PERFORMING RIGHTS SOCIETIES AND THE DIGITAL ENVIRONMENT

While scholars have written extensively on the substantive issues raised by the Internet and the possible application of copyright in the digital age, collecting societies remain absent from the discussions. Yet, copyrights would be of little value without the collective management performed by these societies. In 1986, Dr Arpad Bosh, the then Director General of WIPO, stated that "With galloping technological developments, collective administration of such rights is becoming an ever more important way of exercising copyright and neighbouring rights. Taking into account its increasing importance, much more attention should be paid to it, both at the national and at the international levels". The goal of this paper is to address this concern. Based upon a non random sample of interviews that were conducted in December 2005 and January 2006 with 7 collecting societies (4 European, 2 North American and 1 Japanese), this exploratory research aims at finding how collecting societies operate in the digital environment regarding the ubiquitous nature of the Internet, and what their concerns and perspectives are for the future.

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I. INTRODUCTION

Since England passed the first copyright act, the Statute of Anne in 1710[1], copyright has always been confronted by technological innovations. The tremendous impact of the Internet and its related technological innovations are the latest step in this evolution. Thanks to the Internet, works can now be disseminated throughout the globe simultaneously at any given time and reproductions can be made without investment or loss of quality. For these reasons, the Internet raises several questions about the applicability of copyright to the digital environment. Quite logically, these issues have led to passionate and disputed discussions among legal scholars[2], and caused governments to adopt new treaties[3], an EU directive[4] and national legislation implementing these international agreements.

[1] http://www.copyrighthistory.com/anne.html. While the Statute of Ann is often said to have been enacted in 1709, a careful reading of the Act on this website clearly shows that the Act actually was actually enacted in 1710.

[2] *See*, among others : in the US : JESSICA LITMAN, DIGITAL COPYRIGHT (2001); in France: ANDRE LUCAS, DROIT D'AUTEUR ET NUMERIQUE (1998); in Switzerland: LUKAS BÜHLER, URHEBERRECHT IM INTERNET (1999); in Belgium: SEVERINE DUSSOLLIER, DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMERIQUE – DROITS ET EXCEPTIONS A LA LUMIERE DES DISPOSITIFS DE VERROUILLAGE DES ŒUVRES (2005) ; in Germany : STEFAN BECHTOLD, VOM URHEBER- ZUM INFORMATIONSRECHT (2002).

[3] WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), known as "Internet Treaties" (http://www.wipo.int/treaties/en/ip/wct/ and http://www.wipo.int/treaties/en/ip/wppt/). On these treaties, *see*: MIHALY MIHALY FICSOR, THE LAW OF COPYRIGHT AND INTERNET (2002).

[4] Directive 2001/29/EC of the European Parliament and of Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereafter: EC Directive on the Information Society), available at (http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML).

So far the music industry has been the most concerned with the online exploitation of copyrighted works. The importance of digital music is growing each year. The exchange of music files made possible thanks to the development of p2p systems became a way of life for millions of consumers. According to the International Confederation of Societies of Authors and Composers (CISAC)[5], 150 billion musical works were transmitted illegally on the Internet in 2003 (while there were "only" 3 billion in 1999 and 36 billion in 2000)[6]. While CISAC does not yet have any figure for 2003, the estimated loss in 2001 for the music industry was of USD 4.3 billion[7].

The p2p phenomenon thus left no choice for the recording industry but to offer a more consumer friendly business model if it wanted to stop losing revenues. In 2001, Universal and Sony were the first to open their online music store with "Pressplay". EMI, AOL/Time, Warner and BMG followed with "MusicNet". However, the high prices charged by these companies and heavy usage limitations proved unlikely to raise the interests of consumers. Far from having any deterrent effect, the percentage of consumers using p2p exchange files systems went on rising to reach its peak in May 2003 with 35 million users in a sole month[8]. On May 19, 2003, Sony and Universal finally gave up and sold "Pressplay" to Roxio, which

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[5] As of 2004, CISAC numbers 210 authors' societies from 109 countries and indirectly represents more than 2 million creators within all the artistic repertoires: music, drama, literature, audio-visual works, graphic and visual arts (http://www.cisac.org).

[6] http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=FR&Alias=MAN-AR-05.

[7] http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=MAN-AR-05. These figures can of course be disputed and have actually been disputed. *See* in particular Felix Oberholzer and Koleman Strumpf, according to whom file sharing would not have any statistically significant effect on purchases of the average music album and that file sharing probably increases aggregate welfare due to increased dissemination of music ("The Effect of File Sharing on Record Sales. An Empirical Analysis", at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf).

