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The current discussions on collective management of rights in the EU
Economic Concerns

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Abstract

The European Commission is playing a major role in the development of legal instruments to ensure the harmonisation of national copyright laws. Despite the extensive scope of the directives related to copyright, the European legislation is lacking specific rules needed to ensure a well functioning internal market for collecting societies, the institutional bodies deemed to ensure efficiency in the economic transactions between producers and users of copyrighted contents.

Feasibility and effectiveness of a new regulation in the collective management of rights mostly depends on the specific structure of the music market for right licensing. This article provides a definition of the relevant market of collecting societies' activities, and examines its critical economic aspects. In that context, concentration is explained by pointing out which are the main barriers to entry the market of collective management. Attention is also devoted to the analysis of policies undertaken by the Commission in assessing the consolidated practice of bilateral agreements between collecting societies.

The article offers a review of the main tactics that could be adopted to allow cross-border exploitation of repertoires, and implementation of a more competitive and efficient model. An observation of the possible alternatives to institutional systems of collective management completes the discussion, and helps to determine whether the present stage of evolution is likely to ameliorate the qualitative conditions of the Internal Market or if a different approach is preferable.

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Introduction

The analysis of the relationship on between licensing bodies and the competitive dynamics of the markets concerned requires one to keep an eye on the economic function of those institutions. Consistent changes have taken place since the initial emergence¹ of collecting societies. Now these bodies have acquired the size and the structure of large organisations, where the members – authors, performers, songwriters etc. – have completely lost control of the way their rights are practically managed. The evolution of collecting societies has, as a result, created the problem of dealing with organisations that have significant market power. Consequently, antitrust authorities at the national and international level could not have ignored the issue for long, for the better interest of consumers and entertainment industry as a whole.

This paper seeks to provide a general view of collective administration of right at the state of the art, in consideration of economic commentary and the relevant jurisprudence that have shaped the status and the working rules of these institutions. The discussion will focus on five main issues having effects on the competition law and economics of collective management. First, for the purposes of competition assessment, this work will provide a comment on the current delimitation of the market. Secondly, it will describe the main barriers to entry, which constitute a reason to worry for the future evolution of the market. Thirdly, the discussion will focus on bilateral agreements as the most recent instruments for the implementation of cross-border licenses in the online context. In its fourth

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¹ All literature on the topic reports that collecting societies originated from the initiative of Ernest Bourget, in 1847. He was visiting the Café “Les Ambassadeurs” when he realised that a piece of his music was being played without his permission. Therefore, he offered to give permission if “Les Ambassadeurs” let him having his drink for free. The premises refused. The issue was solved before the Tribunal de Commerce de la Seine, where Bourget prevailed. Later on, in 1851, he contributed to the establishment of the first widely recognised collecting society, which took the name of Société des Auteurs et Compositeurs et Editeurs de Musique (SACEM).

section, the paper will contain an assessment of the possible (and impossible) options for establishing pan-European licensing. To finish, the analysis will review the alternative methods for managing intellectual property, beyond the specific collective examples.

1. The market for collecting societies

Collective management of copyright and related rights² is currently lacking of a specific legislation. The main regulatory power on collective licensing bodies is exercised through the instrument of competition law. According to the relevant jurisprudence, collecting societies have to be considered undertakings within the meaning of Article 82 (ex Article 86).³ In the specific case of the music industry, by arranging and administering musical copyrights against payment, collective licensing bodies carry out an entrepreneurial task consisting in the provision of services both with respect to the suppliers and users of music.⁴ Collecting societies are also undertakings acting in a dominant position, and for this reason they are subject to an even closer scrutiny by antitrust authorities at the national and Community level.⁵ Last but not least, the adoption by collective management bodies of reciprocal agreements has raised concerns of possible infringements under Article 81 (ex Article 85) of the Treaty. This aggregation of factors testifies the need to strike the balance between exclusive rights and public interest, and offers the opportunity to deepen the analysis of an unresolved issue in the process of copyright harmonisation.

Exclusiveness

Collecting societies in EU are currently operating on a territorial basis. They are given exclusivity in relation to the repertoire they administer, for the territory where they are established. From this principle, it must not be deduced that there is only one collecting society per State. The Società Italiana Autori ed Editori (SIAE – Authors and Publishers Italian Society) covers the entire market of copyright management on the behalf of the authors, by holding a position of *de iure* monopoly.⁶ Only recently, another organisation took charge of performers' right management (IMAIE). The organisation, however, has a completely private nature and does not interfere with SIAE's exclusivity in the management of authors' and publishers' rights. Diversely, in the UK, there is a variety of collective licensing bodies, such as Phonographic Performance Limited (PPL), Mechanical Copyright Protection Society Limited (MCPS), Performing Rights Society Limited (PRS) and Video Performance Limited (VPL). Dissimilarities in the business models chosen in the different territories are the result of the evolution of collecting societies, influenced by cultural and economic factors as well as institutional orientations. However, even in cases where several collecting societies are present, the exclusivity is maintained. In fact, each collecting society manages a precise right or

² Only "copyright", from now onwards.

³ According to the Community principles on antitrust matters, collecting societies are undertakings because they pursue an economic activity in copyright intermediation, favouring transactions for the commercial exploitations of works. Interestingly, the jurisprudence has established that the definition of undertaking does not depend on the legal status or on the modalities by which a certain body is financed (see *Klaus Hofner e Fritz Elser v Macroton GmbH* (ECJ), C-41/90). This is particularly relevant in the Italian case, where SIAE has been given the status of a public entity (see the decision, by the Italian antitrust authority, of 28 July 1995, n. 3195).

⁴ GEMA I, European Commission Decision of 2 June 1971, OJ L 134/15.

⁵ *Ibidem*, "GEMA holds a dominant position within the Federal Republic of Germany, which constitute a substantial part of the Common market".

⁶ So do the collecting societies of the Netherlands and Spain.

set of rights (phonograms, public performance, mechanical transmission, audiovisual works⁷, reprographic reproduction etc) without overlapping.

