of Performing Rights' (2006) 2 J Competition L Econ 245, 250.

<sup>185</sup> See in this regard S. Ercolani "Dalla gestione collettiva alla gestione << à la carte >>". Licenze on line a geometria variabile per la musica in Europa, in Dir. Autore, 2009, spec.p.257 ss.

<sup>186</sup> See in this regard *supra* n 174.

potential competition in the market between collecting societies, the Decision will provide incentives to collecting societies to improve their efficiency and the quality of their services to the benefit of authors and commercial users.

### 3. The soft law approach before the proposal for a directive

Within EU, the collecting society regulation has not affect just the jurisprudence<sup>187</sup>, but even the legislation, *latu sensu*. As a first intervention, European institutions preferred to resort to soft law, in order to respect the proportionality principle and the national customs. This way of intervention was made of persuasive measures, aimed to put in contact the different national legislations and to limit competitive abuse. This path to the harmonization of collecting societies started with the green book of July 27, 1995 about “*Copyright law and neighbouring rights in the society of information*”<sup>188</sup>. The document, which is divided in two chapters, does not deal only with collecting and management societies, but conduct an important analysis of these societies. With this document the Commission shows its will to safeguard the right for right holders to conduct individual negotiations, this way linking with the prevision related to re-broadcasting *via* cable (directive 98/83/CEE).

In 2000 the collecting societies had adopted the so-called Santiago agreement, which provided the legal framework for a one-stop-shop solution with regard to performing rights.<sup>189</sup> The model resembled the one underlying the IFPI simulcasting agreement, but included a customer allocation clause that ensured the participating societies absolute exclusivity for their national territories, precluding this way any possibility for competition.<sup>190</sup> This methodology of customer allocation, introduced by the mentioned clause, was contested by the Commission in the IFPI simulcasting agreement and was deleted from the

---

<sup>187</sup> See *supra* par 1.

<sup>188</sup> Green Paper on Copyright and Related Rights in the Information Society of July 27 1995 COM(95)382.

<sup>189</sup> Santiago Agreement — COMP/C2/38126. The agreement covered webcasting, streaming, online music on demand as well as music included in video transmitted online [2001] OJ C 145/2.

<sup>190</sup> See Commission press release IP/04/586 of 3 May 2004. 48 [2005] OJ C 200/11.

agreement.

The first consistent intervention regarding the collecting societies topic, was in 2004, with the adoption by the European Parliament of the resolution “*On a European framework for collective management societies in the sector of Copyright law and neighbouring rights*”.<sup>191</sup> With this resolution, the Parliament, reconnecting to the ECJ jurisprudence in *Tournier* and *Lacazeau* cases, confirmed that both monopolies *de jure* and *de facto*, represented by collective management societies are not detrimental for the competition, provided they do not impose unreasonable restrictions to their members or for the access to rights towards potential customers.<sup>192</sup> The Parliament affirmed the economic relevance of the issue, which at that time was related to a percentage between 5% and 7% of EU GDP. The Parliament re-marked the necessity to recognize an adequate and fair participation of all the parties involved in the value chain, as well as a fast, fair and professional acquisition of the rights for all these parties, in order to achieve economic and cultural successes.<sup>193</sup> The document has been concluded with the Parliament wish for: the acknowledgement of the future European directives related to television, radio, communications, transmissions and telecommunications in a digital environment; for a “*principle of copyright*” adoption; and, finally, for their legal protection. Furthermore, considering essential a European framework for the tariffs assessment, it has been highlighted that collective management societies should have worked “*according to the principles of transparency, democracy and participation of the authors*”.

---

<sup>191</sup>European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights of 15 January 2004 available at <<  
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0036>>>

<sup>192</sup> See *supra* p 1.

<sup>193</sup> See generally n 184.

The following year, a point of no return has been reached in the discipline of collecting societies with the Commission Recommendation of May 18, 2005 about the cross-border collective copyright and neighbouring rights management, in the authorized musical online services (2005/ 737/ CE)<sup>194</sup>. This represents an important intervention of the Commission, because for the first time a European institution strongly interferes, affecting the critically related to collecting societies. The importance of this intervention has been increased by the usage its recommendations firstly in the CISAC decision and, secondly in the European directive proposal.<sup>195</sup> Differing from the directive proposal, the Recommendation deals only with music and online licenses sectors, not covering the entire topic of collecting societies. With the Recommendation, the Commission highlights the opportunity to build up a multi-territorial license to offer a higher right assurance for the commercial users, together with the necessity for a dematerialization under which the right holders could have the right to entrust any right to a collective manger, in any territory of their choice.<sup>196</sup> The Recommendation, moreover, encourages to arrange tools for an alternative resolution of the disputes, especially regarding tariffs, conditions under which grant the licenses, entrustment of online rights, as well as a clear administration. All these principles will be reaffirmed in the directive proposal. Although it is an important tool, the tenet, while commenting the Recommendation, expressed strong doubts on its nature of tool with no binding force, with neither deadlines for its adoption, nor penalties in case a minimum level of harmonization has not been reached.<sup>197</sup>

---

<sup>194</sup> Commission Recommendation of May 18, 2005 about the cross-border collective copyright and neighbouring rights management, in the authorized musical online services (2005/ 737/ CE) available at << <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF>>>

<sup>195</sup> See *infra* chapter.

<sup>196</sup> See in this regard p. (7) – (9) Commission Recommendation of May 18, 2005 about the cross-border collective copyright and neighbouring rights management, in the authorized musical online services (2005/ 737/ CE).

<sup>197</sup> See on this point L. Gibault – S. Van Gompel, “Collective Management in the European Union” at 154.



Two years after the Recommendation issue, European Parliament has come back to the point, with the adoption of another resolution through which relieving the intervention of the Commission of critiques<sup>198</sup>. The Parliament expressed concerns about some dispositions related to online sell of musical registrations, which could be misinterpreted and applied even to other sectors; in addition the Parliament expressed the doubt that introducing a more competitive system among collective collecting societies, the protection of the minor and local repertoires could be affected, due that it is granted by the presence on the territory of national collecting societies. In conclusion, the Commission and the Parliament, although in the field of a collision on the aspects mentioned above, agree that a higher level of competition is required in the market of collecting societies, but it is not clear whether the two parties agree on the operative tools to use in order to achieve the goal or not.<sup>199</sup>

Nevertheless, the interventions of the Commission with the CISAC decision and with the recommendation of 2005, the conception of how the future structure of the market for European collective copyright management should be is ambiguous. On one hand the Commission recognizes the differences in efficiency, quality of services, and conditions of membership between collecting societies, and the CISAC decision is meant to open up the market to more competition between collecting societies.<sup>200</sup> On the other hand, with the adoption of the Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, a different perspective could

---

<sup>198</sup> 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)), available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN>>

<sup>199</sup> See generally Riis T., *Collecting societies, competition and the Service Directive*, in 6 *Journal of Intell. Prop. Law & practice*, 2011.

<sup>200</sup> See on this point CISAC Case par. 133, 167, 248; see also A Andries and B Julien-Malvy, above, n 56, 55.

be appreciated: its primary focus is on facilitating copyright clearance and opening up the potential for creative online content, and competition is merely seen as a means to these ends.<sup>201</sup>

The main consequence of all the interventions of the European institutions and, particularly, of the principles affirmed in CISAC decision, is the directive proposal of European Commission in July 11, 2012.<sup>202</sup>

This proposal states that European legislators should aim to: on one hand an harmonization of the collecting societies regulation, with regards to the governance, the requirements and the transparency guarantees that collecting societies should offer to the users of their repertoires; on the other hand the guarantee for a development of multi-territorial licenses, especially in the field of telecommunications<sup>203</sup>. This proposal represents a step forward with regard to the legislative tool used, because before it, the EU has intervened only with soft-law tools, without strongly incentive the harmonization.<sup>204</sup> There was a need for a more radical intervention, discarding the regulation which represents an inappropriate tool to discipline a sector as the one under examination, characterized by deep differences among Member States. A Directive seemed to be the more suitable tool to respect the peculiarities and the historical basis of all the legal models, due to its flexibility.<sup>205</sup> The different legal models have been

---

<sup>201</sup> See *supra* n 192.

<sup>202</sup> Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market", of July 11, 2012, COM (2012) 372 final, 2012/0180(COD) (quoted as "Doc. 2012/0180(COD)")

<sup>203</sup> See on this point the Explanatory memorandum, annexed to the proposal at 3.

<sup>204</sup> See in this regard, Riccio G.M, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli at 159.

<sup>205</sup> See in this regard Riccio G.M, above n 197 at 160.

relevant for the work carried out by the Commission, both because it had analysed the criticality of these models to measure its intervention, identifying the critical points to solve, and because some models, as the English and German ones, had influenced the European legislator due to their prestige, efficiency and economic relevance. However it is an oversimplification to believe that the Directive proposal has been issued following one or more legal models, because, on the contrary, it has to be considered as the birth of an endogenous legal model, in the sense that the directive represents the result of the different European interventions during the years.<sup>206</sup> With the coexistence of an endogenous process and the acknowledgement of a more efficient model, a sort of feedback between national models and European model is carried out, meaning with the second a model in which the legislator chooses a national solution while stating a directive, but permits its modification and integration in the other States.<sup>207</sup> To conclude, it is possible to affirm that, despite the legislative process is essentially endogenous at EU Authorities, the legislator is affected by the jurisprudence and, indirectly, by the position adopted by the different Member States. In conclusion, although the regulative process essentially acts as a process all within the European institution framework, it has strongly conveyed the influence of jurisprudential and national soul of European union.

---

<sup>206</sup> See *supra* n 199.

<sup>207</sup> See on this point G. Bennacchio "Diritto privato della Comunità Europea. Fonti, modelli, regole, Padova, 1998 at 142.

## **CHAPTER 3: DIRECTIVE 2014/26 THE FUTURE OF THE DIGITAL EUROPEAN SINGLE MARKET**

### ***1. Adoption of the Directive 2014/26/EU***

Collective management organisations, as many times highlighted in the previous pages,<sup>208</sup> act as intermediaries between right holders (in a variety of industries such as music, books and films) and the service providers who intend to use their works. They allow to grant licenses and to collect and distribute royalties in circumstances where the negotiation of licences with individual creators would be impractical and generates high transaction costs.

Cases of mismanagement of rights revenue and long-delayed payments have shown that there was a need to improve the functioning of collective management organisations.<sup>209</sup>

Furthermore, the collective management of rights also plays a key role in the licensing of online music service providers (music download services or streaming services). These service providers are often aimed to achieve a wide coverage on the territory, offering a large catalogue of music. Service providers didn't find many collective management organisations ready to face the two request simultaneously, experiencing this way difficulties when trying to obtain the licences necessary to launch online music services across the EU. The result was fewer online music services available to consumers across the EU and a slower incorporation of innovative services.

Before the adoption of the Directive, there were more than 250 collecting societies in the EU managing revenues of around 6 billion euro annually. The use

---

<sup>208</sup> See *supra par.*

<sup>209</sup> See generally “The Collective Management of Rights in Europe - the Quest for Efficiency” of 1 July 2006, *KEA - European Affairs*

of rights in the music sector accounts for about 80% of the total revenue collected by collecting societies.<sup>210</sup>

In the light of this environment, a strong intervention by the Authorities had been needed, and in July 2012, as announced in its Communication “*A Single Market for Intellectual Property Rights*”,<sup>211</sup> the Commission adopted its proposal on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses. At first the proposal and then the adoption of the Directive were important for the completion of the Digital Single Market, allowing to complete a single market for intellectual property and taking part of the 2011 Commission strategy on intellectual property. The measures suggested by the European Commission in its legislative action, are aimed to promote the adoption of measures to modernise collecting societies and build up a system of incentives to promote their transparency and efficiency. The advent of a new digital technologies era, is opening the doors for great opportunities to creators, consumers and businesses alike. The increasing demand for online access to cultural content (e.g. music, films, books) is not affected by any borders or national restrictions and the same is with regards to the online services used to access them. This is the environment where collecting societies act, with particular regard to the music sector, where they collectively manage the licensing of copyright-protected music tracks for online use on behalf of composers and lyricists and collect and redistribute to them corresponding royalties.

However, some collecting societies struggle to adapt to the requirements of the management of rights for online use of musical works, particularly in a cross-border context. The proposal, as a first result, has lead all the collecting societies to comply with European standards, when they decide to engage in the multi-territorial licensing of their repertoire would. This would allow service providers

---

<sup>210</sup> See on this point European Commission, Press release, Brussels, 11 July 2012, available at <<  
[http://europa.eu/rapid/press-release\\_IP-12-772\\_en.htm](http://europa.eu/rapid/press-release_IP-12-772_en.htm)>>

<sup>211</sup> Available at  
<[http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)>

to obtain more easily the necessary licences to distribute music online across the EU and to ensure that revenues are correctly collected and fairly distributed to composers and lyricists.

The new European standards required the collecting societies to improve their governance and to conduct their activities with greater transparency. The need for a change of certain practices was highlighted by recent cases of royalties collected on behalf of right holders, which have been lost due to narrow investment policies, but especially by evidence of too many delays in the payments of royalties to right holders.

The main and complementary purposes of the proposal were the following:

- the promotion of a higher transparency level and an improved governance of collecting societies through strengthened reporting obligations and right holders' control over their activities, in order to incentive more innovative and better quality services.
- to encourage and facilitate multi-territorial and multi-repertoire licensing of authors' rights in musical works for online uses in the EU/EEA

The meaning of tracing a path to achieve the purposes mentioned above could be reassumed in the following points:

- law would consecrate the possibility for right holders to have a say in the management of their rights, be remunerated more quickly and choose the most efficient collecting society for their purposes. This would generate better protection of right holders' interests, at the same time increasing access to cultural content for consumers.
- The new rules would change the way collecting societies operate across Europe, imposing new standards such as improved management of repertoire, quicker payments to members, transparency on revenues coming from the exploitation of rights, an annual transparency report and additional information provided directly to right holders and business partners (such as other collecting societies). Member States would have to introduce mechanisms to solve disputes between collecting societies and

right holders. The direct consequence of an introduction of improved standards and processes should be better-operating collecting societies and more confidence on their activities.