[8] Mary Madden/Lee Rainie, *The state of music downloading and file-sharing online* (April 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf; *see* also Mary Madden/Lee Rainie, *The impact of recording industry suits against music file swappers* (January 2004, Pew Internet & American Life Project), at http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf.

used it as a base to relaunch the Napster online music store[9]. One month before, Apple had however launched in the United States a service that would prove the viability of online music sales and become a model; this model was iTunes. Unlike previous online music stores, iTunes has several advantages: it allows a free preview of 30 seconds per song for a price of USD 0.99 per download, respectively USD 9.99 for an album, an amount that reflected the projected price announced one year earlier by Jupiter Research, a market research firm[10]. The system is easy to use and the *à la carte* pricing model makes the music store feel like p2p in certain ways, thanks to fast searching and a one click purchasing mechanism. The DRM used by Apple, called "FairPlay" has acceptable restraints: users can use the songs downloaded on five computers and can make unlimited CD burns of their songs[11]. Most importantly, unlike its predecessors, Apple has secured the participation of content providers before its release on the market. Thanks to the support of the majors and over 600 independent labels, iTunes proposes a catalogue of more than 2 millions songs. ITunes quickly expanded its services to other countries to cover Europe, Canada, Japan and Australia[12]. As of February 2006, iTunes had sold over 1 billion songs, i.e. more than 80% of worldwide online music sales[13].

According to Charlie Mc Creevy, European commissioner for internal market and services, "The digital market for music was worth USD 330 millions in 2004 – estimates expect it to double in 2005. Analysts predict that digital sales could reach 25% of record

[9] http://en.wikipedia.org/wiki/Pressplay.
[10] URS GASSER, ITUNES: HOW COPYRIGHT, CONTRACT, AND TECHNOLOGY SHAPE THE BUSINESS OF DIGITAL MEDIA - A CASE STUDY 9 (2004), at http://ssrn.com/abstract=556802.
[11] GASSER, *supra* note 10, at 11, however points out that one can only burn the same exact playlist seven times in order to prevent mass-production of copies for illicit sales.
[12] http://en.wikipedia.org/wiki/ITunes_Music_Store.
[13] *Id.* For a worldwide listing of the online music stores, *see* http://www.pro-music.org/musiconline.htm.

company revenues in five years. 50 million portable music players were sold in 2004, including 10 million iPods"[14].

Both the p2p phenomenon and the development of online music stores raise important questions as to the management of the online exploitation of copyrighted works. This exploitation involves several layers of stakeholders. The first layer consists of the right holders, and they shall be defined more accurately later on when I give a general overview of the music industry; the second is the users, i.e., the ones who are supposed to request the authorization to exploit the copyrighted works, in our case the websites' owners; the third layer is the computing industry, which designs the software facilitating the widespread dissemination and/or exchange of copyrighted works on the Internet as well as the technical protecting devices; the fourth layer is composed of the consumers, who use the Internet to play the copyrighted works, and the final layer consists of the collective societies, who manage the exploitation of these works on behalf of the right holders.At first glance, a global study on the management of copyrighted works involving all the stakeholders could appear to be the most relevant. Such a study would however suffer several shortcomings. First, all these layers involve different categories of players. For instance, users develop their activities based upon different business models: iTunes, an online music store, differs from KaZaa, a p2p system, which differs in turn from web-broadcasters, i.e., online radio or television stations. One may thus doubt the validity of any selected sample. Besides, a study taking all the stakeholders into account might be diluted by trying to represent too many divergent opinions. A focus on collective societies makes sense for several reasons. First, scholars have yet to

[14] http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf.

address the issue of copyright management from the standpoint of collective societies. True, several scholars have discussed copyright management on the Internet. However, most publications have been and are focused on the enactment and implementation of legal provisions related to digital rights management (DRM) as a consequence of the adoption of the Internet Treaties[15]. Strangely enough, the question of how collective societies operate in the digital environment remain absent from any debate among legal scholars. No empirical research has ever been conducted in this area. In the very first sentence of his seminal book on collective administration of copyrights, David Sinacore-Guinn writes: "Despite the obvious importance of collective rights administration and organizations, publications on the legal aspects of the activities of collective societies and the concepts that govern them are rare"[16]. I would add that publications on collective societies in the digital environment are almost nonexistent. The time has come to fill that void. Secondly, we shall see that, from a methodological point of view, collective societies are structured upon a similar model everywhere around the world[17]. All of them are facing the same problems on the Internet. To find a representative sample is thus much easier.