Market definition

In order to provide comments on a possible evolution in the direction of competitive models, it is important here to clarify the concept of market delimitation adopted by the relevant jurisprudence. It is agreed that “the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products”.⁸ The European Court of Justice (ECJ) addressed the issue by focusing on the intrinsic characteristics of the products supplied by the dominant firm. In our case, the focus is on the collective management of rights, and on licensing in particular. On the one hand, from the side of the “product market”, the fact that there is no substitute for what is offered by national collecting societies attributes to licensing an uncontested dominant position. This point could relate the situation of collective management to other problematic issues in the field of intellectual property, and could suggest that the next regulatory steps should be to try to implement models of compulsory licensing.⁹ Having said this, problems have arisen in terms of compatibility with the intellectual property related international treaties, such as the Berne Convention, the Rome Convention and the WIPO treaties, but also with European Law and European authorities’ decisions. On the other hand, the relevant geographic market at the moment has to be considered the national market where collecting societies are allowed to operate, namely the market delimited by national boundaries.

A real natural monopoly?

The next step consists in the consideration of collecting societies within the markets where they act. Courts have often taken their decisions assuming that collecting society act in the context of natural monopoly.¹⁰ Independently from the specific number of collecting societies present in each national jurisdiction, one should ask whether the examples in the European territory are also to be

⁷ Though, the film industry relies on individual management more than the music industry.

⁸ *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* (ECJ), ECR 1973 (215).

⁹ A further interesting reflection could come from the interpretation of copyrighted repertoires as essential facilities. In relation to broadcasters, for example, the service provided by collecting societies is essential, and the access to it has posed a number of problems. The essential facility perspective realistically suggests that the problem is not one of eliminating the profits of the monopolist. However, differences between the specific characteristics of the essential facility doctrine and collective management subsist. First and foremost, in the context of collective management, the societies never show the intention to extend their dominant position to the downstream market, by denying the access to their repertoire. This paper will point out that it is rather the other way around: right holders and users are becoming more likely to acquire a role played by collecting societies, now that technology does not require the same monitoring effort as in the past. Further thoughts on the topic can be found in Heimler, Alberto and Nicita, Antonio, “Intellectual property right-based monopolies and ex-post competition: Some reflections on the essential facility doctrine” (2000).

¹⁰ “A natural monopoly exists in an industry where a single firm can produce output such as to supply the market at a lower per unit-cost than can two or more firms. The telephone industry, electricity and water supply are often cited as examples of natural monopolies. These industries face relatively high fixed cost structures. The costs necessary to produce even a small amount are high. In turn, once the initial investment has been made, the average costs decline with every unit produced. Competition in these industries is deemed socially undesirable because the existence of a large number of firms would result in needless duplication of capital equipment”. Definition from Depoorter, Ben W.F., “Regulation of Natural Monopoly”, *Encyclopedia of Law and Economics*, 5400, 498-532.

considered natural monopolies for the management of the specific rights they deal with. The question must be asked from a positive and normative perspective. The positive standpoint should clarify the reasons that have impeded the establishment of more than one collecting society, and if that was done in an efficient manner. Moving beyond the current situation, a normative perspective should open a discussion on the effective status of the market, questioning whether efficiency actually require the establishment of a single collecting society per right per territory, or whether instruments need to be deployed in order to abate the obstacles for the enhancement of the market of collective management via competition. In any event, examples of X-inefficiencies could suggest that is time to change direction.¹¹

A similar level of the analysis is probably beyond the scope of this paper. Nevertheless, the call for cross-border licenses of music content is demanding the reconsideration of the definition of the exploitation models. The views discussed here could suggest that a change is needed. It will not necessarily require the adoption of a uniform approach through heavy regulation, given the fact that the societies seem to respond to the technological challenge by changing from a natural monopoly to a structure of a more hybrid nature. Evolution and national peculiarities could require differentiated solutions, but also a higher degree of harmonisation in some key aspect of the rules governing collecting societies operations.

2. Relevance of barriers to entry

In the current debate on how collective management should be reform in order to promote more efficient solutions, the European authorities have expressed a positive opinion in respect to the possible “liberalisation” for the market of collective management. A committed support will be provided especially in the online context.¹² However, in order to take the appropriate steps towards a competitive environment, where new collecting societies could actually emerge, it is important to understand why they have maintained such a dominant position. By doing so, it is helpful to assess the real extent of barriers to entry, which will help in assessing the feasibility of the new policies proposed below.

Absolute cost advantages

The costs advantages of collecting societies descend primarily from their position of *de iure* or *de facto* natural monopolist in their national markets. This has been maintained thanks to the special relationship that, over time, has been established between right holders and the societies. Collective bodies own a sort of exclusive on the supply side in reason of that relationship. This problem has kept antitrust authorities busy, and it was first pointed out in the GEMA decision.¹³ It is worth

¹¹ “The condition of natural monopoly raises the question whether internal efficiency, cost minimization by the firm, is achieved under natural monopoly. Does a monopoly firm put its resources to the best possible use within the existing state of technology? Modern antitrust economists have used the term ‘X-Inefficiency’ to indicate the internal wastes that occur when a firm acquires monopoly power and is no longer pressured by strong competitors to keep its costs at the competitive minimum”, *ibidem*.

¹² In particular, the Commission released a Communication on the Management of Copyright and Related Rights (2004). While the author was formulating the final thought to be included in the present paper, the Commission also published a working document entitled “Study on a Community Initiative on the Cross Border Collective Management of Copyright” (7 July 2005). In order to provide an appropriate comment to this last document, additional time would be required. However, some of the proposals enunciated in the Study will be included in the article so that the reader is kept up to date as much as possible.

¹³ See *supra*, footnote n. 4.

recalling some aspect of that case, as the German collecting society has often been taken as having a typical set of collecting societies' working rules.¹⁴ At that time, the absolute advantage in terms of costs was acquired with the instrument of restrictive licensing conditions. Abusive clauses tightened the relationship between members and the society, in a way that practically precluded the right holder from addressing other societies in other Member States. Right holders were also prevented from withdrawing their assignment contracts at reasonable conditions.