- The multi-territorial licensing of authors' rights for the use of music on the Internet across borders would be facilitated but also subjected to the demonstration of the technical capacity to perform this task efficiently. This would benefit authors, internet service providers and citizens alike.<sup>212</sup>

Based on these premises, on 4<sup>th</sup> February 2014, there was the adoption of the *Directive on collective rights management 2014 / 26/ UE*, so called “*Barnier Directive*” from the name of the Commissioner for Internal Market and Services Michel Barnier, who, about the directive adoption said:

*"We need a European digital Single Market that works for creators, consumers and service providers. More efficient collecting societies would make it easier for service providers to roll out new services available across borders – something that serves both European consumers and cultural diversity." He added "More generally, all collecting societies should ensure that creators are rewarded more quickly for their work and must operate with full transparency. This is paramount to sustaining investment in creativity and innovation which will in turn lead to additional growth and increased competitiveness."*<sup>213</sup>

To face the challenges of a fast-evolving digital economy, collective management organisations need to modernise their operations, with particular regards to an increase of the transparency and control of how they are managed. It is necessary that they provide a more efficient service to both the right holders

---

<sup>212</sup> See for this analysis in general European Commission, Press release Brussels, 11 July 2012, available at <[http://europa.eu/rapid/press-release\\_IP-12-772\\_en.htm](http://europa.eu/rapid/press-release_IP-12-772_en.htm)>

<sup>213</sup> See in this regard European Commission MEMO Brussels, 4 February 2014 available at <[http://europa.eu/rapid/pressrelease MEMO-14-80\\_en.htm?locale=en](http://europa.eu/rapid/pressrelease_MEMO-14-80_en.htm?locale=en)>

and the service providers: better collection and redistribution of revenues, accurate invoicing and more granting of multi territorial licences for aggregated repertoire. In that sense the specific objectives<sup>214</sup> of the Directive are to:

- improve the management of all collective management organisations through the establishment of common governance, transparency and financial management standards;
- set common standards for the multi-territorial licensing by authors' collective management organisations of rights in musical works for the provision of online services;
- to create conditions in order to expand the legal offer of online music.

Right holders, service providers and consumers will be the main beneficiaries. Service providers, in fact, will find easier to clear their rights, in case of better functioning and more transparent collective management organisations, which allow to have lower transaction costs. This should facilitate the birth of new services, particularly in the online world across the single market. Another consequence would be the possibility for European consumers to access to a wider variety of creative content. Right holders, furthermore, while exercising more control over collective management organisations than today, will be able to take informed choices as to who manages their rights. The Directive enshrined in law something which had been recognized only in principle: the right for right holders to have their rights managed by any collective management organisation. Moreover, increased business opportunities and better managed collective management organisations should result in increased revenue distributed to right holders. This, in turn, should provide additional incentives for creativity.<sup>215</sup>

---

<sup>214</sup> See on this point European Commission, MEMO Brussels, 4 February 2014 Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions available at <[http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm)>

<sup>215</sup> See in this regard *supra* note 7



## 2. *General overview: Structure, contents scope and definitions*

The EU Directive on the collective management of copyright and multi-territorial licensing of online music (“the Directive”), published on 26 February 2014, came into effect on 10 April 2014, with the obligation to transpose it into national law by 10 April 2016. The Directive is part of the European Commission’s ‘*Digital Agenda for Europe*’<sup>216</sup> and the ‘*Europe 2020 Strategy for smart, sustainable and inclusive growth*’<sup>217</sup>. As it has been highlighted in the previous paragraph<sup>218</sup>, the Directive is composed of a set of measures aimed at improving the licensing of rights and the access to digital content. These are intended to facilitate the development of legal offers across EU borders of online products and services, thereby strengthening the Digital Single Market. The Directive is composed of four parts:

- Title I outlines its scope and de notions
- Title II focuses on the rights of and protections for right holders, underpinned by minimum standards of governance and transparency that are required of all EU CMOs
- Title III sets out the standards that EU CMOs which choose to engage in multi-territorial licensing of online musical rights must meet introducing new provisions to ensure that cross border services meet certain standards, including transparency of repertoire and accuracy of financial flows related to the use of the rights.

---

<sup>216</sup> See in this regard << [<< http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R(01)) >>

<sup>217</sup> See in this regard << [<< http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf](http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf) >>

<sup>218</sup> See supra par.

- Title IV covers the requirements for enforcement of all the measures in the Directive, including the procedures for handling complaints and settling disputes.

With regard to its subject, this Directive lays down the requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations. In the Directive, have also been laid down the requirements for multi-territorial licensing by collective management organisations of authors' rights in musical works for online use.<sup>219</sup> In article 2, it is determined which parts of the Directive are applied to each different entity.<sup>220</sup> In particular, the scope of the 2014 Regulations does not currently extend to those organisations that also collectively manage rights but which have a different legal form to Collective Management Organisations (CMOs), in this sense implying those ones called “Independent Management Entities” (IMEs). Often CMOs use to be constituted as companies limited by guarantee, they are typically described as “not for profit” organisations and are owned and controlled by their members, which are nothing else besides the right holders. IMEs, at the opposite, are profit-oriented commercial entities and they are not owned or controlled by right holders. Under the Directive they will have to comply with certain provisions; broadly summarised, these oblige them to provide information

---

<sup>219</sup> See in this regard article 1 of the Directive : “ *This Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations. It also lays down requirements for multi-territorial licensing by collective management organisations of authors' rights in musical works for online use.* ”

<sup>220</sup> See in this regard article 2 of the Directive: 1: *Titles I, II, IV and V with the exception of Article 34(2) and Article 38 apply to all collective management organisations established in the Union.*  
 2. *Title III and Article 34(2) and Article 38 apply to collective management organisations established in the Union managing authors' rights in musical works for online use on a multi-territorial basis.*  
 3. *The relevant provisions of this Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation, provided that such entities carry out an activity which, if carried out by the collective management organisation, would be subject to the provisions of this Directive.*  
 4. *Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.*

to the right holders they represent, CMOs, users and the public.<sup>221</sup> The Directive brings into scope both the subjects defined as “collective management organisations” and “independent management entities”; even if the latter are not in scope of the 2014 Regulations and, more generally, are affected only by some of the Directive’s provisions.<sup>15</sup> Therefore for the purposes of this Directive, it is necessary to well distinguish between “collective management organisation” and “independent management entity”<sup>222</sup>.

- “Collective Management Organisation” means any organisation which, due to a law authorization or by way of assignment, grant licences, or any other contractual arrangement, to manage copyright or rights related to copyright on behalf of more than one right holder. CMOs operate for the collective benefit of those right holders, as their sole or main purpose, and meanwhile they must fulfil one or both of the following criteria: being owned or controlled by its members and being organised in the form of a not-for-profit organisation;
- “Independent Management Entity” means any organisation which, due to a law authorization or by way of assignment, grant licenses or any other contractual arrangement, to manage copyright or rights related to copyright on behalf of more than one right holder. IMEs operate for the collective benefit of those right holders, as their sole or main purpose, and meanwhile they must fulfil one or both of the following criteria: either

---

<sup>221</sup> See on this point the Collective Rights Management in the Digital Single Market Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market, intellectual property office UK available at <<

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401225/collective\\_rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401225/collective_rights.pdf) >>

<sup>15</sup> In this regard see for example articles 16(1), 18, 20 and 21 (a)(b)(c)(e) and (f) of the Directive

<sup>222</sup> See in this regard the definition provided by article 3 of the Directive available at

<< <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN> >>

being owned nor controlled, directly or indirectly, wholly or in part, by right holders; being organised on a for-profit basis.

As it emerges from the recitals, this Directive is part of a framework of Union Directives adopted in the area of copyright and related rights, which provides a high level of protection for right holders and thereby a framework wherein the exploitation of content protected by those rights can take place.<sup>223</sup> These Directives contribute to the development and maintenance of creativity, this can be better understood thinking that in case of an internal market where competition is not distorted, protecting innovation and intellectual creation also encourages investment in innovative services and products. In this sense Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action. The aim of this disposition is to strengthen the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. In the light of this Directive, collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression. This role could be covered both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their right holders and the public.<sup>224</sup>

---

<sup>223</sup> See on this point (1) of the Directive: “*The Union Directives which have been adopted in the area of copyright and related rights already provide a high level of protection for rightholders and thereby a framework wherein the exploitation of content protected by those rights can take place. Those Directives contribute to the development and maintenance of creativity. In an internal market where competition is not distorted, protecting innovation and intellectual creation also encourages investment in innovative services and products.*”

<sup>224</sup> See on this point (2) of the Directive: “*The dissemination of content which is protected by copyright and related rights, including books, audiovisual productions and recorded music, and services linked thereto, requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers. It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States. Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the*

Furthermore, as highlighted in the Directive recitals, which represent an interpretative framework for the Directive itself, the differences in the national rules governing the functioning of collective management organisations, in particular with regard to their transparency and accountability to their members and right holders, have generated difficulties in a number of instances, in particular for non-domestic right holders seeking to exercise their rights, and to poor financial management of the revenues collected. In case of problems with the functioning of collective management organisations, one of the direct consequences is represented by inefficiencies in the exploitation of copyright and related rights across the internal market, with negative effects for the members of collective management organisations, right holders and users. This need for improvement in the functioning of collective management organisations has already been identified in Commission Recommendation 2005/737/EC (1). With this Recommendation a number of principles have been set out, such as the freedom of right holders to choose their collective management organisations, the equal treatment of categories of right holders and an equitable distribution of royalties. It also stated that collective management organisations should provide users with sufficient information on tariffs and repertoire, before starting any negotiation between them. It also contained recommendations on accountability, right holders representation in the decision-making bodies of collective management organisations and dispute resolution. However, the Recommendation has not been strictly followed. As a consequence and in order to improve the protection of the interests of the members of collective management organisations, right holders and third parties required that the laws of the Member States relating to copyright management and multi territorial licensing of online rights in musical works, should be coordinated with the aim to

---

*use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets.”*

have equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1)<sup>225</sup> TFEU.<sup>226</sup>

In the light of the statement of the recitals it is possible to consider as the aim of the Directive: the willing to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework, and it should therefore also have as a legal base Article 53(1)<sup>227</sup> TFEU. In addition, being strictly linked to a sector which offers services across the Union, this Directive should have as a legal base Article 62<sup>228</sup> TFEU.

To achieve the goals of the directive, it is important to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards<sup>229</sup>, as long as those standards are in line with Union law. Furthermore nothing in this Directive should preclude a Member State from applying the same or similar provisions to collective management organisations which are established outside the Union but which operate in that Member State.

---

<sup>225</sup> See in this regard the article 50 (1) TFEU regarding the freedom of establishment available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT> >>

<sup>226</sup> See on this point (7) of the Directive: “ *The protection of the interests of the members of collective management organisations, rightholders and third parties requires that the laws of the Member States relating to copyright management and multi-territorial licensing of online rights in musical works should be coordinated with a view to having equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1) TFEU.* ”

<sup>227</sup> See in this regard the note 18 and the article 53 (1) available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT> >>

<sup>228</sup> In order to facilitate, improve and simplify the procedures for granting licences to users.

<sup>229</sup> for example more stringent standards than those laid down in Title II of the Directive

Within this framework, collective management organisations are not required to adopt a specific legal form. In practice, those organisations operate in various legal forms such as associations, cooperatives or limited liability companies, controlled or owned by right holders or by entities representing them.

To run their business, collective management organisations should be free to choose to outsource certain of their activities, such as the invoicing of users or the distribution of amounts due to right holders, which can be carried out by subsidiaries or by other entities that they control. At the same time, it is important to include appropriate safeguards in the statute of collective management organisations, in order to ensure that holders of copyright and related rights can benefit fully from the internal market when their rights are being managed collectively and that their freedom to exercise their rights is not affected.

In the light of CISAC decision<sup>230</sup>, a collective management organisation, in its operating, should not discriminate between right holders on the basis of their nationality, place of residence or place of establishment.<sup>231</sup>

As strongly affirmed in recital (55) in case the objectives of the Directive (improvement of the ability of their members to exercise control over the activities of CMOs, a sufficient transparency by CMOs and the improvement of the multi territorial licensing of authors' rights in musical works for online use) cannot be sufficiently achieved by Member States but can, by reason of their scale and effects, be better achieved at Union level, the Union should adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, The Directive does not go beyond what is necessary in order to achieve those objectives.

---

<sup>230</sup> See in this regard par.

<sup>231</sup> See on this points (9) to (14) of the Directive available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=IT> >>

### ***3. Collective management organizations: right holders, relation with users, transparency***

The Directive provides rules and prerequisites, outlining this way objectives oriented in two directions: on one side the improvement of CMOs governance and transparency, on the other side the aim to promote the grant of multi territorial licenses for online music.

More in details, regarding the improvement of governance and transparency (applicable to every CMO), from the recitals which introducing the Directive, it is possible to deduce that those principles revolve around a general principle of equity and non-discrimination, which has to be respected both when granting the licenses and when the members join the CMO. It is also stated that tariffs have to be determined depending on objective and non-discriminatory parameters and that licenses should be negotiated by management entity and users according to the good faith principle. It is also important to guarantee members an adequate participation in the entity, which consist both in the decision process and in the right to vote in the general board meeting, but even in the possibility to control how the entity is managed. To allow the control on the management, the Directive envisages an internal supervisory authority, the participation to which must be granted to the members<sup>232</sup>. Another important topic is the transparency of the collective management entity. In order to guarantee the transparency, the Directive envisages for the collective management entities the obligation to provide information about: the organizational structure, the way activities are managed, the statutes and politics regarding tariffs and operating expenses. There is even an obligation to provide annual reports on transparency and the usage of funds destined to social, cultural and educational services.

---

<sup>232</sup> See in this sense ( 22) to (24) of the Directive available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=IT> >>



Title II of the Directive, which is composed of five chapters and named “*Collective management entities*” represents the first of the two independent part the Directive is composed of.

In this title are stated the dispositions applicable to all the management societies in order to improve their operation.

Chapter 1 includes dispositions on the representation of right holders and on the participation to the collective management entities. Article 4 of this chapter, states two general principles:

- management entities must act on behalf of the right holders they represent
- management entities are not allowed to impose any obligation to the right holders, unless this is strictly necessary to manage their rights or interests

It is important to highlight how in this article there is no reference to the members of the entity, but only to the right holders; this states a necessity to extend the disposition also to the members of other collective management societies, whose rights are managed due to representation agreements<sup>233</sup>.