The core of this paper is based upon several interviews that were conducted between December 2005 and January 2006 with executives of the following collective societies: the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc.

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[15] See for instance : in Switzerland : Jacques de Werra, *The Legal System of Technological Protection Measures under the WIPO Treaties, the DMCA, the European Union Directives and other National Legislations (Japan, Australia)*, 189 RIDA 66 (2001); in the US: Jane Ginsburg, *News from the US: Development in US Copyright Since the Digital Millenium Copyright Act*, Part I, 196 RIDA 127 (2003) and Part II, 197 RIDA 77 (2003); in Belgium: SÉVERINE DUSSOLLIER, DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMÉRIQUE – DROITS ET EXCEPTIONS À LA LUMIÈRE DES DISPOSITIFS DE VERROUILLAGE DES ŒUVRES (2005).

[16] DAVID SINACORE-GUINN, COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS xli (1993).

[17] See *infra* Part II: Did you say collective societies ?

(BMI), *die Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA), *la Société des Auteurs, Compositeurs et Editeurs de Musique* (SACEM), *la Société Suisse pour les droits des auteurs d'oeuvres musicales* (SUISA), *la Société Belge des Auteurs, Compositeurs et Editeurs* (SABAM) as well as the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC)[18]. This selection is based upon the following criteria: The United States, Europe and Japan are the primary consumers of musical works[19], and the paper focuses on countries having a similar level of copyright protection. Considering recent developments within the European Union[20], it also makes sense to take into consideration not only large European collective societies such as GEMA and SACEM, but also small ones such as SUISA and SABAM.

II. DID YOU SAY COLLECTIVE SOCIETIES?

A. Introduction

1847. The reign of Louis-Philippe was coming to an end. Charles Baudelaire had published his first translations of Edgar Allan Poe's works and Honoré de Balzac was about to finish his *Comédie Humaine*. The music industry was still far from being an "industry". This was still a time when technology played a much lesser role, and when Giuseppe Verdi

[18] All interviews but for JASRAC were conducted face-to-face. An interview questionnaire was sent to JASRAC.

[19] According to data collected by Jürgen Meier and Armin Vogel, *The Music Industry in the 21st Century – Facing the Digital Challenge* 18 (2002), at http://www.screendigest.com/reports/mi2104/NSMH-5SDK6M/sample.pdf, market shares regarding music consumption in the world were divided as follows in 2002: 38.8% for the United States, 29.8% for the European Union and Switzerland (with 6.6% for Germany and 4.6% for France) and 17.7% for Japan. By comparison, China's market share for music consumption only amounted to 0.5% (lower than the 0.7% allocated to Switzerland for instance) despite 30.3% of worldwide population.

[20] See *infra* Part IV A 1: How Do Performing Rights Societies Operate in the Digital Environment – Authorized Distribution Channels: Online Music Stores – From the Sydney Agreement to the EU Recommendation.

could see his works performed publicly in *Teatro alla Scala*. The same applied to Ernest Bourget, whose fame could not be compared to that of Verdi but who, still, also owned copyrights in his works. On one evening in March 1847, Ernest Bourget was sitting at the terrasse of the *café-théâtre* "Les Ambassadeurs" on the Champs-Elysées and enjoying a glass of *eau sucrée*. While drinking, Ernest Bourget heard the performance of his composition "Les Bluettes" in the café. Considering that he had no reason to allow the performance of his work without compensation, he offered to authorize the owner of the café to perform his work in return for his drink. The owner refused, Ernest Bourget sued him in front of the *Tribunal de Commerce de la Seine* and won the case[21]. The story would have remained an anecdote if it had not led to the creation in 1851 of the *Société des Auteurs, Compositeurs et Editeurs de Musique*, better known as SACEM[22], whose main mission is to monitor the works of its members and distribute the amounts received from the exploitation of these works among these members. The concept of performing rights society was born[23].