From the point of view of efficiency, it is clear that collecting societies should be made able to rely on the stability of their repertoire. This is because users legitimately request solidity and consistency in relation to the license they negotiate and purchase with the society.¹⁵ They want contracts to be drafted and implemented over a sensible period of time. This argument, however, could be misleading if it was unreasonably interpreted. The conditions locking members into the relationship with their collecting society should still respect the requisite standard of fairness. Overall, the fact that GEMA asked the right holders to assign their rights for a minimum period of 6 years¹⁶ did not constitute the core problem.

The primary advantages for of collecting societies over the other – rare – alternative solutions for managing copyright and neighbouring rights have more to do with the effective way in which works are exploited. In particular, conditions of assignment and redistribution of royalties can determine the ability for the existing institutions to manage their repertoires and ensure that the supply of copyright content flows directly to their recipients.

The conditions for assignment of rights have been considered an issue under Article 82 (ex Article 86). In the GEMA case, assignment was requested for all rights owned at the time the contract was signed, and for rights that would be attributed or reattributed during the time of validity of the contract, including those descending from technological progress or changes in the legislative framework. In particular, rights were to be assigned with exclusive title for the entire world. The Commission found that similar conditions constituted an abuse of GEMA's dominant position and stated the necessity for members of GEMA, and of collecting societies in general, to be free to decide whether they want to assign all their rights or only some of them. The Commission also stressed the necessity to amend the clauses having deterrent effect in case of membership withdrawal, and ordered to reformulate them in a fair manner. In fact, the threat of losing the main benefits in case of interruptions of the contract was increasing the extent of the abuse. At the current state of the art, "The Board of Supervisors shall be obliged on conclusion of deeds of assignment with citizens and publishers of the member states of the European Economic Community to consent to the rightholder assigning his exploitation rights only in part to GEMA. However, the assignment

¹⁴ GEMA is the German *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* or society for musical performing and mechanical reproduction rights. As a state-recognised trustee organisation, it administers the exploitation rights of creators of music. It has the legal status of a commercial association and is subject to supervision and control by the German Patent Office, the German Federal Cartel Office, the Berlin Senate of Justice and the General Meeting of GEMA. In daily practice, it performs two main functions: firstly, GEMA helps the users to easily obtain all rights entailed in the use of music. Secondly, it passes on the royalty payments to the composers, lyricists and music publishers. GEMA makes no profit: all earnings minus administrative costs are paid to domestic and international authors whose works were performed (from GEMA's website www.gema.de).

¹⁵ In this paper we make reference to users by considering, in particular, the category of commercial users such as broadcasters (radio or television i.e. public, or commercial, pay or free access), cable network operators, online content providers, small businesses e.g. bars, restaurants, hairdressing salons (this classification comes from the Study mentioned above).

¹⁶ In fact, "all rights currently vested in the rightholder and those accruing in future shall be assigned for a minimum period of six years and this assignment shall be extended by an identical period unless notice of termination of the deed of assignment is given one year before its expiration", Statutes of GEMA as amended on 24-25 June 2003.

of rights can relate only to forms of use of rights in and to all of the works of the rightholder and not to rights in and to any of his individual works".¹⁷ This aspect allows more flexibility and could effectively lower the considerable advantage that GEMA had built up with the deed of assignments in its initial version processed by the Commission. In the light of the opinions expressed by the European authorities, solutions such as the old practice of compulsory assignments¹⁸ are likely to completely disappear from the scenario of collective management, especially now that right holders claim more freedom for certain forms of individual management.

Product differentiation

Collecting societies operate as monopolists in their specific segments of the market by charging different prices for different users. They also provide a number of diversified licenses depending on the users request, in a quasi-tailor made manner. Collecting institutions' claim is that they offer adequate solutions to the needs of each category of users and respond to the different value that users attribute to the items they purchase. A similar practice helps to eliminate the gap between collecting societies and users, but also generates greater profits for the monopolist, who is able to appropriate most of the deadweight loss that would arise in absence of price discrimination. If on the one hand product differentiation, assisted by the instrument of price discrimination, strengthens the position of collecting societies to the detriment of a hypothetical competition, on the other it does produce positive effects for users. A welfare assessment, however, is not that straightforward.

In the phonographic industry, price discrimination occurs via the identification of the size and purposes of the uses. For example, a TV broadcaster pays a higher price in respect to a hairdresser shop. However, the matter is not limited to the context of mechanical rights, or performers' rights for music. The traditional examples of differentiation in the field of the cultural industry actually come from libraries and video rentals. In the first case, publishers charge higher prices for the copies of books sold to libraries. In the second case, the videocassettes or the DVDs are significantly more expensive if they include a rental license. This is because price differentiation applied to broadcasters, libraries and video rentals takes into account a prospective number of uses that will descend from the specific commercial activities. However, a limit has been imposed on price discrimination by the prohibition on applying dissimilar conditions to equivalent transactions (Article 82 (c) of the Treaty). The same category of users should therefore be offered of the same license conditions.

Another example of product differentiation consists in the provision of pension funds and benefits to collecting societies' members. Even if not all societies are engaged in such activities, most of them do offer additional services in order to expand the scope of their business, integrate the services generally required by right holders and reaffirm their position in the context of economic exploitation of the repertoires.

¹⁷ *Ibidem*.

¹⁸ See *Belgische Radio en Televisie v SV SABAM and NV Fonior* (ECJ), 1973 ECR (313): "compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition, especially if such assignment is required for an extended period after the member's withdrawal".

Economies of scale

Collecting societies aggregate a variety of goods that would not have the same value if they were administered alone. This is probably the most powerful justification for the presence of collecting societies, especially in the music industry. The efficiency argument does not have particular relevance if referred to the impossibility for right holders to engage in individual management, although such a limitation does constitute the fundamental reason for the establishment of large organisations for the collection of royalties on a grand scale. What really matters is the fact that collecting societies can realise a high number of transaction with users only if they are entrusted with the management of the widest possible repertoire. If this occurs, collective licensing bodies have the opportunity to serve the entire demand, then they can address their strategies to the totality of the users for which they are competent, and consequently spread the costs of their services over a multiplicity of purchasers. In the case of a monopolist dealing with all copyrights and in absence of capacity constraints, monitoring uses and taking actions against infringers theoretically maintains costs at the minimum.