Article 5, which is dedicated to right holders’ rights, is the result of previous legislative interventions, in particular of the Recommendation of 2005. In fact clause 2 of the article states the right to freely choose the territory and elect the management organism to which entrust rights. The chosen entity must consent the management of rights, unless this activity is out of its scope or the entity provides objectively justified reasons to not agree. The possibility to choose for the right holders must not be influenced either by the nationality or by the country in which both the right holder and the chosen management entity are

---

<sup>233</sup> See In this sense RICCIO G. M. p. 176, , *Copyright collecting societies e regole di concorrenza. Un’indagine comparatistica*, 2012, Giappichelli. Concerning the proposal for a directive of 2012 and the fact that the article 4 looked different and in particular it provided a distinction between members and rightholders. The proposed article outlined that the collecting societies shall act in the interest of the members, while the prohibition to impose obligations not objectively necessary, was related to the rightholders in general.

established. Clause 4, to reaffirm this freedom, states the right to revoke an entity its rights, in order to entrust the same ones to another entity, provided a six month earlier notification.

The following clause 6 is about the members and states how they can participate in a collective management entity. The requirements to participate in those entities have to be in agreement with parameters of objectivity and transparency, being at the same time not discriminatory; moreover, those requirements have to result from the statute or, in general, they have to be publicly accessible. The entity is allowed to take position against a request for member subscription, as long as it is able to clearly explain the reasons understanding that choice<sup>234</sup>. The same clause, at the end, affirm the necessity to foresee adequate mechanisms to let the members participate to the decision process. The following articles contain detailed instructions, with particular regard to general assembly and supervisory activity, respectively articles 8 and 9.

The first topic is disciplined in detail, with provisions on frequency of convocation, assembly functions, scope of its decision power and finally, the article reaffirms the right for the members to participate and exercise their right to vote. It is important to highlight the request for a supervisory board, which represent an obligation for the collective management entity to build up an organism to monitor how the entity is managed; the article, at the end, states even for a fair and balanced representation of the different member categories.

---

<sup>234</sup> See In this sense RICCIO G. M. p. 176, , *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli. The formulation of the present article is pretty different from that one of the proposal for a directive in which it has been outlined that collecting societies may reject a request for membership based solely on objective criteria; A kind of formulation which may leave doubt about the interpretation, in particular the doubts concern the question if within such objective criteria could also include that of the anti- economy in the repertoires management.

In chapter 2, which concerns the revenues management, measures to be adopted in the following three areas are envisaged:

- about collecting and usage of the revenues, activities which have to be carried out diligently and using a separated accounting;
- in the field of deductions, which have to be determined transparently and reasonably linked to the service provided;
- about the distribution of the amounts collected, which has to be done rapidly, diligently and in line with the general policy stated by the member assembly.

Chapter 3 faces the topics of rights managed, deductions and payments in the framework of representative agreements. Even in this case there is a reference to diligence and accuracy criteria, with a particular attention to prevent discriminations both while determining tariffs and operative expenses and in the collecting and distribution of revenues.

Chapter 4 concerns the relationship with the users. Here is stated the good faith as the principle which both the collective management entities and the users must follow during the negotiations and the exchange of relevant information. There is finally a statement for granting conditions which have to be based on objective and not-discriminatory criteria.

To conclude, chapter 5 contains dispositions about transparency and communications, that represent central topics many times highlighted by the European Parliament and the Commission as issues to face for the harmonization and for a better operation of collective management entities, especially by a reduction of asymmetric information. This chapter states that collective management entities must provide the right holders and the other entities, in the framework of representation agreements, information regarding the amounts collected, the amounts paid, the deductions and the licenses granted (or, eventually, refused). On justified request of the interested subjects, the

management entities have to give information about the works protected they represent and about the territorial coverage.

The need for transparency has also resulted in two additional obligations: the public disclosure of some information<sup>235</sup>, which must be communicated by a continually updated website, and an annually transparency report, prepared each financial year and published on the website.

As it emerges even from the recitals, in fact, in order to enhance the trust of right holders, users and other collective management organisations in the management of rights by any collective management entity, this one should comply with specific transparency requirements. Each collective management organisation or its member being an entity responsible for attribution or payment of amounts due to right holders, should therefore provide certain information to individual right holders at least once a year, with particular regard to the amounts attributed or paid to them and the deductions made. Collective management organisations should also provide sufficient information, including financial information, to the other collective management organisations whose rights they manage under representation agreements.<sup>236</sup> Furthermore in order to ensure that right holders, other collective management organisations and users have access to information on the scope of activity of the organisation and the works or other subject-matter that it represents, a collective management organisation should provide information on those issues in response to a justified request. On the other side,

---

<sup>235</sup> Art. 21 of the Directive list the following information: the statute, the conditions for membership and for the withdrawal of rights management, the standard contracts for the licensing, the standard rates, the list of persons who manage the activity of the collecting society.

<sup>236</sup> See on this points (34) of the Directive: *“In order to enhance the trust of rightholders, users and other collective management organisations in the management of rights by collective management organisations, each collective management organisation should comply with specific transparency requirements. Each collective management organisation or its member being an entity responsible for attribution or payment of amounts due to rightholders should therefore be required to provide certain information to individual rightholders at least once a year, such as the amounts attributed or paid to them and the deductions made. Collective management organisations should also be required to provide sufficient information, including financial information, to the other collective management organisations whose rights they manage under representation agreements”*

any issue about which amount can be considered a reasonable fee to charge for this service, should be left to national law. Each collective management organisation should also make public information on its structure and on the way in which it carries out its activities, including its statutes and general policies on management fees, deductions and tariffs. At the end, to ensure provide the right holders the possibility to monitor and compare the respective performances of collective management organisations, such organisations should make public an annual transparency report comprising comparable audited financial information specific to their activities. Collective management organisations should also make public an annual special report, forming part of the annual transparency report, on the use of amounts dedicated to social, cultural and educational services. This Directive should not prevent a collective management organisation from publishing the information required by the annual transparency report in a single document, for example as part of its annual financial statements, or in separate reports.<sup>237</sup>

---

<sup>237</sup> See on this points (36) of the Directive: “ *In order to ensure that rightholders are in a position to monitor and compare the respective performances of collective management organisations, such organisations should make public an annual transparency report comprising comparable audited financial information specific to their activities. Collective management organisations should also make public an annual special report, forming part of the annual transparency report, on the use of amounts dedicated to social, cultural and educational services. This Directive should not prevent a collective management organisation from publishing the information required by the annual transparency report in a single document, for example as part of its annual financial statements, or in separate reports.*”

#### ***4. Multi-territorial licensing of online rights in musical works by collective management organisations***

The second scope of the Directive is represented by the multi-territorial licenses. This topic is characterized by a non conforming relationship between the Internet, a borderless phenomenon, and the European market for online musical services, that is still too fragmented, due to, among the other reasons, the difficulties in the collective management. Si rileva inoltre che il mercato unico digitale non è ancora pienamente funzionante e che la gestione collettiva del diritto d'autore su base territoriale rimane la norma nel campo della musica online. The situation, as it has been outlined, contrasts the increasing customers demand for an access to the digital content and its innovative services, beyond national borders<sup>238</sup>. The direct consequence of this situation is a need for a system of licenses granting for the rights related to the online musical works, which is able to adapt to the multi-territoriality of the Internet. This need represents an encouragement to the diffusion of multi-territorial licenses, as it has been already supported by the Recommendation 2005/737/CE.

In such a cross-border environment, it is essential to create the conditions to support this kind of licenses, establishing a set of rules in order to guarantee their efficacy and transparency. This set of rules mainly refers to the usage of databases for an accurate, fast and detailed elaboration of data related to musical works, right holders and rights which could be sublicensed by each collective management entity. Collective management organisations, from their side, have to foresee prevention measures to guarantee the accuracy and integrity of data, providing at the same time access to all the information needed to identify the

---

<sup>238</sup> See on this point (38) of the Directive : *“While the internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved. The complexity and difficulty associated with the collective management of rights in Europe has, in a number of cases, exacerbated the fragmentation of the European digital market for online music services. This situation is in stark contrast to the rapidly growing demand on the part of consumers for access to digital content and associated innovative services, including across national borders.”*

repertoire they are managing, for the potential users, the right holders and the other management organisations.<sup>239</sup>

The will to support the usage of multi territorial licenses clearly emerges from the recital n. 44, which states that collective management organisations which do not want to, or are not able to, grant directly these kind of licenses, should grant authority to manage their repertoire to other entities. At the same time, it is appropriate that the entities granting these licenses accept to represent the repertoires of those other entities which have decided to not doing it directly. To achieve this, the representation agreements to grant multi territorial licenses should not be concluded on an exclusive basis, in order to not limit the freedom to choice for the users and the other management entities.

Title III of the Directive represents the remaining autonomous set of rules, dedicated to multi territorial licenses granting for online musical services providers; these provisions, then, are applicable only to the collective management societies which deal with these services. The main news introduced by this set of rules are the following two: on one hand a *pan-European passport* for multi territorial licenses granting about online musical works; on the other, the *tag-on* regime.<sup>240</sup>

---

<sup>239</sup> Art 22, titled *Annual transparency report*, contains a clear reference to the annex with regard to the list of the information in details: the budget, a report on the activities, information on refusals to grant a licence a description of the organizational and governance structure of the organism information on any entities directly or indirectly owned or controlled, wholly or in part, by the collective management organization, information on the total amount of remuneration paid to the persons in the previous years, a special report on the use of any amounts deducted for the purposes of social, cultural and educational services, financial information on rights revenue, financial information on the cost of rights management and other services provided by the collective management organisation to rightholders, information on relationships with other collective management organisations. See in general the annex available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=IT> >>

<sup>240</sup> The definition of pan- European passport was used by the Commission in the Staff Working Document *Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-*

About the first scope, it affirmed that multi territorial licenses could not be granted by all the collective management organisations, but only by those who can be described as *pan-European*. This kind of collective management entities must comply with certain characteristics and meet certain requirements, especially on a technological level. These organisations must also have sufficient capacity to online deal the data required to grant, effectively and transparently, those licenses. All those requirements are stated by article 24, which in particular refers to the following capabilities for collective management organisations: to monitor the tracks usage, to accurately identify musical works and right holders, as well as to solve potential discrepancies between data they own and the ones owned by other management entities. Articles from 25 to 28, state that while carrying out their activities, the collective management organisations granting multi territorial licenses, must comply with: criteria of transparency, fairness and punctuality, with regard to information about their repertoires; the possibility, based on factual evidences, for the stakeholders to ask for the correction of these information; the control of right usage, as well as the billing and payment of amounts due to right holders.

The introduction of the *tag-on* regime gives to the entities which do not want to or are not able to meet the requirements expressed above, the possibility to conclude representation agreements with societies who meet those requirements; these agreements allow societies which do not meet the requirements to entrust their repertoire management to other entities, with the aim to grant multi territorial licenses. Article 29, finally, specifies that such agreements must not be exclusive and the agent has to manage the repertoire entrusted, in a non-discriminatory way.

As expressed by the Recommendation of 2005, the development of multi territorial licensing is important to build up a European single market for online

---

*territorial licensing of rights in musical works for online uses in the internal market*, 11 luglio 2012, SWD(2012) 204 final.



music services providing<sup>241</sup>; this is even more clear in the light of article 30 of the Directive, which obliges the agent entities to conclude a representation agreement when they grant multi territorial licenses for the same category of rights asked by the principal. That which could be considered an invasion of the free autonomy of collecting societies, it is instead justified by a double necessity: to guarantee the representation to those right holders joining an entity which does not grant multi territorial licenses and to protect minor organisations which would be put at the margins of the market, due to their lack of technical capabilities to deal with those kind of licenses<sup>242</sup>.

A need to support the access to multi territorial licenses emerges even by article 31, which allows right holders to take back the rights related to their online music works, in case the entities they were joining would have not, within April 10<sup>th</sup> 2017, started to grant multi territorial licenses or entered in a representation agreement with another multi territorial-licensing entity. The right holder can even take back just the rights entrusted for multi territorial licensing, without affecting the other rights, which he could manage on his own, or entrust to another entity. Finally, it is important to remember that the topic of multi territorial licenses is circumscribed to the rights related to online musical works; article 32, in fact, excludes from the scope, the rights on online musical works which are requested for radio and television programmes.

---

<sup>241</sup> See on this point (8) of the Commission Recommendation 2005/ 737/ EC “ *Supports the idea that a CRM should be free to provide commercial users based anywhere in the European Union with pan-European and multi-repertoire licences for online uses (including mobile telephony uses), on fair and individually negotiated terms and without discrimination between users; calls on the Commission to conduct an assessment of the impact of a global licence for online services and its effects on the economic and social situation of authors of vff.*”

<sup>242</sup> See in this regard RICCIO G. M. p. 197, *Copyright collecting societies e regole di concorrenza. Un'indagine comparatistica*, 2012, Giappichelli.

## ***5. Enforcement of the Directive***

In conclusion, Title IV of the Directive, entitled *Implementing* measures, deserves to be analysed. This Title, together with Titles I and II, contains provisions applicable to each collective management entity. This part, in article 33, states that management organisations must provide effective complaint procedures to their members and to the other management entities<sup>243</sup>.

Moreover collecting societies are allowed to foresee rapid, independent and impartial procedures to solve the disputes and this provision is even applicable to entities which grant multi territorial licenses (art. 34). About the disputes it is even affirmed that Member States must guarantee the possibility to present those before a court or another independent and impartial organism which is expert in intellectual property (art. 35).

About the topic of controls, articles 36 and 37 state that each Member State must designate a national competent authority, to monitor the compliance with obligations and dispositions of the Directive. This authority should have the power to impose sanctions and adopt appropriate measures in case of non-compliance with what has been stated in the Directive; then the authority should rapidly deal with any request for information and notify circumstances which are able to represent violations of the Directive (articles 36-37).

In article 38 the cooperation among competent national authorities and between those and the Commission, is foresight and supported, through exchanges of information and consultations, in order to monitor the situation and promote the development of multi territorial licenses.