Performing right societies quickly spread around Europe: The *Societa Italiana degli Autori ed Editori* (SIAE) was created in 1882, the *Anstalt für musikalisches Aufführungsrecht* in Germany in 1903[24]. In 1911, SACEM created an office in the United States in an attempt to enlist American Composers. Americans however had no desire to enroll in a French society and, on a rainy October night in 1913, nine composers and music publishers led by Nathan

[21] This story is depicted by several authors. *See* for instance: David Peeperkorn, *Collecting for "Bluettes"*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 11 *et seq.* (1989); MIHALY FICSOR, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2003), at 19 § 28.
[22] http://www.SACEM.fr.
[23] Actually, the SACEM was not the first collective society in history. In 1791, Beaumarchais had founded the Société des Auteurs et Compositeurs Dramatiques (SACD) to represent the interests of dramatic authors and composers to theater owners with respect to performances of their works. In 1837, Honoré de Balzac, Alexandre Dumas, Georges Sand and Victor Hugo had created the Société des Gens de Lettres de France (SGDL). The latter one however protects the interests of writers without being a collective society *stricto sensu*.
[24] SINACORE-GUINN, *supra* note 16, at 84.

Burkan created the American Society of Composers, Authors and Publishers, better known as ASCAP[25].

After performing right societies were flourishing in many countries[26], it became clear that organization on an international basis was required. One way to do it could have been to open foreign offices with foreign jurisdictions, as SACEM had tried to do in 1911 in the United States. However, such a solution would have required each user to request a license from each foreign office to be able to perform that office's repertoire; it thus had significant transaction cost and was fairly unpopular among authors[27]. A preferred approach that quickly developed and is still being used was for collective societies to enter into reciprocal representation agreements with each other[28]. According to these agreements, each society agrees to represent the interests of the other within its respective territory; instead of monitoring its sole repertoire, each collective society thus administers a worldwide repertoire on its territory.

In order to coordinate their work, 18 performing rights societies founded the International Confederation of Authors and Composers (CISAC) in 1926[29], whose model contract has been used since its adoption in 1936 for most if not all reciprocal agreements concluded among the performing rights societies[30]. Eighty years after its creation, CISAC

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[25] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 54-55 (rev. ed. 2003); I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Organizations, Revisited*, 50 J. COPR. SOC'Y 355, 376 *et seq.* (2003).
[26] *See* SINACORE-GUINN, *supra* note 16, at 85.
[27] ULRICH UCHTENHAGEN, LA GESTION COLLECTIVE DU DROIT D'AUTEUR DANS LA VIE MUSICALE (2005), at 125 § 672.
[28] *See* on these agreements : SINACORE-GUINN, *supra* note 16, at 645 *et seq.*
[29] http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-HISTORY&Lang2=EN. *See* for more information on CISAC: UCHTENHAGEN, *supra* note 27, at 110 *et seq.*, § 582 *et seq.*
[30] UCHTENHAGEN, *supra* note 27, at 113 *et seq.* § 597 *et seq.*; FICSOR, *supra* note 21, at 42 § 87.

now has 210 members from over 109 countries[31]. In December 1990, European collective societies decided that time had come for them to create a group that would be a link between them and the European institutions. That group is called the European Grouping of Societies of Authors and Composers (GESAC) and currently counts 34 of the largest author's societies in the European Union, Norway and Switzerland, representing nearly 500'000 authors, not only in the area of music, but also graphic and plastic arts, literary, dramatic and audiovisual works[32].

Performing rights societies have significant economic power. ASCAP currently counts over 230,000 U.S. composers, songwriters, lyricists, and music publishers as affiliates. Through agreements with affiliated international societies, it also represents hundreds of thousands of music creators worldwide[33]. ASCAP revenues for 2005 amounted to USD 749 millions[34]. Collective societies worldwide collected over USD 5 billions in 2003, with 90% of these revenues coming from the music industry[35].

B. Nature and membership

According to Sinacore-Guinn, "collective societies" can be defined as "a legally cognizable entity whose objectives are to represent the economic and moral interests of creative rights owners and whose function is to administer, using transactional techniques of a greater or lesser degree of collectivization, the economic and moral rights of a significant

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[31] http://www.cisac.org/web/Content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-MEMBER.
[32] http://www.gesac.org/eng/gesac/default.htm.
[33] http://www.ASCAP.com/about/.
[34] http://www.ascap.com/press/2006/031306_financial.html.
[35] http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=A-US-CISAC.

proportion of a nation's creative rights owners in their works"[36]. Performing rights societies are just one type of copyright collective societies and specifically monitor the public performances of musical works.

With the exception of the United States, collective societies are all regulated by both provisions in national legislation[37] and by their bylaws. While the US Copyright Act does not specifically discuss performing rights societies, they operate under consent decrees, for reasons that shall be explained below. Due to the fact that performing rights societies owe their origins to the actions of individual authors in major industrial nations, they are all private organizations owned and controlled by their affiliated right owners[38]; for instance, the board of directors of ASCAP is composed of 24 directors, 12 of whom are writer members and 12 of whom are publisher members[39]. The legal status of these societies may vary however; while ASCAP, JASRAC and GEMA are non-profit associations, BMI, SACEM and SUISA are corporate entities.