Achievement of economies of scale traditionally serves as the reason why the entertainment industry is characterised by a considerably high number of intermediaries, and it is particularly relevant now that the digital era allows quasi-infinite productive capacity. One strategy to maximise economies of scale is the consolidated practice of blanket licenses. Blanket license agreements have two main characteristics: on the one hand, they create a benefit for users who acquire the right to use the whole repertoire, without any limitation or further legal concerns. On the other, royalties are calculated independently from the number of uses actually made. This is particularly advantageous in the area of entertainment, specifically in the music industry, where the collecting societies' marginal costs of licensing an additional unit of copyright content is zero. In this respect, the benefit lies in the simplification of the monitoring process, which results into a consistent saving in transaction costs. However, most of the critics of blanket licenses allege that the benefits are fully appropriated by collecting societies themselves. In fact, collecting bodies do not need to tailor specific contracts for each user, they get paid even if their clients do not use the whole repertoire and they bear lower monitoring costs.

In this context, one could suppose that a risk for entrants could be that the incumbent lowers the price asked to users, so that the incumbent could maintain its monopoly thanks to the extendible capacity of licensing, monitoring and collecting activities. The issue of bilateral agreements, discussed below, will contribute to verify that there are many other elements to suppose that entrance is not an option at the moment.

3. The issue of bilateral agreements

Another aspect that must be considered in the wider picture of collective management is one of reciprocal representation agreements. These types of agreements worried antitrust authorities for their negative effects on users and final consumers, but also because they allowed the consolidation of the dominant position of collecting societies in their respective markets. Given the territorial nature of copyright law and the opposite need to exploit works occurring beyond national boundaries, national collecting societies had to find the instrument to propagate their repertoire without losing their possibility to charge users for the uses they make.

Definition of Reciprocal Representation Agreements

Appropriation of returns is currently made on the basis of bilateral agreements, under which collective licensing bodies can represent foreign repertoire in their own jurisdiction, awarding foreign artists with the same treatment accorded to national right holders, at least in theory.¹⁹ Reciprocal representation also determines how earnings from foreign artists are returned and distributed.²⁰ The wide diffusion of bilateral agreements produced concerns about the standardisation of practices to the detriment of users. In fact, the agreements could lead to uniform behaviour in the relationship between collecting societies in the Europe. Interestingly, in *Lucazeau v SACEM*, the Court pointed out that “Reciprocal representation contracts between national copyright management societies concerned with musical works whereby the societies give each other the right to grant, within the territory for which they are responsible, the requisite authorizations for any public performance of copyrighted musical works of members of other societies and to subject those authorizations to certain conditions, in conformity with the laws applicable in the territory in question, where those contracts have the dual purpose of making all protected musical works, whatever their origin, subject to the same conditions for all users in the same Member State, in accordance with the prohibition of discrimination laid down in the international conventions on copyright, and to enable copyright management societies to rely, for the protection of their repertoires in another Member State, on the organization established by the copyright management society operating there, without being obliged to add to that organization their own network of contracts with users and their own local monitoring arrangements, are not in themselves restrictive of competition in such a way as to be caught by [ex] Article 85(1) [now article 81(1)] of the Treaty”. From this statement, it emerges that antitrust authorities have chosen one of the two traditional approaches adopted to regulate competition, namely the so-called “rule of reason”.²¹ It complements “per se rules”, which instead provide a higher degree of State intervention. However, in the specific circumstances, bilateral agreements could be contrary to antitrust provisions, for example when they aim to impede “direct access to their repertoires by users of recorded music established abroad”.²²

¹⁹ The principle of non-discrimination is part of the *acquis communautaire* and of the jurisprudential approach to collecting society as well. In the GEMA decision, the Commission established that collective licensing bodies cannot exclude foreign right holders from membership. Otherwise, that would constitute an abuse.

²⁰ These arrangements are generally divided in two categories, denominated type A and type B agreements. The type A obviously requires a mutual exchange in the coverage of the respective repertoires of two collecting societies, with a consequent transfer of the relevant fees collected over a period of time. Type A agreements respect the copyright law orientation to grant national treatment even for foreign right holders. Type B agreements, instead, develop the same exchange in the coverage of the respective repertoires, but they do not provide an actual transfer of the fees. Therefore, the moneys collected thanks to the use of foreign repertoires remain to the benefit of national right holders. There is no direct relationship between the uses and the remuneration. Even if the amounts collected in the single countries could compensate each others, this practice actually contradicts a very basic principle. Such a concern must be deeply considered by regulatory bodies and by courts when judging the lawfulness and the efficiency of bilateral agreements.

²¹ “Courts, scholars, and the enforcement agencies have articulated a three-step test to govern analysis under this Rule of Reason. First, a plaintiff must establish a prima facie case by showing that the restraint produces tangible anticompetitive harm, a showing that usually consists of proof of *actual detrimental effects* such as increased price or reduced output. Second, the defendants must prove that their agreement produces *procompetitive* benefits that outweigh the harm implicit in plaintiff’s prima facie case. Third, even if the defendants can make such a showing, the plaintiff can still prevail by proving that the defendants can achieve the same benefits by means of a *less restrictive alternative*. This three-part test, it is said, helps courts distinguish those contracts that harm or destroy competition, by creating or exercising market power, from those that promote it”. Passage from Meese, Alan J., “Price Theory, Competition, and the Rule of Reason”, University of Illinois Law Review (2003).

²² *Lucazeau v SACEM* (ECJ), ECR 1989 (2811).