In this framework, it is also affirmed how the provisions on enforcement measures should be without prejudice to the competencies of national independent public authorities established by the Member States pursuant to Directive 95/46/EC to monitor compliance with national provisions adopted in

---

<sup>243</sup> Especially, regarding the authorization to manage rights, their withdrawal or revocation, the conditions for membership etc.

implementation of that Directive.<sup>244</sup> In particular Member States should establish appropriate procedures by means of which it will be possible to monitor compliance by collective management organisations with this Directive. While it is not appropriate for this Directive to restrict the choice of Member States as to competent authorities, nor as regards the *ex-ante* or *ex-post* nature of the control over collective management organisations, it should be ensured that such authorities are capable of addressing in an effective and timely manner any concern that may arise in the application of this Directive. Member States should not be obliged to set up new competent authorities. Moreover, it should also be possible for members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify a competent authority in respect of activities or circumstances which, in their opinion, constitute a breach of law by collective management organisations and, where relevant, users. Member States should ensure that competent authorities have the power to impose sanctions or measures where provisions of national law implementing this Directive are not complied with. This Directive does not provide for specific types of sanctions or measures, provided that they are effective, proportionate and dissuasive. Such sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a collective management organisation or, in cases where an authorisation is issued for an organisation to operate, the withdrawal of such authorisation. This Directive should remain neutral as regards the prior authorisation and supervision regimes in the Member States, including a requirement for the representativeness of the collective management organisation, in so far as those regimes are compatible with Union law and do not create an obstacle to the full application of this Directive. It is necessary to

---

<sup>244</sup> See in this regard (53) of The Directive “*Provisions on enforcement measures should be without prejudice to the competencies of national independent public authorities established by the Member States pursuant to Directive 95/46/EC to monitor compliance with national provisions adopted in implementation of that Directive.*”

ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Collective management organisations should offer their members specific procedures for handling complaints. Those procedures should also be made available to other rightholders directly represented by the organisation and to other collective management organisations on whose behalf it manages rights under a representation agreement. Furthermore, Member States should be able to provide that disputes between collective management organisations, their members, rightholders or users as to the application of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure. In particular, the effectiveness of the rules on multi-territorial licensing of online rights in musical works could be undermined if disputes between collective management organisations and other parties were not resolved quickly and efficiently. As a result, it is appropriate to provide, without prejudice to the right of access to a tribunal, for the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts between, on the one hand, collective management organisations granting multi-territorial licences and, on the other, online service providers, rightholders or other collective management organisations. This Directive neither prescribes a specific manner in which such alternative dispute resolution should be organised, nor determines which body should carry it out, provided that its independence, impartiality and efficiency are guaranteed. Finally, it is also appropriate to require that Member States have independent, impartial and effective dispute resolution procedures, via bodies possessing expertise in intellectual property law or via courts, suitable for settling commercial disputes between collective management organisations and users on existing or proposed licensing conditions or on a breach of contract.<sup>245</sup>

---

<sup>245</sup> See note 37.

## 6. *Critical Analysis of the directive*

In the light of the analysis of the Directive, the previous analysis and the issues that concern the collective management companies, it is now appropriate outline future scenarios, both hoped by the directive and likely.

According to the main objectives of the Directive the first result should be a better functioning of the collective management market at European level, through the provisions on collecting societies governance, laid down in order to create a greater coordination between national legislations on the access to the collective rights management services.

Furthermore, the clear interest on the development of a multi-territorial licence system should lead towards a one more important result which consists in a closer approach essential for the creation of a European Internal Market regarding the exploitation of online music content.<sup>246</sup>

In summary form, according to the Directive the future scenario should be characterized by an overview of well- functioning and transparent collecting societies, in order to benefit the different subjects involved ( authors, collecting societies, users, rightholders), through an easier and free access to the collecting societies which could potentially handle rights in a more efficient way.

Furthermore it is expected a simplification in the on-line music market in favor of product and internet services suppliers, who will find easier to obtain licence in a context increasingly free from the narrow national boundaries<sup>247</sup>.

---

<sup>246</sup> However, it has been noted that the multi-territorial licensing system can actually help to develop the digital single market goal only if it can break the traditional licensing system based on bilateral agreements between collecting societies in monopoly position, ; See in this sense AREZZO E. (nt. 151), p. 92.

<sup>247</sup> This mechanism is described by various articles and analysis published following up the Directive. See in this regard <<http://www.marchiebrevettiweb.it/29-diritto-di-autore/2368-pubblicata-la-direttiva-europea-sulla-gestione-collettiva-dei-diritti-d-autore-e-dei-diritti-connessi.html>> and CIVITELLI C., *La Direttiva 2014/26/UE: verso un mercato unico digitale delle opere musicali e nuove regole per gli organismi di gestione collettiva dei diritti d'autore e dei diritti connessi*, available at <<<http://www.jei.it/approfondimenti/item/417-ladirettiva-2014-26-ue-verso-un-mercato-unico-digitale-delle-opere-musicali-e-nuove-regole-per-gli-organismi-di-gestione-collettiva-dei-diritti-d-autore-e-dei->

In this sense the freedom of rightholders to choose which organizations to entrust the management of their rights, the introduction of third parties subjects authorized to the administration of rights, as the independent management entity, contribute to connect collecting societies in the wider level of the European Internal Market.<sup>248</sup> From these pro competitive pressures results a unavoidable competition between a plurality of organizations, which as a natural positive effects led to a constant effort of the collecting societies in order to improve their standard of governance. However, the lack of explicit provisions about the development of a competitive context has to be read in the light of the numerous provision about transparency and governance, as if to underline that the main purposes are in general a better functioning of the collective management in both title of the Directive that of the collecting societies and that of the multi-territorial licence, taking into consideration competition as a possible tool. Not surprisingly the Communication from the Commission to the Council of 2004 states that in order to achieve a genuine Internal Market for both the off-line and on-line exploitation of intellectual property, more common ground on several features of collective management is required. This would safeguard its functioning throughout the Community and permit it to continue to represent a valuable option for the management of rights benefiting rightholders and users alike. Achieving more common ground on collective management should be guided by copyright principles and the needs of the Internal Market. It should result in more efficiency and transparency and a level playing field on certain features of collective management. Abstaining from any legislative action does not seem to be an option anymore. To rely on soft law, such as codes of conduct agreed upon by the market place, appears to be no appropriate option.<sup>249</sup> The

---

diritti-connessi.>> See also “Le società di gestione collettiva” available at *Guida al diritto d'autore* <<http://dirittodautore.it/>>

<sup>248</sup> See in this regard and related to the proposal for a directive RICCIO G. M. (nt. 67), p. 203

<sup>249</sup> See in this sense 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 (Text with EEA relevance) /\* COM/2004/0261 final \*/

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. Such an action would respect the subsidiarity and proportionality principles and would harmonise certain features of collective management. 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. This initiative have been subject to a public consultation, which has taken account of recent developments in the market and legislation of the present and the new Member States.

However these provisions, although directed to other purposes, may be object of a deeper reading able to identify their pro competitive pressures. These pressures show more clearly their intensity in two areas of intervention: in coming up beside traditional management bodies the independent entities, resulting in expansion of authorized entities to manage rights collectively, and in the freedom of choice of the rightholders.

Specifically, the freedom of choice acts as a clear index of the will to open up the market of collective management of rights, in the wake of the 2005 Recommendation and CISAC decision of 2008. This aspect of freedom of choice unfolds on three different levels: the choice of the subject to which entrust the management of rights (collecting societies, independent entity, individual management), the choice of the object and the choice of the Member States.

Secondly, the propension towards better competitive conditions comes to light in relation to the theme of transparency, constant reminder in the various interventions of the Community Institutions. In this regard the provisions about information obligations and about clearer administration mechanisms, pricing and distribution helps to provide clarity to all the parties involved. In this sense, from the rightholders point of view, it is equivalent to a greater comparability between the different offers which should encourage collecting societies to invest in efficiency in order to be more competitive <sup>250</sup>.

Others competitive implications can be found in relation to the specific theme of the multi-territorial licence, and in particular according to the article 31 of the Directive. The article states that where a collective management organisation does not grant or offer to grant multi-territorial licences for online rights in musical works or does not allow another collective management organisation to represent those rights for such purpose by 10 April 2017, rightholders who have authorised that collective management organisation to represent their online rights in musical works can withdraw from that collective management organisation the online rights in musical works for the purposes of multi-territorial licensing in respect of all territories without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing, so as to grant multi-territorial licences for their online rights in musical works themselves or through any other party they authorise or through any collective management organisation.

---

<sup>250</sup> See on this point and for further considerations about competitive pressures which indirectly arise from the directive PALMIERI A. (nt. 174), pp. 69 e ss



Once the rightholders have withdrawn their rights from the previous collecting societies, may individually manage them or through another collecting societies able to grant multi-territorial licences or even through a third party authorized entity; in this way, it emerges a wide competitive scenario within which pan-European collecting societies, rightholders, and independent entity compete.<sup>251</sup>

In the specific field of the multi-territorial licence other competitive repercussions are configurable in the fragmentation of the repertoires as a consequence of the legislative initiative according to which the right of withdrawal has been recognized to rightholders in relation to rights, categories of rights and types of works for territories of their choice (art. 5.4 and 31 of the Directive)<sup>252</sup>.

In this regard it is appropriate to consider the collective management market structure as a *two-sided market*<sup>253</sup> in relation to the two different but linked categories of subjects helped by the collecting societies: on the one hand users and consumers who represents the application for licenses, on the other hand the rightholders who represents the application for management services. The fragmentation of the repertoire has an impact on both, but is open to different reflections. Therefore, in the context of multi-territorial licences and online rights on musical works, it is appropriate to carry out a separate analysis; On the users' side it is useful to consider the case of online music service providers, namely those streaming or downloading platforms in the digital format. In this context, users according to The Directive could benefit of a type from a type of licenses which allows a cross-border exploitation of rights, missing at the same time the advantages related to the one-stop-shop system, offered by the traditional

---

<sup>251</sup> See in this regard. AREZZO E. (nt. 151), p. 90.

<sup>252</sup> See in this regard and about the fragmentation of repertoire AREZZO E. (nt. 151), pp. 93 e ss.

<sup>253</sup> Synthetically, it is defined in this terms a market in which companies supply two groups of consumers, in order to facilitate an interaction between them; In the context of collective management, a collecting society serves on one hand rights holders, by providing management services, on the other hand, users by granting licenses for the use of the works of their own repertoire.

collecting societies. Therefore, right holders could freely choose who entrust their rights for online use of their works, designating for example different collecting societies regardless of the area and consequently online music service providers to offer their service will have to consider a regroup of repertoire of their interest, applying for a certain number of licences. To handle this context in the more efficient way, and in order to simplify obtaining licenses the level of market transparency needs to be high. While on the right holders 'side it useful to understand the scope of the clause contained in the above mentioned article 5 and article 31 of The Directive which confer to them the faculty to withdraw their rights from a collecting to entrust them to a new one. According to this mechanism the underlying purpose may be that to overcome the exclusivity of the mandates, in order to reach a greater competition. However in addition to the dispositions mentioned above, the other dispositions of The Directive do not seem sufficient to achieve this purpose. The only disposition that explicitly asks for a non-exclusivity nature refers about agreements of representation between collecting societies ( article 29 of The Directive)<sup>254</sup>.

On closer inspection, even embracing a development of a competitive environment, the elimination of mandate exclusivity, trough that rightholders entitle a specific collecting societies to manage their rights, it's not in line with rightholders' interests for one important reason: A market in which all the collecting societies can yield to the same repertoires would ultimately favor a competition based on price and not on transparence and efficiency, at the same

---

<sup>254</sup> “Member States shall ensure that any representation agreement between collective management organisations whereby a collective management organisation mandates another collective management organisation to grant multi-territorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature. The mandated collective management organisation shall manage those online rights on a non-discriminatory basis. The mandating collective management organisation shall inform its members of the main terms of the agreement, including its duration and the costs of the services provided by the mandated collective management organisation. 3. The mandated collective management organisation shall inform the mandating collective management organisation of the main terms according to which the latter's online rights are to be licensed, including the nature of the exploitation, all provisions which relate to or affect the licence fee, the duration of the licence, the accounting periods and the territories covered.”

time an advantage for users and a disadvantage for rightholders and authors in terms of decrease in revenue.<sup>255</sup>

Furthermore from a competitive point of view, the analysis conducted in this dissertation, rough out an overview in which collecting societies compete among themselves already in the collection of mandates for the management of online rights, outlined a competition based essentially on repertoires. Nevertheless it is important to consider the disparity of musical repertoire, meant in the sense of greater or less appealing. It is clear that the pan-European body that will hold the most attractive repertoires will obtain a better position within the market. Thus, the expected scenario in the medium - long term, could be the emergence of new monopolies, or a kind of oligopolistic scenario in which the scene is dominated by those few pan-European entities which manage to obtain the most popular repertoires.<sup>256</sup> The development of *de facto* monopolies is a peculiar attitude of national markets, it occurs now to transfer this trend to an European level, with unknown consequences on minor repertoires or niche repertoires, and therefore on the protection of cultural diversity: in this sense the large pan-European collecting will try to concentrate in its own hands the most appetizing repertoires on the other hand less popular ones will continue to be managed by smaller or niche collecting societies, which may not have the instruments or authorities to release multi-territorial licenses. However, this problem could be avoided obliging the collecting societies which makes such request to stipulate a representation agreement through which granting such licenses.

---

<sup>255</sup> An additional conflicting situation with the interests of the rights holders was also suggested, based on a possible expectation of an obligation for the right holders to grant their rights to any pan-European collecting societies that makes a similar request; This circumstance it would be contrary to the disposition laid down by the Directive: if it is true that the holders themselves have the freedom to rely on a management company of their choice, that freedom would be affected by a situation in which right holders are obliged to rely on certain collecting societies. See in this sense AREZZO E. (nt. 151), p. 97

<sup>256</sup> See in this regard GUIBAULT L., VAN GOMPEL S., *Collective management in the European Union*, in GERVAIS D. (a cura di), *Collective management of copyright and related rights*, Kluwer Law International, The Netherlands, 2010, p. 160 e ss.