With the exception once again of the United States, where three performing rights societies coexist, ASCAP, BMI and SESAC[40], most collective societies operate as *de facto* or *de jure*[41] monopolies within their territory[42]. This monopolistic situation has at least three

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[36] SINACORE-GUINN, *supra* note 16, at 10 and 194.
[37] Art. 65-78 of the Belgium Copyright Act, as well as the Royal Decree of April, 6, 1995; Art. L 321-1 to L 321-13 of the French Copyright Act; The German Copyright Administration Law; The Japanese Law on Intermediary Business Concerning Copyright; Art. 40-60 of the Swiss Copyright Act.
[38] FICSOR, *supra* note 21, at 40 § 79 *et seq.*, 136 § 365 *et seq.*; SINACORE-GUINN, *supra* note 16, at 16, who however mentions that collective societies are public entities in the developing countries. *See* for instance the Algerian *Office national des droits d'auteur et des droits voisins* (ONDA), http://www.onda.dz/onda.asp.
[39] Art. IV Section 1 of the Articles of Association of ASCAP.
[40] For a brief overview of each of these societies, *see*: James Kendrick, *A Short History of Collective Licensing – Musical Compositions – The American Experience*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 30 *et seq.* (2002); DAVID SINACORE-GUINN, INTERNATIONAL GUIDE TO COLLECTIVE ADMINISTRATION ORGANIZATIONS 532 *et seq.* (1993).
[41] Such is the case for instance of Switzerland, where Art. 42.2 of the Swiss Copyright Act provides that "authorization shall be granted as a rule to one society only for each category of works and to one society for neighboring rights".

major advantages[43]: first, it enables collective societies to grow large enough to effectively represent their members on a national scale and defend their interests; second, it allows the appropriate infrastructure to effectively monitor the exploitation of members' works throughout the country; and third, users can get a license from a single society rather than having to ask for permission from several entities. Broad support was expressed in favor of the dominant if not exclusive position of collective societies during the hearing related to collective management that took place in Brussels in November 2000[44].

However, monopolistic or dominant positions also raise some concerns. One may wonder whether collective societies are allowed to refuse applicants. As a matter of principle, applicants have to fulfill the requirements contained in the bylaws, i.e., for performing rights societies, to be an author, composer or publisher. May nationality requirements be used to exclude prospective members? The answer depends upon the countries. Before 1971, GEMA used to have bylaws that prohibited the affiliation of non-German citizens. In a decision rendered on June 2, 1971[45], the European Court of Justice ruled that those bylaws were infringing article 86 of the EC Treaty by denying nationals of other Member States the right to join GEMA. In addition, the Court ruled that Member States had to allow affiliates to limit the grant of their rights to certain territories as well as entrust the management of their rights

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[42] Robert du Bois, *Principles of tariffs and distribution; some remarks on the most important activities of authors' rights societies*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 68, 71 (1989); SINACORE-GUINN, *supra* note 16, at 16; UCHTENHAGEN, *supra* note 27, at 19-20, § 57 *et seq.*; Herman Cohen Jehoram, *The Future of Copyright Collecting Societies*, 3 E.I.P.R. 134, 135 (2001).

[43] SINACORE-GUINN, *supra* note 16, at 222 *et seq*., and FICSOR, *supra* note 21, at 135 § 362 share the same view.

[44] http://europa.eu.int/comm/internal_market/copyright/management/hearing-collective-mgmt_en.htm. *See* also remarks made by Mihaly Ficsor and Gerhard Pfennig in response to Axel aus der Mühlen, *in* WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 91-92 (1998).

[45] *GEMA I*, decision of June 20, 1971, OJ L 134/15. *See* Jan Corbet, *Author's societies in Europe*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 22, 26 (1989).

in different territories to different societies. Similarly, affiliates had to have the right to limit the grant of their rights to certain categories of rights, and to hand over the administration of other categories of rights to other societies. This ruling was confirmed three years later in *BRT v. SABAM and Fonior*, in which the European Court of Justice ruled that collective societies had to ensure a balance in their internal rules between "the requirements of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights"[46].

While very few authors have actually taken advantage of the new provisions to join different societies for different categories of rights and/or territories[47], the situation remains that any EU author is entitled to join any EU collective society due to the principle of free movement of persons. However, this principle does not apply in other countries, which still require a certain relation with their country as a precondition: SUISA for instance requests its members to demonstrate a close relation with Switzerland, either through citizenship, residence or in some other way[48]; going further, JASRAC requests any member to be a resident of Japan and to have the center of his/her activities in Japan[49].