From theory to practice

This issue has been subject to the scrutiny of the Commission in two recent circumstances, notified before the Commission, and related to the IFPI-Simulcasting Reciprocal Agreement²³ and the so-called Santiago Agreement²⁴. It is important to point out this aspect because the two examples constitute the present realistic steps towards the establishment of pan-European licenses.²⁵ Furthermore, it is worth asking whether the consolidated practice of bilateral agreements should actually constitute the way forward for the realisation of an efficient integration of the services offered by those crucial intermediaries in the entertainment industry.

In October 2002, the Commission provided negative clearance to the application made by IFPI (International Federation of Phonographic Industry) in relation to the agreement between record producers' right administration societies for simulcasting licenses. The exemption granted by the Commission allows IFPI collecting societies to work as one-stop-shops for simulcasting licences. Such licenses would have a "multi-territorial" and "multi-repertoire" character, and will be offered to those broadcasters interested to transmit radio and TV programmes over the internet. The Agreement is intended to reduce legal uncertainty and, more importantly, broadcasters' and collecting societies' transaction costs. In fact, under the new licensing regime, broadcasters would only have to get the permission to use the protected material once from a single collecting society, without the need to seek authorisation separately in all countries where the programmes could be actually received.²⁶ The Commission did not ignore the possible anti-competitive effects of such an agreement, particularly in the composition of tariffs, and therefore requested a clearer determination of prices involved, with a separation between the royalty element and the administration fee. However, it is logical to think that the Agreement it is not likely to replace the existing competition, because it is directed at the development of an entirely new service.

Similarly, the European Commission's press release dated 3 May 2004 suggests that a coherent approach will be adopted with respect to the notification of the Santiago Agreement extension, concerning thirty-four of the world's major collecting societies acting on behalf of music authors.²⁷ Sixteen of them are based in Europe. The Commission warned that the amendments extending the Santiago Agreement could be in breach of competition rules. The issue relates to the

²³ "IFPI-Simulcasting Agreement", decision of 08.10.2002, OJ L 107/58.

²⁴ "Santiago Agreement", notification of 17.05.2001, OJ C 145/2.

²⁵ It is worth mentioning the "BIEM-Barcelona Agreement", notified on 28.02.2002, OJ C 132/18. It is the most recent among the agreements. It concerns the "Bureau International des sociétés gérant les droits d'enregistrement et de reproduction mécanique", the umbrella organisation for collecting societies entrusted with the management of authors' rights in mechanical reproduction. The Agreement relates online reproduction. It covers webcasting and on-demand transmission of music by acts of streaming or downloading. Similarly to the other two examples, it has a "multi-territorial" and "multi-repertoire" nature. However, it would maintain the customer allocation, in respect to the territorial orientation of copyright but against the principles of freedom of choice, as illustrated in this section of the paper. The unclear outcomes of the BIEM-Barcelona Agreement have produced only a limited range of reactions.

²⁶ From the perspective of the legal discipline, this does not contradict the traditional country of destination principle.

²⁷ "In September 2000, around the time of the CISAC Congress in Santiago (Chile), five member societies dealing with music performing rights signed the so-called Santiago Agreement...The Santiago Agreements were initially signed by the following societies: BMI (United States), BUMA (Netherlands), GEMA (Germany), PRS (United Kingdom), and SACEM (France). Now, there are over forty societies that are part of the "Santiago" framework. In September 2001, at its congress in Barcelona, CISAC sister organisation BIEM, the organisation specifically co-ordinating the practices of mechanical rights societies, adopted very similar standard contracts dealing with mechanical reproduction rights". Excerpt from CISAC (International Confederation of Societies of Authors and Composers) website (<http://www.cisac.com/>).

provision of licences, to commercial users, for music downloading and streaming services. Despite the characters of multi-repertoire and multi-territoriality, the notified version of the Agreement would lead to the standard customer allocation clause being maintained, which obliges users to purchase licences only from the national collecting societies where the provider's activity is located.²⁸ The Commission has pointed out that justification for a similar limitation in the users' freedom to operate with a collecting society of their choice cannot be found in any technical argument and it is inconsistent with the very nature of the internet, which has a worldwide coverage.

4. Moving to a different market: the pan-European license

From what has been described in relation to the IFPI-Simulcasting and the Santiago agreements, it is clear that in the first instance it has been advances in technology that have required new systems for the distribution of content to be developed. In such a context, the law is facing the struggle of keeping up to date. It is surprising to notice that, despite the huge effort in the harmonisation process²⁹, copyright maintains its territorial nature. While a legislative answer has not yet been given, since the beginning of the new millennium the Commission has been involved in finding solutions on the specific issue of collective management. As mentioned before, in 2004, the Commission released a "Communication on the Management of Copyright and Related Rights in the Internal Market, launching a consultation on the role of collecting societies".³⁰ The replies to the consultations produced the elaboration and the fresh release of the working document entitled "Study on a Community Initiative on the Cross Border Collective Management of Copyright" (7 July 2005).

Stakeholders' needs

The Communication pointed out that a substantial evolution in collective management could come from the insistent call for a pan-European licence. This is essentially the direction taken by the collecting societies in the context of distribution of licenses over the internet. The economic advantage of the establishment of an official and unified system for pan-European licenses will certainly be counted by the corresponding reduction of transaction costs and an appropriate level of legal certainty, as stressed above. The point to be discussed is whether the current approach of using the instrument of bilateral agreements is sufficient to ensure the efficient evolution towards pan-European licenses, or whether a deeper intervention by legislators is required.

A disadvantage of the current case-by-case approach is the consequent lack of rigorous harmonisation and consistency within the same market of collective licenses. In fact, the Commission authorised the agreement concerning simulcasting, while a decision on the Santiago and Barcelona agreements is still pending. Timing and difference in the treatment of similar circumstances could

²⁸ The initial version of the IFPI-Simulcasting Agreement also contained the same restrictive element. However, the Commission obliged IFPI to eliminate it, otherwise exemption would not have been granted.

²⁹ The effort has been deployed in the drafting and implementation of seven directives, relevant for copyright matters. The seven directives are commonly referred to as Software (91/250/EEC), Rental (92/100/EEC), Satellite (93/83/EEC), Term (93/98/EEC), Databases (96/9/EC), Information Society (2001/29/EC) and Resale Right Directives (2001/84/EC). An Enforcement Directive (2004/48) has also been passed.