In addition to the fragmentation of the repertoires it should be considered also fragmentation of rights, intending for fragmentation the division of rights into online and offline music, the consequences of which would also contribute to the scenario just outlined. Referring to Article 31 of the Directive, it has been noticed that rightholders have the chance to unpack their own rights among several collecting societies: for example, a holder may leave the offline rights for a musical opera care of his own collecting society and withdraw online rights only to entrust them to another one that grants multi-territorial licenses. Therefore to the national collecting societies would remain to manage mostly offline rights, confirming the hypothesized fragmentation of the repertoires with a consequent possible gap between paneuropean- national – and smaller collecting societies, a gap which will increase over time.<sup>257</sup>

---

<sup>257</sup> In addition to this gap, a critical aspect of the fragmentation of rights has also been highlighted: often online markets are linked to the corresponding offline markets by interrelationships (*i.e.* via radio-market-offline transmission and Broadcasting it over the Internet - online market). It means that what happens in a market has repercussions on the other; Therefore unpacking such rights, breaks the bond, and causes negative effects in terms of efficiency of the management of rights. In this sense SARTI D. (nt. 64), p. 6

## CHAPTER 4: DIRECTIVE 2014/26/UE NEW PERSPECTIVES FOR THE DIGITAL EUROPEAN SINGLE MARKET

### 1. *Competitive alternative models*

To complete the work, and for a better understanding of the market-oriented directive, it seems appropriate to review the reasons which, from the economic point of view, justify the collective management of copyright.

As already widely outlined in the previous chapters, collective management of copyright was promoted as an effective way for authors and rightsholders such as performers, publishers and producers to monitor and, in some cases, verify certain uses of their works that would be otherwise individually unmanageable due to the large number of worldwide users or due to the development of new technologies. In this perspective collective management allows authors to use the power of collective bargaining to obtain more for the use of their work and negotiate on a less unbalanced basis with large multinational user groups.<sup>258</sup> In collective bargaining it is reflected the market power. It is defined as the “ability of a seller or buyer to affect the price of a good”<sup>259</sup>. The exercise of this power can affect both: right-holders and users. On the one hand, the bargaining power can be exercised by the collecting society when it represents authors as a community. Thus, collecting societies act as a pressure group influencing the law making process. On the other hand, the bargaining power can be exercised by offering blanket licenses. In this case the extent of the repertory is fundamental, because greater is the repertory, greater the bargaining power will be. This type of offer strengthens the position to negotiate by the collecting society with

---

<sup>258</sup> See on this point Daniel J Gervais, Alana Maurushat *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, Canadian Journal of Law & Technology, 2003

<sup>259</sup> See in this regard PINDYCK, R., and RUBINFELD, D., *Microeconomics, 6th ed.*, Upper Saddle River, New Jersey, Pearson Education Inc. - Prentice Hall, 2005, p. 669.

benefits for the user who will economize having also less risks to access directly the repertory with greater incentives to contract directly with the collecting society. In this way the economic function of collecting societies has been mainly treated as a way to lower transaction costs.

In this sense, according to the economics literature of copyright, the economic function of collecting societies has been mainly treated as a way to cut down transaction costs.<sup>260</sup> Without such entities, it would be impossible, or at least not economically advantageous for the authors to manage and mediate, while for users, similar difficulties would be encountered in attempting to obtain licenses for the use of copyrighted works. Collecting societies satisfy to this complexity, ensuring that centralized agents acting in the name and on behalf of authors and other rights holders may have direct contractual relationships and thus benefits with those who exploit the works themselves.

Moreover, the cost to detect individual users and any violation would be extremely complex in the absence of a network of authorities responsible for carrying out control activities and in any case overly expensive for individual rights holders. Moreover, as has already argued in the doctrine, the single negotiation between rights holders and users would result inefficient especially, for non-widespread works, where transaction costs would generally exceed the possible economic benefits.

It should then be considered this kind of collecting societies generate economies of scale in copyright management, since they globally manage copyrights by covering the entire artists repertoire or other rights holders, for identical licenses and forms of use. In this way they can amortize the high transaction costs that would render individual rights management uneconomic. Prima facie it seems then preferable a centralized and collective management of rights.

---

<sup>260</sup> See in this sense C. Handke – R.Towse, *Economics of Copyright Collecting Societies*, in 38 Int. Rev. Of Intell. Prop. and Competition Law, 937 (2007)

We can infact affirm that the benefits of collective management theoretically become, also a benefit to both final users and those who purchase licensed blanket reducing their transaction costs.

Management costs also represent an inverse function compared to the number of registered right-holders and protected works, where the increase in subscribers will decrease management costs

$$C(i) = k \cdot h$$

Where (C) indicates the production costs, (i) indicates the number of members of the collecting society, (k) a positive constant, and (h) the flexibility of the costs. This situation is included by the doctrine amongst the reasons that suggest that collecting societies represent natural monopolies. In this context to the collecting societies is recognized egalitarian functions between the rights holders, without denying, that the cost for the administration of less value rights is obviously greater than the administration of higher - value rights, creating diseconomies scale which, while favoring weak subjects, sacrifices the strong ones.

In order to avoid that those belonging to the first category from being deprived of collective management, the trend is that the monopoly is legal obliging them to record all those requesting it. Such a solution would have the effect of protecting cultural diversity and artists with little commercial feedback so as to be one of the main arguments affirming the legitimacy of existing monopolies, especially in those systems where an exclusivity is expressly recognized by law.

Actually, such arguments find their reason to be in logic reasons and they refer to the fact that the Intellectual Property has been regulated differently depending on the legal system, though mainly through copyright and author's rights (*droit d'auteur*).<sup>261</sup>

---

<sup>261</sup> See generally Riccio G.M., *Copyright collecting societies e regole di concorrenza*, Giappichelli, 2012, at 70

This distinction and missing a unified definition at international level flows into the conception of collecting societies adopted in different legal systems could be an important reading key to understand why these societies work in a different way in each national legal ordering and therefore their regulation and their functions vary from country to country. For instance, in author's rights systems<sup>262</sup>, two main functions of copyright collecting societies are the development of activities that help creation, encourage live entertainment and promote artists' formation, namely the cultural function, representation of authors as a professional community<sup>263</sup>, and the social function.

In copyright systems, these functions have a minor importance and in some legal orderings they simply do not exist. However the economic function of collecting societies is an element in which both legal systems are converging. On the basis of this analysis, it is possible to affirm that features of the services provided by the intermediaries, given the high fixed costs and the variable cost content, encourages creation of a monopoly situation, which is often referred to as a natural monopoly. Another aspect to consider is that the expansion of the repertoire covered by collecting societies significantly impacts on costs and further explains how to set up and justify the natural monopoly. Despite natural trend to the formation of a natural monopoly, the legislator has several options to determine, on the one hand, whether to make the monopoly legally legitimate or to allow the exercise of revenue collection activities by issuing one or more authorizations, on the other hand, to calibrate level of regulation necessary to protect interests other than those represented by the monopolist. The continental

---

<sup>262</sup> See on this point LUCAS, A and LUCAS H-J. *Traité de la propriété littéraire et artistique*, 3<sup>rd</sup> edition, ed. LexisNexis, Litec, (2006), p. 557. POUILLAUD-DULIAN, F. *Le droit d'auteur*, ed. Economica, (2005), p. 683. CARON, CH. *Droit d'auteur et droits voisins*, ed. Litec, (2006), p. 368

<sup>263</sup> For instance, in the section relating to collecting societies, the French Intellectual Property Code in article L. 321-9 provides: " Ces sociétés utilisent à des actions d'aide à la création, à la diffusion du spectacle vivant et à des actions de formation des artistes : 1o 25% des sommes provenant de la rémunération pour copie privée ; 2o La totalité des sommes perçues en application des articles... ”.



tradition joins the original mission of management companies, the reduction of transaction costs in the market of the use of authorships, to goals of a solidarity and the promotion of national culture. Costs are supported through the sale of licenses for the exploitation of rights related to works by national and foreign authors and result in services provided through social security funds or funding of cultural activities for the benefit of the national cultural industry.

It is also possible the diversification of regulatory and organizational models in the sector. Observing the period prior the Directive relative to the legal monopolies of countries such as Italy, the Netherlands and Denmark, there are normative context where "only" a single collecting society (Switzerland) or a *favor* expressed by the creation of a semi-legal monopoly regime by the grant of a single authorization (Spain), which justifies, greater screening of the public authorities (Germany). In France, the Copyright Collecting Society (CCS) submits to the Government its statute and may be authorized unless the Ministry of Culture opposes it; This has allowed the creation of a number of companies active in the industry. State authorization represents a compromise between legal monopoly sanctioned by some national laws and the most open market model, which finds expression in the UK.

Theoretically, each of the two main models through which the legislator acts (legal monopoly and free competition regime) has its own advantages and disadvantages. First of all, as Christian Handke and Ruth Towse point out, the existence of a single provider of management services of a certain Copyright package gives benefits to the company as long as the firms refrain from leveraging their monopolistic position to raise prices and tolerate inefficiencies in their internal organization usually. Furthermore the centralized management of copyright services may appear to the legislator as the best way to generate economies of scale and facilitate understanding between demand and offer. In this context the legal monopoly is supported by more strict regulation in order to avoid abusing the recognized position. However, the corporative soul which

permeates this model inevitably lower the standards due lack of motivations that only a competitive scenario may guarantee and may suggests a model bound to fail in self-referentiality which forget its first *mission* as a system which defends the authors' interests and act as intermediary between them and the demand for the use of protected works. On the other hand there are reasons to think that interposing between multiple subjects between authors and the demand of protected works can lead to higher transaction and agency costs.

The pluralistic model may, on the contrary, be preferred by those who consider competition, even potential, and useful motivation to the improvement of their performance and efficiency. In this sense some argue that, actually, public intervention may be unfit for such a dynamic market like the one in question.

According to Robert Merges, legislation and jurisprudence are essentially inferior to industry in shaping its own copyright marketing system for the marketing of copyright and the CCS grown spontaneously demonstrate the ability of industry to adopt its own solutions based on property rights, the ability to adapt to everyday needs and new technologies is a determining factor for an efficient management of the copyright marketing.

Among other profiles to be considered in evaluating the efficiency of the models adopted are the territorial coverage of the collecting societies. In the case does not exist a monopolistic regime *ex lege*, it happens then the possibility for any collecting societies, created after the first one, tend to place themselves in other sectors, avoiding forms of competition that would have high transaction costs and prefer to specialize on different types of protected rights. . This scheme, for example, is the one adopted by the English legal system, where some small societies, such as PRS, live together with niche sectors. An additional benefit of the monopolistic collective management of copyright and related rights, if viewed from the perspective of the users, is the ability to easily and quite safely locate rightholders. Often, it is not easy to identify all those who have the right,

which is the reason why, in the case of individual negotiations, there is a high risk of entering into licensing agreements with non-holders and not with all subjects that may have copyright rights.

In this context the analysis of the Directive shows that the European Commission does not prevent expressly a Member State to recognize to a specific subject the exclusivity in the way that the legal monopoly regime can also coexist with the liberalization of cross-border services offered. Instead, it is a prerogative of the national legislator to consider the opportunity to maintain a legal reserve. Actually it means that it is entrusted to the Member State to choose whether to allow only foreign providers to erode the Italian market by offering better services at lower rates, or give this opportunity to Italian collecting societies.

According to Handke and Towse, there is no economic justification to limit the size of the Collecting Societies to the size of the national market. Where copyright law would be cross-border, say in the EU, a larger CSS should provide a more efficient solution.

This solution would not prevent from what has been so far analyzed that due to the market structure, with high fixed costs and variable low costs, the competitive model would lead to the specialization of the various collecting societies and to the creation of dominant positions or *de facto* monopolies. Although it is possible to prohibit the formation of competing companies with the national public monopoly, the European Commission is in favor of an open market subject to European Union competition rules to which also national monopoly has to comply.<sup>264</sup> It follows the opportunities of copyrighted works and for authors to choose which collecting societies entrust. However the current trend which followed the adoption of the Directive seems to push for the repeal of existing monopolies and an enlargement of the workability beyond traditional

---

<sup>264</sup> See on this point the Directive 2014/ 26 / UE and its recitals for an overview of the specific European Commission point of view

national limits. This kind of approach is more adequate in those systems - such as England - where there are no legislative limits to market opening and also to a system moving to competition, at least in oligopolistic terms.

### ***1.1 Monopolies and Possible solutions of Inefficiencies***

From the analysis of the previous paragraph emerges that from a Law and Economics perspective we can recognize some “classical” issues adduced to justify the subsistence of monopolistic positions (legal or natural) in collecting societies system:

- Collecting societies guarantee economical efficiency due to a centralized copyright management<sup>265</sup> On the other hand, individual management may be difficult or non-economical sustainable. Without these bodies individual management and intermediation would in fact be impossible (or not economically advantageous) for authors. At the same time, complications may be hit on attempting to obtain individual licenses. CCs ensure that "centralized" subjects - acting in the name and on behalf of authors and other rightholders - can have the direct contractual relationship (and, therefore, benefit schemes) with those who exploit the works.
- Another aspect is represented by the wide range of rights recognized by the legislation on copyright and the connected problem of managing with potential users a unified and comprehensive coverage of various rights. The situation is even more complex considering that authors' individual rights are independent from each other (and, therefore, in theory capable of separate and free acts of disposition) and that required licenses may change according to the type of transmission or distribution used, and also depending on the considered geographic market. Likewise, individual negotiation between rightholders and users would be inefficient especially for works not widely distributed, where transaction

---

<sup>265</sup> See in this sense HANDKE, C. – TOWSE, R. (2007), Economics of Copyright Collecting Societies, 38 *Int. Rev. of Intell. Prop. and Competition Law*, 937.

costs generally exceed the potential economic benefits<sup>266</sup>.

- Another important aspect is that CCSs work only in one nation or in a well defined territorial context, where competition is not allowed. In fact, when there is no “ex lege” monopoly, any CCSs born after the first one tend to place oneself in other areas, avoiding any form of competition (and also high transaction costs), preferring to specialize in different – often “niche” - protected rights areas (like in the English system).
- Monopoly also avoids risks connected to copyright management that involves both rightholders and users<sup>267</sup>. Without collective management in fact they have to face risk linked to two main information asymmetries. First of all the market’s lack of knowledge and the elasticity of demand, intended as the variation in demand from the users of a product (in this case, of a protected work) in case of percentage variation of the product’s price<sup>268</sup>. The second asymmetry is represented by parties’ knowledge (e.g. the users), and the bargaining power, which penalizes rightholders compared to bodies such as radios, televisions, record labels, whose market position has strengthened over the time. Finally, the last is the relative risk of non-payment of royalties and the individual inability to

---

<sup>266</sup> See on this point HOLLANDER, A. (1984), Market Structure and Performance in Intellectual Property: The Case of Copyright Collectives, 2 *Intern. J. of Industrial Organization*, 199.