Considering their dominant position, collective societies have to operate based upon the principle of fair and equitable treatment; in other words, they have no right to treat applicants placed in similar positions in a different way[50]. Once an applicant fulfills the requirements stated in the bylaws, it is almost impossible for a collective society to refuse an

[46] Case 127/73, [1974] ECR 313.
[47] Corbet, *supra* note 45, at 26.
[48] Art. 5.1 of the Statutes of SUISA (http://www.SUISA.ch/home_f.htm).
[49] http://www.JASRAC.or.jp/ejhp/membership/index.html.
[50] *See* SINACORE-GUINN, *supra* note 16, at 341-342. Art. 45.2 of the Swiss Copyright Act expressly provides that "they [the collecting societies] shall administer the rights in accordance with fixed rules and with the requirements of equal treatment".

application[51]. This being said, the issue is only theoretical, because in practice, collective societies are eager to have as many members as possible to increase their repertoire.

Authors, composers and publishers never have an obligation to adhere to a collective society, even though affiliation will often be unavoidable with respect to those rights that by nature or statute cannot be administered individually[52]. This is one of the main issues addressed by the consent decrees under which both ASCAP and BMI operate. To understand how these decrees were enacted, one has to go back to the 1940s. As radio had become more and more successful in the 1930s, ASCAP, then the sole performing right society in the United States, had expressed its will to increase its license fees so as to collect more substantial royalties. Broadcasters claimed that ASCAP was abusing its monopolistic position. Since ASCAP licenses were to expire on December, 31, 1940, broadcasters decided to fight against the society on its own territory, and to create a new performing rights society on their own: that society was Broadcast Music, Inc. (BMI). Meanwhile, the Justice Department had filed an antitrust suit against ASCAP and was willing to file a new one against both ASCAP and BMI in 1941, alleging eight violations of the Sherman Act. Both BMI and ASCAP settled the cases[53]. The consent decrees are the result of these settlements[54].

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[51] On this issue in more detail, *see* SINACORE-GUINN, *supra* note 16, at 303 *et seq.*

[52] SINACORE-GUINN, *supra* note 16, at 289; UCHTENHAGEN, *supra* note 27, at 34 § 144; John Morton, Remark *in* WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 35 (1998), according to whom "from the point of view of musicians, […] it is […] unrealistic to regard the collective management of rights as exceptional", and Gerard Gabella in the same volume, at 37.

[53] GOLDSTEIN, *supra* note 25, at 58-60; Kendrick, *supra* note 40, at 31 and 34; UCHTENHAGEN, *supra* note 27, at 20 § 62.

[54] For ASCAP: *United States v. ASCAP*, 1940-1943 Trade Cases (CCH), 56,104 (S.D.N.Y. 1941), amended by 1950-1951 Trade cases (CCH), 62,595 (S.D.N.Y. 1950), amended by 1960 Trade Cases (CCH), 69,912 (S.D.N.Y. 1960), amended by 2001 Civil Action (WCC) 41,1395 (S.D.N.Y. 2001). For BMI: *United States v. BMI*, 1940-1943 Trade Cases (CCH) 56,0966 (E.D. Wis. 1941); 1966 Trade Cases (CCH) 71,941 (S.D.N.Y. 1966). On these consent decrees, *see*: Alfred Schlesinger, *Collecting Societies and United States Anti-Trust Law*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 85 *et seq.* (1989); Koenigsberg, *supra* note 26, at 382 *et seq*.

In its fourth provision, which points out the voluntarily basis of any collective management, the 2001 consent decree enjoins and restrains ASCAP from "limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-exclusive licenses to music users for rights of public performance". In other words, performing rights can never be assigned on an exclusive basis in the United States[55].

The situation differs in Europe, where rights are usually assigned on an exclusive basis to the societies. These exclusive assignments have been challenged there as well however. In 1993, the Irish rock band U2 and their publishers challenged PRS' rules, according to which their live performance right had to be assigned on an exclusive basis[56]. According to the band, they would be better served if they were able to administer this right on their own for at least two reasons: self-administration would obviate the need to pay any administrative and social deductions[57], and they would get paid for their performances much faster than the three year period they faced at PRS. PRS refused to forego the assignment, believing that self-administration was not only impossible but contrary to the band's interests. Confronted with this refusal, U2 brought an action before the High Court of Justice for abuse of dominant position by PRS in February 1994. The proceedings were delayed due to an investigation that

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[55] Andre Schmidt, *Contracts and Powers of Representation of Collecting Societies*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 54, 57-58 (1989); Koenigsberg, *supra* note 25, at 379.