³⁰ For a more detailed analysis of the Communications and the responses, see Frabboni, Maria Mercedes, "A Difficult Future for Reforms on Collective Management of Rights", *Entertainment Law Review*, Vol. 16, No. 6 (2005), 144-148 (*forthcoming*).

have negative effects on the way market adapts to the new systems of distribution. These factors are likely to assume greater importance because several other sectors would want to adopt of cross-border licensing models. In fact, such licenses are not only useful in the context of the internet. For example, all the businesses connected to digital TV channels, irrespective of whether they are based on satellite or cable transmission, could benefit from simplification in process of acquisition of licenses. Thus, a higher degree of clarity would be ensured, to the benefit of collecting societies, users and right holders alike, if the European authorities could direct the formation of uniform licenses or at least standardised businesses models. Overall, a proposal for the harmonisation of collective management, in the form of Community-wide licenses, could bring more predictable effects and could lead to an evaluation of the economic impact descending from these measures. Given the sporadic character of the examples above, it might even result that the benefits of the new licenses do not offset the burden of costs to be faced because of the reform of collecting societies. Similarly, modalities for the remuneration of right holders under the new model could actually provide negative incentives and impoverish the average quality and quantity of the repertoires made available. In order to counter such a similar risk it is worth trying to consider a general set of rules and not leave it to disorganised developments.

Given the consumer oriented approach taken by antitrust law in the EU, it is also important to point out the position of users, who are in most cases the final intermediaries before fruition takes place. Users have shown a general enthusiasm for a new system of licenses and contractual conditions. They have even suggested that content is made available without territorial limitation, in the real world like on the internet. This option would question the instrument of bilateral agreements as they do not necessarily constitute an element of net inefficiency, but they certainly limit the possibility of establishing a flexible system of tariffs. Bilateral relationships could be weakened in two diverse ways, both of which I now briefly summarise. In addition, a more conservative approach will be included in the range of the possible solutions.

Three different options

The first option probably could be identified as the bravest proposal. It would consist of the opportunity for collecting societies to manage the repertoires on multi-territorial basis, without customer allocation clause so that users of all nationalities could purchase whichever licence form whichever collecting society and use it in Europe, or maybe even worldwide. This solution is supported by the Study. It would be based on "right holders' choice to authorise a collecting society of their choice to manage their works across the entire EU"³¹. Accordingly, a French broadcaster, for example, could purchase his license in the UK even if its broadcastings take place in a number of different countries and the material is exploited beyond the national borders. However, collecting societies would not have the right to license the whole repertoire but only the works of those right holders who have conferred the right onto them directly.

Apart from contradicting most of the legal principles for the exploitation of copyrighted works, some aspects of this first option are courageous but might also result in a series of negative side effects. First, a unique blanket license for the whole repertoire on all territories would not be available. Therefore, competition would require users to engage in several transactions. Secondly, perfect competition as such would not necessarily be the best solution. It is true that collecting societies would have to compete for the appropriation of the largest

³¹ The Study, 5.

portion of users.³² In fact, they would survive only from the economies of scale realised through the payments made by the users. In these circumstances, however, competitive strategies *à la Bertrand* would lead to a price war, on the basis of the success of the respective repertoires. Collecting institutions would tend to charge the lowest possible price at the most favourable conditions for their users. A similar choice would be to the detriment of right holders and creativity industry as a whole. Right holders' compensation would be less than satisfactory, with possible negative effects on the incentives to provide new material for the repertoires.. This does not mean that artists would not produce any longer. Creators would simply find alternative methods of dissemination.³³

Collecting societies, however, could even choose to compete *à la Cournot*, and do not play the price war in the first place. In fact, even if just one among the societies has the adequate incentive not to decrease its prices and differentiate its services instead, right holders escaping from the other societies engaged in competition would all assign their rights to the society that would protect them the most. Following this perspective would lead to collecting societies not playing the competitive strategies in the first place, but rather differentiating their offer instead. This second idea is more likely to safeguard repertoires and the global quality of the content managed by the official licensing institutions. However, competition *à la Cournot* requires regulation to provide the appropriate incentives for the preservation of the value of repertoires, and accepts a certain degree of concentration as necessary to maintain efficiency in terms of quantity and quality of the creative effort. Though, in a similar oligopoly, would collecting societies' bargaining power be able to contrast the power of strong right holders, especially in the music industry? This point is made not discuss the merit of the competitive structure but to raise awareness on the effects of such an innovative policy.

The second option is the establishment of a single European collecting society, with the duty of granting pan-European licenses in a centralised manner.³⁴ This approach reflects similar solutions adopted in the context of intellectual property rights, for example in the case of patents. The new body would unify all transactions from the side of right holders into a unique request for assignment, in order to form a unique repertoire for Europe. In this way, national collecting societies would be eliminated. However, one must consider another important factor, which would heavily determine the outcome of this model, namely the fact that the establishment of a unique collecting body for Europe would be exceptionally expensive. Then, policy makers would have to assess whether it would be preferable to allocate the costs to right holders or users, or share them between the two. An additional worrying element relates to the heavy delays that such a change would cause in the process of improving copyright harmonisation and implementation. Delays are likely to be the most severe when State intervention is the greatest, namely in the case of a unique society eliminating all other forms of collective management. One may want to notice that this option has not even been taken in consideration by the Commission.

³² "The Study concludes that [a similar option] offers the most effective model for cross-border management. With respect to cross-border licensing, allowing right-holders to choose a collecting society outside their national territories for the EU-wide licensing of the use made of his works, creates a competitive environment for cross-border management of copyright and considerably enhances right-holders' earning potential. With respect to cross-border distribution of royalties, the right-holders freedom to choose any collecting society in the EU, will be a powerful incentive for these societies to provide optimal services to all its rightholders, irrespective of their location - thereby enhancing cross-border royalty payments", *ibidem*.