<sup>267</sup> See in this sense PÉREZ GÓMEZ TÉTREL, A.M. (2007), Efficient Allocation of Risk as an Economic Function of Collecting Societies, *Society for Economic Research on Copyright Issues. Annual Congress*, Berlin, 12 and 13 July 2007, 3; KATZ, A. (2005), The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights, in *Journal of Competition Law & Economics*, 541.

<sup>268</sup> See generally WALRAS, L. (1926), *Elements d’économie politique pure ou Théorie de la richesse sociale*, Lousanne.

monitor efficiently their works (e.g. infringements). The greatest risk for users is also going through individual negotiation with authors. It is evident that they tend to overestimate their position and commercial value of their work, due to the lack of market knowledge in which they operate<sup>269</sup>.

- A final advantage of collective and monopolistic management, is the competence to simply identify rightholders, avoiding risk of entering in agreements with wrong subjects.

For these reasons it seems difficult to overcome the dogma of a centralized collective management. On the other hand, the most outstanding inefficiencies that come out from the analysis of monopolistic positions concern the role of management and administration costs of collecting societies. This is a remarkable profile, which should be not only a starting point in any study on the topic, but also a good test practical conclusions.<sup>270</sup>

The incomes that companies distribute to their members may be summarized in general with the following formula:

$$\mathbf{R} = \mathbf{P} - \mathbf{C} - \mathbf{F}$$

where **R** is the total value of the proceeds collected from the exploitation of repertoire's works, **P** is the total amount distributed to CCS' members, **C** are the costs, **F** the funds distributed for cultural and social activities.

In this formula we must consider two more aspects: their membership size (indicated by **M**) - which is a variable that can impact both positively and

---

<sup>269</sup> See on this point GREFFE, X. (2002), *Arts and Artists from an Economic Perspective*, Paris, p. 99, who describes artist as «isolated persons (in relation with the market), know really bad the possibilities of the enhanced value in the future of their works».

<sup>270</sup> See in this sense the analysis of Italian Case *SIAE* conducted by Riccio G.M., *Copyright collecting societies e regole di concorrenza*, Giappicchelli, 2012, at 83 ss.

negatively with R, depending on the actual capacity of these subjects to generate income - and the number of employees of the collecting societies (indicated by E)<sup>271</sup>. Furthermore, it should be noted that M (in a general sense, but also understood as individual members' bargaining power) is a variable with direct impact on C.

However the Law and Economics literature has proposed three solutions to solve potential monopolies inefficiencies in copyright and connected rights management market:

a) **Legislative control.** Through the first model, it is possible to check royalties paid to rightholders, which can be fixed by law or subject to a next judicial review in order to assess any abuses in the distribution of collected proceeds. Examples for this model can be found: a) in the contract obligations (e.g. obligation to register all rightholders who make a request, like in SIAE. model); b) setting obligation to guarantee equal treatment to all members; c) users' licences supervision made by higher authorities, in order to prevent any abuse (e.g. Intellectual Property Office and Copyright Tribunal control on the licenses issued by British CCSs).

b) **Bilateral Monopoly.** The bilateral monopoly is achieved when one CCS counterpart is represented by another CCS or by any other body which manages copyright collectively. This is what happened in Italy, with IMAIE - the body that represents the actors and performers - and SIAE, or the same situation occurred in the past in United Kingdom with the links between BBC and PRS. In these cases, CCS' strength is balanced by the bargaining power of the other party, who is able to strive for profit and utility maximization (also for its members), radically reducing the problem of asymmetric information. Another

---

<sup>271</sup> See on this point ROCHELANDET, F. (2003), Are Copyright Collecting Societies Efficient Organisation? An Evaluation of Collective Administration of Copyright in Europe, in *The Economics of Copyright. Developments in Research and Analysis*, W.J. Gordon – R. Watt (eds.), Cheltenham, UK – Northampton, MA, USA, 182.



example are, of the agreements concluded at the international level by individual collecting societies belonging to CISAC or BIEM, theoretical in a position of equality between them: there are no agreements negotiated between individual companies, but also understanding imposed by the bodies which they belong to, that determine the problem of uncompetition restrictive agreements between CCSs or a strong supervision carried out by international bodies.

c) **Price Discrimination.** Some scholars suggest to implement price discrimination with the purpose to mitigate monopoly negative effects. Some indicators are commonly adopted by the European CCSs (mainly referred to clubs), like licensing costs parameterized on room size or on the turnout. Price discrimination has another variant. Users of protected works are maybe different interest carriers: some economists argue the need for market-sharing mechanism using a pay-per-use basis, taking into account the capacity assets and interest of potential users, dividing them into different categories. Another solution would be separated marketing of “repertoires packages”, instead of a single license which covers all the CCSs’ repertoire (e.g. licenses designed for individual authors or dedicated to a clear musical genre). Carrying out a competitive logic will open the market door to new players, offering different repertoires (with artists often less known than those protected by big CCSs) and cheaper licensing costs. Finally the absence of monopoly should also enable consumers to benefit indirectly of the decrease in copyrighted works prices.

## ***1.2 Monopoly is a overcome dogma ?***

The assumptions analyzed so far relative to the need for collective bargaining and brokerage by the collecting societies are currently subject rethinking especially after the introduction of new computerized control tools on the exploitation of works, referred in particular, to Digital Rights Management, those tools which, in an all-encompassing way and without considering the specific features, allow to detect and trace even at distance protected works. The progress of Information Technology therefore requires new challenges to the industry and puts into question the assumption that collective copyright management is based on, namely market failure due to the high transaction costs. Information management confirms every day ambivalent effect that Besen and Kirby had observed in 1989. On the one hand, new ICT tools multiply the way in which protected works are used (so as to make it even easier for copyright infringements), meanwhile providing the opportunity to gather more informations and reduce transaction costs encouraging agreement between demand and offer. The potential of Digital Right Management has been explored by several authors. In a recent essay, Jehoram<sup>272</sup> emphasizes the disruptive effect of the new information tools, capable of reallocating the author of copyright management and challenging collective rights management. In Italy for example, the changed scenario within which the collective administration market has been introduced it was used by AGCM, in an opinion on implementation Of the Directive in Italy, as a argument for a competitive turn in the collective management of rights.<sup>273</sup>

The Authority notes that in an economic context characterized by big technological changes, the failure to open up the national rights management

---

<sup>272</sup> See in this sense Eberhard Becker, Willms Buhse, Dirk Günnewig, Niels Rump *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, 2003

<sup>273</sup> See in this sense << <http://www.agcm.it/component/joomdoc/allegati-news/AS1281.pdf/download.html>>>

market limits operator freedom of economic initiative and freedom of choice for users,

However the current position according to the Directive, the Commission's position over the years, as well as the economic and juridical literature on this subject, the debate between solidarist instances and free market criteria could probably be solved through a third way represented by private freedom tempered by a public authority, supervision, or through a pan-european Monopoly if properly regulated.

In fact, the market opening process may increase majors' commercial power, that could manage bigger and enormous musical repertoires, increasing also their own contractual power, passing from a "collecting societies monopoly" to a "major right owners monopoly". The other risk is connected to the possibility that the gap between small and big CCSs could become greater. Under the terms of competition, there is a further risk. The large collecting societies, may impose exclusive contracts to individual users, in order to let them use only their own repertoires. Finally, the market globalization encourages and facilitates the creation of dominant market positions, reducing fixed costs associated with establishment and management of any branch offices, and allowing also from remote the pursuit of certain activities. On the other hand, following the experience of some European countries (*i.e* United Kingdom), liberalization does not necessarily determine the erasing of small collecting societies by the bigger ones. On the contrary, the competition between various collecting societies develops technical specialization or, in copyright market case, probably a specialization in specific work sectors, often neglected by big operators (because considered not profitable<sup>274</sup>). The Directive, breaking down national boundaries and opening the market, may be also prejudicial to medium-sized companies, in

---

<sup>274</sup> On the contrary Other scholars argue that «the numbers and the duties of societies must be dramatically reduced per country, with no more than one per right, per type of work, and preferably with one per type of work». PATRY, W. (2012), How to fix Copyright, 182.

which management inefficiencies are more widespread. The opposite result should induce CCSs to have to deal with the logic of competition, improving their administration and reducing costs. Finally, another important aspect is connected to the possibility that the liberalization could be circumvented at the national level when it is object of transposition by the member states, for example imposing certain law standards for CCSs. Coming back to the Italian frame for example, the Government has made public the draft on “Minimal requirements necessary for a correct development of secondary rights connected to copyright intermediaries market”. Reading the text of the proposal we can recognize positive elements (like the provision of a minimum number of employees, as in the Portuguese experience) but, on the other hand, the choice of imposing a minimum financial estate, that could penalize new operators who are trying to access in the market, is rather perplexing. Following this example, the risk also for the other European countries, will be to follow an “incomplete” liberalization, “changing” the already existing legal frames, with a formal (and not sub-stantial) transposition.

## ***2. The future scenario in the Digital single Market perspective***

The creation of the EU Digital Single Market is a policy objective rooted in the ‘Digital Agenda for Europe’, an initiative that the European Commission launched and defined in May 2010.<sup>275</sup> The Digital Agenda aims at delivering sustainable economic and social benefits from a digital single market based on fast and ultra-fast internet and interoperable applications, thus implementing one of the seven flagship initiatives included in the EUROPE 2020 Strategy (COM/2010/2020). The Agenda comprises seven pillars and 101 actions. In particular, Pillar I of the Agenda contains 21 actions with the goal of creating a digital single market by removing all barriers that might hamper the free flow of online services and entertainment across member state borders, thus fostering a European market for online content, establishing a single area for online payments and protecting EU consumers in cyberspace. On 18 December 2012, the European Commission published a ‘to-do’ list, disclosing new digital priorities for 2013-14. Priority number 5 aims at updating the EU's copyright framework, which is considered a key issue to achieve the goal of a Digital Single Market.<sup>276</sup> The Commission is currently working on this action plan by developing two parallel tracks of action. The first track concerns the efforts undertaken to review and modernise EU copyright legislation, whose most tangible results to date have been the 2012 Orphan Works Directive<sup>277</sup> and the

---

<sup>275</sup> See in this regard the “Digital Agenda for Europe” website <<http://ec.europa.eu/digital-agenda/digital-agenda-europe>> . See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Agenda for Europe”, COM(2010) 245 final, 19 May 2010

<sup>276</sup> See generally Communication from the Commission on Content in the Digital Single Market, COM(2012)789 final, 18 December 2012 [hereinafter Content in the Digital Single Market] <<[http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/121218\\_communication-online-content\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/121218_communication-online-content_en.pdf)>> .

<sup>277</sup> See in this regard Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012, [hereinafter Orphan Works Directive].

proposal on collective rights management.<sup>278</sup> The second track is the creation of a multi-stakeholder platform ('Licences for Europe') that should help develop industry-led solutions to a number of issues for which rapid progress seems necessary and possible without legislative changes. Interestingly, Michel Barnier, European Commissioner for the Internal Market, announced the launch of this initiative in the course of delivering the keynote speech at the inaugural event of the CEPS Task Force on Copyright in the EU Digital Single Market on 7 November 2012.<sup>279</sup>

As regards the first track, since 2011 the Commission has been reflecting on how to create a Single Market for intellectual property rights in order to boost creativity and innovation.<sup>280</sup> Unification of legislation through a regulation is certainly the best option for single markets to materialise and to develop fully in the various sectors. Unification seems also an irreversible trend at EU level after the entry into force of the Lisbon Treaty, which facilitates the creation of unitary intellectual property rights.<sup>281</sup> For several reasons, however, the EU has a long way to go before it can establish a unified legal framework in the field of copyright. The fact that copyright is the only field in the domain of intellectual property where a unification process has not yet started (and is unlikely to start in

---

<sup>278</sup> Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, COM(2012) 372 final, 11 July 2012 [hereinafter Proposal on Collective Management] <[http://ec.europa.eu/internal\\_market/copyright/docs/management/com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf)>

<sup>279</sup> See on this point M. Barnier (2012), "Making European Copyright Fit for Purpose in the Age of Internet", Speech 12/785, Centre for European Policy Studies, Brussels, 7 November <[http://europa.eu/rapid/press-release\\_SPEECH-12-785\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_SPEECH-12-785_en.htm?locale=EN)>

<sup>280</sup> See in this regard Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, European Commission, "A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe", COM(2011) 287 final Brussels, 24 May 2011 [hereinafter A Single Market for Intellectual Property Rights] <[http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)>

<sup>281</sup> See Article 118 TFEU.

the near future) is not coincidental. EU policy-makers are still reflecting whether copyright should be modernised through harmonisation (i.e. a comprehensive codification of the present body of EU copyright Directives) or unification measures (i.e. the creation of a unified legal framework granting uniform pan-European entitlements that could either supersede or co-exist with national titles). According to the Commission, a higher degree of harmonisation of national rules might be pursued through the adoption of a ‘European Copyright Code’.<sup>282</sup> Such a codification effort would help to consolidate the existing EU copyright entitlements and would finally give EU law-makers the possibility of updating and harmonising the field of copyright exceptions and of adapting the existing enforcement rules to the digital environment with the aim to ensure a fair balance with other fundamental rights. As far as the second track of action is concerned, ‘Licences for Europe’ was launched in January 2013 and has developed four work packages, namely cross-border access and portability of services, user-generated content and licenses for small-scale users of protected material, audio-visual work and film heritage institutions and text- and data- mining.<sup>283</sup> The stakeholder dialogue is being developed through closed-door meetings where enterprises from the creative industries, licensing bodies, commercial and non-commercial users of protected content and Internet end-user representatives are exploring and testing innovative licensing solutions enabled by new technologies. The purpose of the whole exercise is to identify short-term, pragmatic solutions, where possible, but also to explore the limits of licensing in the selected areas. Even though the outcome of this initiative is still uncertain, a dialogue among stakeholders and the formulation of concrete proposals might place the European Commission in a better position to assess which goals can be realistically pursued through industry-led solutions and, conversely, which policy objectives will require public policy action. In This context spite of the national

---

<sup>282</sup> See European Commission (2011a), A Single Market for Intellectual Property Rights, p. 11.