[56] PRS is an acronym for the UK performing rights society. The following explanations are based upon the two following contributions: Crispin Evans & Nathalie Larrieu, *Collective Licensing Today (non digital media) – Performing Rights: The Licensor Experience – Live Performances: the PRS Experience*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 61 *et seq.* (2002); Euan Lawson, *Collective Licensing Today (non digital media) – Performing Rights: The Licensee Experience – Live Performances: Collecting Societies and the Public Performance Right*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 89, 92 *et seq.* (2002).

[57] As to these deductions, see *infra* Part II D: Did you Say Collective Societies - Accounting and distributing royalties.

began on October 13, 1994 under the auspices of the British Monopolies and Mergers Commission. In February 1996, the Commission determined that the exclusive assignment was not mandated by the members' interests and was in violation of *GEMA* and *BRT* mentioned previously. Based upon this outcome, the parties finally settled. As a result, PRS amended its statutes and introduced a general scheme under which it would grant each member a license for live performances upon request wherever and whenever the performance takes place; in addition, PRS engaged itself to pay the royalties directly to the publishers and writers within 30 days of the date of the concert. On August 6, 2002, the European Commission confirmed the opinion of the British Monopolies and Mergers Commission in *Banghalter*, and held that a mandatory assignment of all the author's rights, including as to their online exploitation, would amount to an abuse of dominant position within the meaning of article 82(a) of the E.C. Treaty[58]. Therefore, while nobody has ever contested the right for members to leave a society and adhere to another one[59], *U2* and *Banghalter* made it clear that authors also have the right not to adhere to any performing right society at all.

Considering the monopolistic or at least dominant position occupied by European performing rights societies, antitrust analysis plays a significant role in the way these societies perform their duties. Antitrust suits against performing rights societies have been filed in both

[58] *Banghalter and Homem Christo v. SACEM*, decision of August 6, 2002, case COMP/C2/37.219, available at http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37219/fr.pdf.

[59] According to UCHTENHAGEN, *supra* note 27, at 48 § 226, SUISA, which administers the worldwide register of composers, authors and editors technically called CAE/IPI (standing for "*Compositeurs, Auteurs, Editeurs*"/Interested Party Information), would transfer over 100'000 affiliations from one society to another each year.

Europe[60] and the United States[61]. In most countries, the governmental control is not limited to judicial supervision however. Additional regulation usually comes from two sources: first, the control of copyright royalty tribunals over rate schedules, such as in Germany, Switzerland or the United States[62]. While these tribunals only intervene when stakeholders cannot reach an agreement in Germany and in the United States, it always has to approve the rate schedules in in Switzerland; in practice, such approval is automatic when stakeholders have reached a consensus. Neither Belgium nor Japanese laws require any governmental approval of the rates, but both countries nevertheless communicate their rates to public entities: to the Ministry of Economical Affairs in Belgium[63], and to the Agency for Cultural Affairs in Japan[64]. Secondly, in all countries under scrutiny but the United States, the operations of performing rights societies are supervised by a public entity[65].

After having discussed the nature and legal framework under which performing rights societies operate, we now turn more specifically to their duties.

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[60] *See* Jean-Francois Bellis, *Collecting societies and EEC law*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 78 *et seq.* (1989). For instance: *BRT v. SABAM and Fonior*, Case 127/73 [1974] ECR 313; *Greenwich Films v. SACEM*, Case 22/79, [1979] ECR 3275; *GVL v. Commission*, Case 7/82, [1983] ECR 483; *Musik Vertrieb Membran v. GEMA*, Case 55/88, [1981] ECR 147.

[61] *CBS v. ASCAP*, 400 F.Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2nd Cir. 1977), *rev'd*, *BMI v. CBS*, 441 U.S. 1 (1979); *BMI v. Moor-Law, Inc.*, 527 F.Supp. 758 (D.Del 1981), *aff'd mem.*, 691 F.2d (3d Cir. 1982); *ASCAP v. Showtime*, 912 F.2d 563 (2nd Cir. 1990); *Nat'l Cable Television Ass'n v. BMI*, 772 F.Supp. 614 (D.D.C. 1991).