³³ As an example, see section 5 of this paper, on creative commons.

³⁴ See also Suthersanen, Uma, "Collectivism of Copyright: The Future of Rights Management in the European Union", *The Yearbook of Copyright and Media Law* (2000), 15-42.

Finally, a third alternative model would consist in being more conservative, and enhancing the implementation of bilateral agreements. This would occur with the elimination of all kinds of discriminatory practices towards right holders, made on the grounds of residence, nationality, or category of membership. Furthermore, this option would not include costumer allocation clauses any longer, and would aim to appropriate systems for the remuneration of all right holders.³⁵ In this context, competition would still be limited.

As a conclusion of this section, it is surprising to notice on the one hand that the discussion on the need to make collecting societies more competitive has brought to the conclusion that competition itself could represent a risk for the quantity and quality of the products offered to users. On the other, the alternative models fail to provide a reliable projection on the possible outcomes. Paradoxically, two out of three options indicate that an Internal Market would work properly if the barriers for the entry of new subjects remain as they are or increase. This evidence seems to support the view that collective management would have to stretch quite a lot in order to abandon rapidly the model of natural monopoly.

5. Weakening the barriers' argument: collective management under a different light

This part of the paper does not pretend to contradict the relevance of the inevitable barriers to entry, and their negative effects on competition as they have been identified over several years of investigations and legal disputes. Those barriers exist and are not likely to be eliminated, but can only weakened. The phenomena that will be described below constitute ways of tackling the traditional methods of collective management by providing alternatives to collective management, that will never be perfect substitutes but they will partly limit the power of collecting societies' exclusivity. These final thoughts conclude the discussion by offering views beyond the possible proposals of a specific reform, but in direct connection with management of intellectual property.

The role of strategic groups: the culture of creative commons

The open source movement and all the lobbies against the establishment of strong property rights have contributed to the rise of a feeling that creativity should diversify its ways of distribution and, in particular, should not necessarily comply with the mechanisms of exploitation created for the benefit of record companies.³⁶ Peer-to-peer file sharing devices have underlined the vulnerability of copyright in the entertainment industry, by offering the possibility to final consumers to acquire content for free. However, from the point of view of the actual organisational models, it is more interesting to recall the solution that has emerged under creative commons licenses.³⁷ Under a system of creative commons, the content would arguably have more chance to reach the public sphere, given the fact that constriction, typical of the "all right reserved" copyright regime, would be avoided. Creative commons licences would reserve some rights to the author, while some other rights would be waived. The effective benefit to social welfare is difficult to assess. However, one must bear in mind that these kinds of legal instruments pose effective challenges to the activity of collecting societies, as they impoverish the aggregate value of their repertoire. If an increasing number of right

³⁵ The Commission argued this would be a second best solution (the Study, 34).

³⁶ See Lessig, Lawrence, *The Future of Ideas: the Fate of the Commons in a Connected Worlds* (2001).

³⁷ <http://creativecommons.org/>. While several countries have joined the project and proposed their licence schemes, only few of them have had the chance to actually implement it.

holders adopt similar licenses, the impossibility to find substitutes to collecting societies' repertoire could be drastically reduced. What should be expected from collecting societies losing valuable items of their repertoire? Certainly, competitive strategies could develop. However, it is important to ask whether this will lead to an improvement in social welfare.

From the discussion among legal scholars on the possible effects of creative commons licenses it has emerged, first and foremost, that they do not constitute a particularly innovative instrument for the distribution of content.³⁸ However, they have acquired particular relevance now that the access to creative material is facilitated through the internet. Again, as in radio simulcasting and streaming, the evolution of alternative business models does not strictly depend on the specificities of the legal system, but rather on the opportunity of exploitation.

One could see how the elements giving impulse and popularity to the creative commons phenomenon are mainly cultural ones and require to be only mentioned by the present work. The argument, which is often brought as an example of open access for creativity goods, is that emerging artists would have a strong preference for being known by the public before any other commercial strategy is undertaken. This could even apply in the fields of publications of academic works. Furthermore, the new forms of distribution and exploitation of the works focus on process of creative collaboration, providing incentives for more experimental kinds of creations, in a wide range of intellectual property based products (music, literature, theatre plays but also software etc).

Creative commons could also promote an opposite legal approach in respect to territorial collective management, or the hypothesis of a unique collecting society at the European level. In fact, under the collecting societies' framework, management of copyright has moved the focus towards a right to remuneration. Through the diffusion of such licenses, right to remuneration is not that important. It is not a surprise to observe that most of the users of creative commons licenses have chosen the element of attribution as crucial. They want to be recognised as authors. But apart from that, the ways the creative effort is economically exploited do not matter that much. However, once a part of the artist's repertoire is given to the public domain, record companies and publishers could be discouraged to invest in him. In fact, only a part of his resources are available for commercialisation. Caught in a vicious circle, the creators, the younger artists in particular, will be penalised by the use of creative commons. They are the creators that, above all the others, require a consistent initial investment. If some of their resources belong to the public domain, the value of their future productions is also likely to be devaluated.

The comments on creative commons have consistently demonstrated that proposals for a new approach are undoubtedly orientated towards the affirmation of alternative methods to do business. Even if creative commons are the result of cultural disputes, rather than a strong opposition to the current inefficiencies of collective management, they do oblige stakeholders and right holders in particular to start thinking about efficiency of the alternatives, not only in the short run but also in the perspective of preserving the value of their own repertoires.

³⁸ It is interesting to see the reactions offered by the music industry itself. A point of view was offered by Pike, Emma, "What you need to know about Creative Commons", available at <http://www.bmr.org/html/news/news53.htm>.

Challenges from other markets: will right holders or users ever internalise the managing function?