<sup>283</sup> See the ‘Licences for Europe’ website <[http://ec.europa.eu/internal\\_market/copyright/licensing-europe/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm).>

and territorial dimension of copyright entitlements in the European Union, in recent years the European Commission has been seeking to foster the development, growth and functioning of EU-wide markets for digital content. The Internal Market Directorate General of the Commission is convinced that there is wide room for multi-territorial (and possibly EU-wide) licensing of rights that might reflect the natural cross-border reality of the Internet and of In this context the Digital Single Market is based on the elimination of national barriers between Member States for on-line transaction, in order to increase economic prosperity and contribute to an even closer union among the people of Europe. This goal has further evolved into the idea of Internal Market, which does not possess a precise economic or legal definition, it is a process rather than an event represented by an area with no internal frontiers in which freedom in all aspects is ensured. According to this framework, the Digital Single Market shows its productive potential to improve access to information, efficiency in terms of reduced transaction costs, dematerialized consumption and reduced environmental impact, as well as introducing better business and administrative model. In this context, copyright is subject of continuous reflection, due to the new opportunities offered by technology and new models with which digital content is distributed and used. Urges then a need to verify the adequacy of existing legislation to the new technological reality and to clarify the boundaries of exclusive rights which, in the digital universe, concern artistic and literary creations And even technologies, such as computer programs and 'intelligent' information collections (databases). It is important then to ensure effectiveness to the rights and prerogatives traditionally intended to reward and remunerate the intellectual work of authors and encourage the investments of those who make the fruit of such work available to the public . In short, the purpose to achieve is: the balance of interests: to widen as far as possible access to knowledge and information in an increasingly interconnected society via the Internet and social networks; and the interest that such access and the consequent use of intellectual works will develop in ways and forms that encourage and reward creativity and



innovation by promoting economic growth. However, in Europe, an acceptable balance of interests is made more complex than elsewhere because of differences in business practices and in the approach of national legislators to fundamental legal issues that the European acquis in the field of copyright has not Permanently removed or solved. Such as, the European Digital Agenda for 2010, the European Commission explicitly pursues the objective of promoting the creation of a common market increasingly concerned with creative digital content. The purpose of the Commission is therefore to create favorable conditions so that the growth of demand and the offer of copyrighted content may develop possibly in favor of both economy and of the cultural industry for the information as a whole. Finally within a Pan-European level and no longer inside each individual Member States, as is now despite the intrinsic cross-border nature of electronic communication.

Three are the areas where are the main obstacles to the creation of a single digital marked:

:

- (i) Individual and/or collective management of copyright, in accordance with strict territorial criteria;
- (ii) Definition and adaption at European level to the exceptions and limitations to these rights;
- (iii) Enforcement of copyright by restrictive to unauthorized,through brokers spontaneous and non such as platform contents providers, operators and or users,etc

The Directive 2014/ 26/ EU having regard to the collective management and the territorial aspects of Copyright represents therefore a milestone in the construction process that will lead towards a Digital Single Market Act. This process considers that achieving a Digital Single Market, based on a common set of rules, could foster EU competitiveness, have positive effects on growth and

jobs, relaunch the Single Market and make society more inclusive, offering new opportunities to citizens and businesses, especially by exchanging and sharing innovation<sup>284</sup>. First objective to be achieved according to the directive is the better functioning of the collective copyright management and rights-related rights at European level in view of better functioning of the internal market. In addition, to those goals, the developments in the licensing landscape must be seen in the multifaceted context of enabling the Digital Single Market across all European Member States; fostering innovation of new digital service providers in Europe; addressing competition concerns towards the collective management of rights; and dealing with the legacy of the traditional territorial nature of copyright administration and exploitation. The regulatory framework and new ways of exploitation affect the formation of private mechanisms of clearance of copyrights<sup>285</sup>.

The most interesting feature, however, concerns the competitive directions of the Directive, directly or indirectly. What sometimes seems clear and other veiled is the intention to increase the competition and comparison between management companies. The freedom of the holders to choose which body to entrust management of their rights as well as the introduction of third authorized parties to administer the rights themselves, such as the independent management entities which contribute to a deregulation of the collecting societies<sup>286</sup> and therefore a waiver of these national boundaries to develop itself into the wider European market.

---

<sup>284</sup> << <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0009+0+DOC+XML+V0//EN>>>

<sup>285</sup> See on this point Schwemer, S. F. (2016). Emerging models for cross-border online licensing. In T. Riis (Ed.), *User-Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (pp. 77-98). Cheltenham, UK/Northampton, USA: Edward Elgar Publishing, Incorporated

<sup>286</sup> See in this regard RICCIO G. M. (nt. 67), p. 203, according to the proposal for a directive

Finally, what is to be expected is an open context to competition between wide management bodies, which does not recognize state borders and operates at the widest European level.

Obviously, it is not automatic that this will happen in the short term and it is likely that the sector in which the effects of the liberalization efforts will be most affected will be the online rights on musical works, which are by its nature disconnected from national boundaries and characterized by smaller barriers .

Where these factors will root, the market will easily be competitive and develop<sup>287</sup> .

---

<sup>287</sup> See in this terms PALMIERI A. *il mercato della gestione collettiva*, in AIDA, 2013, (nt. 174), p. 73. He reveals that in the telematic context does not exist barriers at the entrance as typical input of offline rights management in terms of both, monitoring and enforcement costs; The reduction of such costs enhanced by the online rights market is better adaptable to a competitive rationale.

## **FINAL REMARKS**

Considering that the intrinsic character of territoriality of copyright clashes with the ubiquity of the interests connected to protected works, if the jurisdiction of a State on the subject of authorial protection ends where its borders end, it is valid for intellectual works, which instead tend to move in an area free of state barriers, capacity enhanced by the development of the information society.

The risk related to the territoriality of the law, as noted by the Community institutions, has been identified as a potential slow down on the free movement of goods and services that incorporate copyrighted material, in consideration existing differences between the various legal systems.

Hence the initiatives adopted by the European Union, aimed at harmonization and approximation between the various regulations.

The content of copyright consists of two rights, one moral and one patrimonial, while the first concerns and protects the artistic personality of the author, the second concerns the exploitation of the work, and therefore has to do with a series of purely economic interests.

The management of rights concerns this second type of content. The patrimonial sphere includes within itself a whole range of faculties linked to the economic exploitation of the work, which are transferable and negotiable, and therefore subject to a management that can be exercised directly by the author (or by the owner, if different from the author), or indirectly through collecting societies. The extent and scope of the sphere of assets, especially in certain sectors, such as music, makes collective management a mandatory choice, due to the difficulty to manage independently all the rights activities, mainly linked to negotiation and control of the exploitation of intellectual works. In this context through which the transnational attitude of the works, with particular reference to the musical sector that well represents this trend, the collecting societies have established themselves as a valid and effective tool for managing the patrimonial rights.

The concentration of this activity through a single intermediary subject (collecting societies) would enable to contrast the complexity and the lack individual management skillness in a context in which economic-social and technological developments have expanded the space for exploitation and the negotiation of copyright, opening it more

and more to a supranational context.

The attention was focused on issues such as the activity carried out by the management companies, which should be implemented according to principles of transparency, efficiency and non-discrimination; competition, which should not be prevented by the practices of collecting societies; the creation of a single digital market, for which the multi-territorial licensing tool has been stimulated.

These are the cornerstones adopted by the Community institutions through the issuance of the directive that on the one hand promotes a modernization of collecting societies establishing a series of standards in terms of governance and transparency, especially in response to the critical issues that they affect the work of collecting, on the other hand stimulates the creation of a single market for digital content, favoring and granting multi-territorial licenses for online music rights, suggesting common standards for their release. Collecting societies, traditionally, operate on a supra-state plan, thanks to a network of reciprocal representation agreements, which consolidate the territorial nature of collective management; such practices worked in the past due to the distribution of protected materials strictly linked to physical supports, but are now obsolete by the development of the information society and do not adapt to "liquid" contents, which are now distributed in digital format. The instrument of the multi-territorial license, simply defined as a license covering the territory of more than one EU Member State, wants to promote a renewal in the licensing system, which is able to transcend territorial limitations, according to the new expectation of authors and users deriving from the digital market.

Last technological innovations completely changed the way to create, distribute and consume copyright-protected material. In the analysis of the directive, it is also noted that there is no competitive purpose, mainly forecasting freedom of each owner to choose, without any constraint, which company to entrust and manage their rights.

A natural development of the market, even if there were competition in the short run, would be represented by mergers took in place to benefit from economies of scale and

network effects as defined above, reasserting this way a natural monopoly<sup>288</sup>. It has been many times demonstrated how competition provides benefits in terms of higher quality and lower prices for goods and services.<sup>289</sup> As long as collective copyright management is organized by national monopolies, there will be no incentives to costs reduction for the collecting societies, as they could emerge under a competitive pressure; this situation causes internal inefficiencies to persist, resulting in high administrative costs. Taking this line of reasoning, the Court of Justice in *Tournier* speculated whether the relatively high level of operating expenses of the French collecting society SACEM was due to the lack of competition on the market in question<sup>290</sup>. The Commission (DG COMP) is very much focused on the efficiency of collecting societies and how competition between them can facilitate the most efficient means of rights management.<sup>291</sup> The issue, however, is complicated by the fact that while a certain degree of competition can provide benefits, too much competition can be harmful to the whole systems.<sup>292</sup>

Considering that the competitive pressures are coming from the internal market, the chances to keep a single reference body at the state level or at one-stop shop system, would make the system more efficient and competitive at global level. Emphasis can be placed on the potential risks associated with the plurality of collecting that within the national territory, perform the same functions, including a limited protection for the weakest subjects and for the minor repertoires, as well as doubts about the identification of those entitled that could slow down the circulation of the works.

Secondly, we must not forget how particular is the sphere of reference, concerning copyright, to the extent that the interests that come into play are many and varied, both economic and cultural and social, based on the tradition of civilization. Law which, as we have seen, puts the focus on the author and his artistic personality, a circumstance

---

<sup>288</sup> See on this point Towse, Ruth, and Christian Handke. "Regulating copyright collecting societies: current policy in Europe." *Society for Economic Research on Copyright Issues (SERCI) Annual Congress*. 2007 at 12.

<sup>289</sup> See in this regard Maurice E. Stucke; Is competition always good?. *J Antitrust Enforcement* 2013; 1 (1): 162-197. doi: 10.1093/jaenfo/jns008

<sup>290</sup> Case 375/87 *Minist`ere Public v Tournier* [1989] ECR 2521, para 42.

<sup>291</sup> See the CISAC decision, para 212.

<sup>292</sup> See in this regard Thomas Riis, *Collecting Societies, Competition and The Services Directive*, 6 *J. of Int. Prop. & Pract.* (2011).

which results in the recognition of prerogatives not only economic but also moral. We also must not forget how particular is the sphere of reference, concerning copyright, interests that prevail are many and varied, both economic cultural and social, based on the civil law tradition which, as we have seen, puts the focus on the author and his artistic personality, a circumstance which results in the recognition of prerogatives not only economic but also moral. Therefore it is appropriate to imagine if this framework could be valid for a wider competition even within the national territory and this in view of the fact that the plurality of interests involved has always resulted in gathering the management of rights within a limited number of intermediaries.

It is then evident that generally the tendency is to affirm *de facto* monopolies within the individual States: an example was the case of the United Kingdom in which, even in a regime of free competition, among the various collecting, only a limited number, were specialized in certain sectors. Centralization on a few subjects has been resumed pointing out the possible future scenarios, highlighting how, in the medium to long term, a possible situation would be characterized by the growth of new natural monopolies in the broader European context: large management companies, able to represent broad repertoires and provide multi-territorial licenses, supported by smaller companies purely suited to represent owners of the respective countries able to manage rights offline.

Competitive market opening makes possible to take advantage of the potential benefits of free competition. The entry into the market of more innovative organisms should encourage keeping high performances even if the natural effect could be the emergence of an efficient monopolistic situation due to the tendency to centralize management, these positions would be gained thanks to governance and a proper execution of their activities ; finally, another consequence could be the specialization of collecting in single and specific sectors of copyright.

Therefore, we would expect a scenario, similar to the English context, characterized by the presence of a limited number of collecting societies, focused on specific areas oriented on interest care of certain right holders categories.

These companies could be based on leaner and more flexible structures cutting down

costs with benefits for authors and consumers: the ability to search time to time for the best solutions , better management, in response to the needs of the various subjects involved and to the market conditions, as well as being able to innovate their services thanks to a higher level of specialization.



## BIBLIOGRAPHY

### BOOKS

BECKER E. – BUHSE W. - GUNNEWIG D – RUMP N., *Digital Rights Management: Technological, Economic, Legal and Political Aspects*, 2003

BELL D., *The coming of post-industrial society*, Boston press, 1973

BENNACCHIO G. *Diritto privato della Comunità Europea: Fonti, modelli, regole*, Padova, 1998

CARON, CH. *Droit d'auteur et droits voisins*, ed. Litec, (2006)

CASTELLS M. *The information age: Economy, society and culture, the rise of network society*, 2002

DREXL J., *Competition in the field of Collective Management: Preferring “Creative” Competition to Allocative Efficiency in European Copyright Law* in P. Torremans, *Copyright law A Handbook of Contemporary Research*, 2007.

DUTFIELD G.- SUTHERSANNEN U., *Global intellectual property law*, cheltenham, 2008

ERCOLANI S. *Dalla gestione collettiva alla gestione << à la carte >>. Licenze on line a geometria variabile per la musica in Europa*, in Dir. Autore, 2009

GOAVERE I., *The use and abuse of intellectual property rights in E.C. law : including a case study of the E.C. Spare parts debate*, London, Toronto, Sweet & Maxwell, 1996, *Intellectual property in practice*

GODYER D.G., *Ec Competition law*, 4<sup>th</sup> Edition, Oxford University Press, 2003

GORZ A., *L'immateriale conoscenza, valore e capitale*, ed it., Torino 2003

GREFFE, X., *Arts and Artists from an Economic Perspective*, Paris, 2002

LUCAS, A and LUCAS H-J. *Traité de la propriété littéraire et artistique*, 3<sup>rd</sup> edition, ed. LexisNexis, Litec, (2006)

PALMIERI A., *Il mercato della gestione collettiva*, in AIDA, 2013

PATRY, W. *How to fix Copyright*, 2012

PINDYCK, R., and RUBINFELD, D., *Microeconomics*, 6th ed., Upper Saddle River, New Jersey, Pearson Education Inc. - Prentice Hall, 2005

POULLAUD-DULIAN, F. *Le droit d'auteur*, ed. Economica, (2005)

RICCIO G.M., *Copyright collecting societies e regole di concorrenza*, Giappicchelli, 2012

RICOLFI M., *Figure e tecniche di gestione collettiva del diritto d'autore e dei diritti connessi*, in *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, Quaderni di AIDA, 2006

RIIS T., (Ed.), *User-Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* Edward Elgar Publishing, Incorporated, 2016

ROCHELANDET, F. *Are Copyright Collecting Societies Efficient Organisation? An Evaluation of Collective Administration of Copyright in Europe*, in *The Economics of Copyright. Developments in Research and Analysis*, W.J. Gordon – R. Watt (eds.), Cheltenham, UK – Northampton, MA, USA, 2003

ROCHELANDET, F. *Are Copyright Collecting Societies Efficient Organisation? An Evaluation of Collective Administration of Copyright in Europe*, in *The Economics of Copyright. Developments in Research and Analysis*, W.J. Gordon – R. Watt (eds.), Cheltenham, UK – Northampton, MA, USA, 2003

SARTI D., *Gestione collettiva e modelli associativi*, in *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, Quaderni di AIDA, 2006

SCHWEMER S. F., *Emerging models for cross-border online licensing 2016*

SPENCE M., *Intellectual property*, oxford university. Press, 2007

STOTHERS C., *Parallel trade in Europe. Intellectual Property Competition and Regulatory law*, Hart Publishing, 2007

WATT R., *Copyright and Economic Theory. Friends or Foes?* Edward Elgar Pub 2000

WILLIAMSON O.E., *The economic Institutions of Capitalism: Firms, markets, relational contracts*, in *New York Free Press*, 1985.

## JOURNALS

BESEN S.M. – KIRBY SN.- SALOP S., *An Economic Analysis of Copyright Collective* (1992) Va L Rev 383, 383–4RA Posner, Antitrust Law (2nd edn 2001)

DIETZ A., *The European Commission's Proposal for a Directive on Collecting Societies and Cultural Diversity – a Missed Opportunity*, *International Journal of Music Business Research*, April 2014, vol. 3 no.

EINHORN MA., *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting* (2001) 24 Colum. VLA J L and Arts

FINE F.L., *The Impact of EEC Competition Law on the Music Industry* (1992), *Entertainment Law Review* 6

GERVAIS D.J. – MAURUSHAT A., *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, *Canadian Journal of Law & Technology*, (2003)

HANDKE C. –TOWSE R., *Economics of Copyright Collecting Societies*, in 38 Int. Rev. Of Intell. Prop. and Competition Law, ( 2007)

HOLLANDER A., *Market Structure and Performance in Intellectual Property: The Case of Copyright Collectives*, 2 Intern J. Of Industrial Organization, (1984)

HUGENHOLTZ P.- BERNT *The Recasting of Copyright & Related Rights for the Knowledge Economy* (2012). Amsterdam Law School Research Paper No. 2012-44; Institute for Information Law Research Paper No. 2012-38. Available at <https://ssrn.com/abstract=2018238>

KATZ A., *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights* (2005), J Competition L and Econ

KRETSCHMER M., *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments* (2002), *European Intellectual*

Property Review available at

[http://www.cippm.org.uk/pdfs/kretschmer\\_eipr\\_032002.pdf](http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf)

LUNNEY G., *Copyright Collectives and Collecting Societies: The United States Experience* in D Gervais (ed), *Collective Management of Copyrights and Related Rights* (2006)

LUDER T., *The Next Ten Years in E.U. Copyright: Making Markets Work* Autumn, (2007) *Fordham Intell. Prop. Media & Ent. L.J.* 1

MERGES P., *The Continuing Vitality of Music Performance Rights Organizations* (2008 UC Berkeley, Public Law and Legal Theory Research Paper available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266870#accessed](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266870#accessed)) (2010).

MESTMACKER E.J., '*Agreements of Reciprocal Representation of Collecting Societies in the Internal Market*' (2005) *RIDA* 63

RIIS T., *Collecting societies, competition and the Service Directive*, in 6 *Journal of Intell. Prop. Law & practice*, 2011

RUPING K., *Copyright and an Integrated European Market: Conflicts with Free Movement of Goods, Competition Law, and National Discrimination*, *Temple International and Comparative Law Journal*. 1997

SPADA. P *postfazione. Diagnosi e terapie di un disagio*, in aa.vv., *Gestione collettiva dell'offerta e della domanda di prodotti culturali*, Milano, 2006

STUCKE M. E., *Is competition always good?*. *J Antitrust Enforcement* (2013)

VAVER D., *recreating a fair Intellectual property System for the 21 st century*, 15 *Intell. Property J* ( 2001)

## TREATIES, CONVENTIONS, DIRECTIVES

*Berne convention for the protection of literary and artistic works*, Geneva, (1886)

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on *certain permitted uses of orphan works* available at << <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012L0028>>>

*Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01*  
available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

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* available at << <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31992L0100> >>

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* available at << <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083> >>

Directive 2001/29/EC of 22 May 2001 on *the harmonisation of certain aspects of copyright and related rights in the information society* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>

Directive 2001/84/EC of 27 September 2001 on *the resale right for the benefit of the author of an original work of art* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0084:EN:HTML>

*International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, Rome, October 26, 196,  
available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=289795](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=289795)

*Treaty establishing the European Economic Community*, Mar. 25, 1957, 28 U.N.T.S. 11.

Directive 2006/123/EC of 12 December 2006 on *services in the internal market* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>

Directive 2014/26/EU of 26 February 2014 on *collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market* available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0026>

*Charter of Fundamental Rights of the European Union* of December of 18 December 2000 C 364/3 available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

## **TABLE OF CASES**

*GVL v. Commission* (1983), C-7/82

*Selex Integrated Systems v. European Commission and Eurocontrol*, (2009), C -113/07

*BRT v. SABAM* (1974), C-127/73

*Procureur du Roi v. Dassonville* ( 1974), C-874

*Deutsche Grammophon v. Metro* (1970), C-78/ 70

*Ministère public v. Jean-Louis Tournier* (1989), ECJ C-395/87

*Greenwich Film Production v. Société des auteurs, compositeurs et éditeurs de musique (SACEM) and Société des éditions Labrador* (1979), C-22/79

*GVL v. Commission* (1983), C-7/82

*Banghalter et Homem Christo v Sacem* (2002), COMP/C2/37.219

*Phil Collins v. Imtrat Handelsgesellschaft mbH* (1993), C-92/92

*Lucazeau v. SACEM*, (1989), C- 110/88

*Musik-Vertrieb membran GmbH and K-tel International v GEMA* (1981), Joined C-55/80, C-57/80

*European Commission v. Italy* (2007), C-119/06.

## MISCELLANEOUS

*CISAC Case*, (Case COMP/C2/38.698 )

*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 (Text with EEA relevance) /\* COM/2004/0261 final \*/*, European Commission

*IFPI Simulcasting* ( 2002) ,Case COMP C-2/38.014

*Conclusions of General Lawyer* (2005), C-5/05

*Press Release, Europa, Commission Opens Proceedings into Collective Licensing of Music Copyrights for Online Use* ( May 3, 2004) available at [http://europa.eu/rapid/press-release\\_IP-04-586\\_en.htm](http://europa.eu/rapid/press-release_IP-04-586_en.htm)

NERISSON S., *La légitimité de la gestion collective des droits des auteurs en France et en Allemagne*, PhD thesis, Paris and Berlin 2011

Commission recommendation 2005/737/CE of 18 October 2005

*GEMA I*, Decision of 20.06.1971, OJ L134/15

*GEMA II*, Decision of 06.07.1972, OJ L 166/22

*GEMA III*, Decision of 04.12.1981, OJ L 94/12

*The Collective Management of Rights in Europe - the Quest for Efficiency* of 1 July 2006, KEA - European Affairs available at <http://www.keanet.eu/report/collectivemanpdffinal.pdf>

KRETSCHMER M., *Access and Reward in the Information Society: Regulating the Collective Management of Copyright*, CIPPM Working paper, 2007

STREET J.- LAING D. – SCHROFF S., *Collective Management Organisations, Creativity and Cultural Diversity*, CREATE Working Paper 2015/03, 2015.

FICSOR M., *Collective Administration of Copyright and Neighboring rights*, WIPO, 1990

*Commission staff working impact assesment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market* Brussels, 11.7.2012 SWD(2012) 204 final available at <<http://eur-lex.europa.eu/legal-content/it/TXT/?uri=CELEX%3A52014SC0124>>

*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 (Text with EEA relevance)\** COM/2004/0261 final \*/

Notification of "*IFPI Simulcasting agreement*" (COMP/C2/38.014), *OJ C* 231/18 (2001), Notification of "*Santiago agreement*" (COMP/C2/38.126), *OJ C* 145/02 (2001) and Notification of "*BIEM Barcelona agreement*" (COMP/C2/38.377), *OJ C* 132/18 (2002).

European Commission (2011), *A Single Market for Intellectual Property Rights*

*Green Paper on Copyright and Related Rights in the Information Society* , 1995, COM(95)382.

*Agcm Communication*, 2016 available at <<  
<http://www.agcm.it/component/joomdoc/allegati-news/AS1281.pdf/download.html>>>

CIVITELLI C., *La Direttiva 2014/26/UE: verso un mercato unico digitale delle opere musicali e nuove regole per gli organismi di gestione collettiva dei diritti d'autore e dei diritti connessi*, available at  
<<<http://www.jei.it/approfondimenti/item/417-la-direttiva-2014-26-ue-verso-un-mercato-unico-digitale-delle-opere-musicali-e-nuove-regole-per-gli-organismi-di-gestione-collettiva-dei-diritti-d-autore-e-dei-diritti-connessi>>>

*Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services*, (2005/737/EC) available at  
<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF>>

Commission in the Staff Working Document *Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market*, 11 luglio 2012, SWD(2012) 204 final.



*European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act (2015/2147(INI))* available at << <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0009+0+DOC+XML+V0//EN>>>

*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Agenda for Europe”*, COM(2010) 245 final, 19 May 2010 available at <<http://ec.europa.eu/digital-agenda/digital-agenda-europe>>

*Communication from the Commission on Content in the Digital Single Market*, COM(2012)789 final, 18 December 2012 [hereinafter Content in the Digital Single Market] available at << [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/121218\\_communication-online-content\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/121218_communication-online-content_en.pdf)>> .

*Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market*, COM(2012) 372 final, 11 July 2012 [hereinafter Proposal on Collective Management] available at <[http://ec.europa.eu/internal\\_market/copyright/docs/management/com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf)>

M. Barnier (2012), “*Making European Copyright Fit for Purpose in the Age of Internet*”, Speech 12/785, Centre for European Policy Studies, Brussels, 7 November available at <[http://europa.eu/rapid/press-release\\_SPEECH-12-785\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_SPEECH-12-785_en.htm?locale=EN)>

*Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, European Commission, “A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe”*, COM(2011) 287 final Brussels, 24 May 2011 [hereinafter A Single Market for Intellectual Property Rights] available at <[http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)>

*Collective Rights Management in the Digital Single Market Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market*, intellectual property office UK, 2015 available at <<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401225/collective\\_rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401225/collective_rights.pdf)>>

Copyright: *Commission proposes easier music licensing in the Single Market*, European Commission, Press release, Brussels, 11 July 2012, available at << [http://europa.eu/rapid/press-release\\_IP-12-772\\_en.htm](http://europa.eu/rapid/press-release_IP-12-772_en.htm)>>

European Commission MEMO Brussels, 4 February 2014 available at <[http://europa.eu/rapid/pressrelease\\_MEMO-14-80\\_en.htm?locale=en](http://europa.eu/rapid/pressrelease_MEMO-14-80_en.htm?locale=en)>

ANDRIES A. – JULIEN MALVY B., *The CISAC decision – creating competition between collecting societies for Music rights*, *Competition policy newsletter*, 2008 available at << [http://ec.europa.eu/competition/publications/cpn/2008\\_3\\_53.pdf](http://ec.europa.eu/competition/publications/cpn/2008_3_53.pdf)>>

*Santiago Agreement* — COMP/C2/38126, [2001] OJ C 145/2.

*Commission press release* IP/04/586 of 3 May 2004. 48 [2005] OJ C 200/11.

*European Parliament resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* of 15 January 2004 available at << <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0036>>>

*Commission Recommendation of May 18, 2005 about the cross-border collective copyright and neighbouring rights management, in the authorized musical online services* (2005/ 737/ CE) available at << <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:276:0054:0057:EN:PDF>>>

*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) available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0064+0+DOC+XML+V0//EN>>

*IFPI ‘Simulcasting’* Commission Decision of 8 October 2002 Case No COMP/C2/38.014

TOWSE R. HANDKE C., *"Regulating copyright collecting societies: current policy in Europe."* Society for Economic Research on Copyright Issues (SERCI) Annual Congress. 2007.

GUIBAULT L, “ *When will have a cross border licensing of copyright and related rights in Europe?*”, 2005, *Copyright Bulletin*, UNESCO.

MASTROIANNI R., *La tutela internazionale e comunitaria del diritto d'autore*, available at <  
<http://www.librari.beniculturali.it/opencms/export/sites/dgbid/it/documenti/DirittoAutoreOKpw.pdf>>

PÉREZ GÓMEZ TÉTREL, A.M. (2007), *Efficient Allocation of Risk as an Economic Function of Collecting Societies*, Society for Economic Research on Copyright Issues. Annual Congress, Berlin, 12 and 13 July 2007, 3; available at <<http://serci.org/wp-content/uploads/2017/07/perezgomez.pdf>>

GILIERON P., 'Collecting Societies and the Digital Environment' (2006) 37 IIC 950. Available at <<http://law.stanford.edu/wp-content/uploads/2015/03/GillieronPhilippe-tft2006.pdf>>

GUIBAULT L., VAN GOMPEL S., *Collective management in the European Union*, published in GERVAIS D. (a cura di), *Collective management of copyright and related rights*, Kluwer Law International, The Netherlands, 2010