If the market of collective management was a contestable market, then the emergence or the presence of powerful subjects at the top or at the bottom of the production chain could seriously challenge the dominance of collecting institutions. Concentrations on the side of production, publishing and uses of copyright material do exist. This is the case of the Five Majors, for example, that have integrated most of the functions from the stage of recording to the publication and commercialisation of sound recordings. Also broadcasters, from the side of the users, constitute large interest groups and could exercise a remarkable power in respect to a hypothetical situation where collecting societies compete amongst each other. Therefore, they have the essential structure to face most of the tasks usually performed by collecting societies. These two examples would fit with the widely accepted idea that the possible entrants in the market of collective management would not necessarily be new firms, created on the spot. Assuming a change in the legislation of some countries allowing a free establishment of collecting societies, different types of firms, or even large corporations such as media groups or broadcasters could decide to integrate the managing activity into their business portfolio.

On the one hand, there are appreciable arguments against enabling users to perform the function of monitoring uses and collecting royalties. In fact, a basic conflict of interests exists between the goals pursued by right holders and those of users. Right holders would always fear that users would not declare the correct amount that they used and remuneration would therefore be diminished. However, examples of TV music channels testify that uses and delivery of contents are two functions that can coexist. From the point of view of competitive dynamics, antitrust authorities should bear in mind the counterbalancing role that large copyright users could have, in respect to the power of right holder groups and collecting societies.

On the other hand, publishers³⁹ seem prepared for the important role of managing their own repertoire, grant licenses directly to users and get payments for the royalties as they mature.⁴⁰ However, this approach has two basic problems. First, it does not take into account that large users want to use the whole repertoire of sound recordings, for example. Users would have to keep purchasing different licenses in order to acquire an exhaustive license.⁴¹ A rise in transaction costs could make the publishers' option less attractive, but it might not be a strong argument to oppose publisher becoming issuer and managers of licenses. Secondly, and most importantly, publishers themselves constitute a problem for antitrust authorities. If one considers the music industry together with the film industry, it is clear that a single publisher acquiring the role of manager for its own repertoire could lead to severe concerns. A similar change in the mechanisms of collective management would certainly eliminate the problem of concentration or natural monopolies held by collecting societies, but it would significantly exacerbate the problem of publishers becoming price makers of the entire entertainment industry. It is safe to

³⁹ Represented, to a large extent, by Universal, EMI, Warner, Sony and BMG (the last two merged parts of their vertically integrated activities). The "independent" publishers are large in number but not in size. Therefore, they are obliged to sign contracts with the Majors in order to acquire parts of their chain of production, or know-how. In some cases (see Bruce Springsteen), the songwriters themselves could start publishing companies.

⁴⁰ Katz, Ariel, "The Potential Demise of another Natural Monopoly: Digital Right Management and the Future of Music Collective Licensing", University of Toronto, Law and Economics Research Paper N. 04-02 (May 2004).

⁴¹ Likewise in the first option described in part 4 of this paper.

say that, from the perspective of antitrust law, the risk would be somewhat too high.

Taking product differentiation as an advantage

The difficulties in dealing with internet distribution of music content have suggested that both right holders and collective management bodies were not prepared to face the sudden challenge on online delivery of copyrighted works. These circumstances could be seen to recommend that heterogeneity of competitive strategies would have left some scope for organising an agency dedicated only to the electronic distribution. An agency of this type could establish a certain degree of competition with the pre-existing collecting societies, but it could also promote a sort of cooperation for sharing the competencies with stakeholders performing new roles, at least for some aspects related to the digital environment.

This aspect could constitute an advantage in managing information goods in general, especially thanks to the Digital Right Management technology (DRM). The extent of DRM implementation mostly depends on the very next stages of evolution in the diffusion of common standards and interoperability of the systems of protection. However, if DRM will become an appropriate instrument contributing to all four main functions performed by collecting societies (licensing, monitoring, collecting and redistributing remunerations), supremacy of the present institutions could significantly decrease. The message deriving from the institutional support that has been given to DRM dissemination is that technology can change the *modus operandi* of collecting societies in Europe, despite the evident incoherence of DRM with some of the basic principles of the harmonised copyright discipline, including exceptions to the reproduction right.⁴² The point to be made here concerns the suitability of an approach encouraging technology itself as a primary form of management. On the one hand, saving in licensing, monitoring and collection costs could be to the benefit of the creative process itself. On the other, it is not possible to know whether a similar change could be effectively based on technology, which has intrinsic weaknesses and leaves the door open to circumvention.

Conclusions

This paper has provided a review of the main developments of collective management regulations, in the light of competition law principles and copyright provisions. The assessment of the possible economic effects, deriving from opposite regulatory choices, has brought to the conclusion that an undisputed solution does not exist. The options listed above could eliminate some of the inefficiencies of the present situation, but they would generate other kinds of negative incentives and externalities on stakeholders. In particular, the goal of implementing a high level of competition among collecting societies was found to have dubious outcomes, in relation to the incentive to create valuable products, from both a qualitative and quantitative points of view.

It was a slight surprise to find that the Commission issued a new study on the topic. The document has provided useful guidance on how a future regulation is

⁴² As provided by Article 5 of the Information Society Directive. A summary of the possible conflicts between DRM and copyright law can be found in Towse, Ruth: "Economics and copyright reform: aspects of the EC Directive", *Telematics and Informatics*, Volume 22, (2005) 11-24. See also Ottolia, A., "Preserving Users Rights in DRM: Dealing with Judicial Particularism in the Information Society", *International Review of Intellectual Property and Competition Law*, Vol. 35, Issue 5 (2004), 491-521.

likely to be shaped. Since IFPI-Simulcating and Santiago, the one-stop-shop direction was likely to prevail, supported by the real needs of consumers operating internationally and using technology as an instrument for the consolidation and the expansions of their business. The conclusive thought of this paper is that the organisational models, including the one suggested by the Commission, must be analysed thoroughly, in order to understand if new frameworks could provide the necessary efficiencies for counterbalancing other forms of inevitable concentration, that will developed on the basis of right holders' bargaining powers in the respective markets. If on the one hand technology is requiring the rapid adoption of adequate instruments updating collective management working rules, on the other radical innovation, in the way legislation is proposed, could be troublesome. Focus on the specificities of the market could concretely help legislation and technologies to achieve the common goal of efficiency.