[62] Art. 14 of the German Copyright Administration Law; Art. 46.3 of the Swiss Copyright Act; § 801 of the US Copyright Act. *See* as to these tribunals: SINACORE-GUINN, *supra* note 16, at 428 *et seq.*

[63] Interview with SABAM (December, 22, 2005).

[64] SINACORE-GUINN, *supra* note 16, at 431.

[65] These entities can vary: the Patent Office in Germany (Art. 18 of the German Copyright Administration Law); the Federal Institute of Intellectual Property in Switzerland (Art. 52 of the Swiss Copyright Act); the Ministry of Justice in Belgium (Art. 76 of the Belgium Copyright Act); the Ministry of Culture and a special Commission in France (Art. L 321-3, L 321-9, L 321-12 and L 321-13 of the French Copyright Act). *See* on this control: du Bois, *supra* note 59, at 71-72; Nanette Rigg, *A Short History of Collective Licensing – Musical Compositions – The European Perspective : Collective Management of Rights in Europe From 1777 to 2002. Why is it necessary ?*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 18, 24-25 (2002); FICSOR, *supra* note 21, at 144 *et seq.* § 395 *et seq.* ; SINACORE-GUINN, *supra* note 16, at 519 *et seq.*; UCHTENHAGEN, *supra* note 27, at 12-13 §§ 11 *et seq.*

C. Granting Licenses

The licenses granted by performing rights societies have one specific feature: they cover the whole repertoire monitored by the society, i.e. both its members' repertoire as well as those of its sister societies based upon the executed reciprocal agreements. The delivery of a license for some musical works at the exclusion of others is therefore impossible[66]. Such licenses are called "blanket licenses". In other words, users will be allowed to exploit "any of the works in the collective's repertoire upon payment of a fixed fee, without distinction as to the actual works used"[67]. While this may be at the advantage of most users, others might be interested in a couple of works only and thus unwilling to pay for the whole repertoire. Such was the case in particular of local television stations in the United States during the 1980s. These stations considered blanket licenses to be an unreasonable restraint of trade, and therefore brought an antitrust suit in the United States District Court for the Southern District of New-York. The District Court ruled in favor of the local television stations. On appeal, the Court reversed and ruled that blanket licenses were not an unreasonable restraint on trade where the opportunity to acquire individual rights through program license, direct license, or source license was realistically available to the station, as in this case[68]. In Europe, the French

[66] Certain countries, in particular the United States, allow the deliverance of "per program licenses" which, as their name indicates, consists of licenses for a particular program only. However, there again, the license covers the worldwide repertoire (FICSOR, *supra* note 21, at 43 § 89; SINACORE-GUINN, *supra* note 16, at 388).

[67] du Bois, *supra* note 42, at 69; Gunnar W.G. Karnell, *Collecting societies in music*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE SOCIETIES IN THE MUSIC BUSINESS 15, 17 (1989); SINACORE-GUINN, *supra* note 16, at 20-21, and at 382 *et seq.*; Koenigsberg, *supra* note 25, at 375 and 387; UCHTENHAGEN, *supra* note 27, at 19-20 § 53 *et seq.*; FICSOR, *supra* note 21, at 43 § 88.

[68] *Buffalo Broadcasting Co v. ASCAP*, 744 F.2d 917 (2nd Cir. 1984).

Cour de cassation also ruled in 1985 and 1987 that the delivery of blanket licenses by SACEM did not amount to an abuse of dominant position[69].

The policies and operations of performing rights societies are governed by the principal of fair and equal treatment[70], meaning they are not allowed to treat similar users in similar positions differently. In *Tournier*, The European Court of Justice made it clear that collecting societies may not engage in a concerted action having the effect of systematically refusing to grant direct access to their repertoires to users located in foreign territories, a possible justification for such a refusal being the impracticality of setting up a monitoring system in the foreign territory[71]. In its article 11.1, the German Copyright Administration Law even provides that "collecting societies shall be required to grant exploitation rights or authorizations to any person so requesting on equitable terms in respect of the rights they administer".

To avoid any discrimination, performing right societies will try and negotiate rates schedules with diverse categories of users for the different types of exploitations possible[72]. Several criteria are relevant to these negotiations[73]. First, performing rights societies will try to find out whether existing rate schedules can apply to a new channel of distribution, a criterion which obviously plays an important role on the Internet; for instance, the rate schedules applied to webcasting are the same as the ones for radio broadcasting. When there is no similar existing business model on the market, which was the case for music on demand a few years ago, the societies will try to consider the royalty rates charged by sister societies

[69] *SARL Le Xénon v. SACEM*, Cass. civ. I, decision of April 16, 1985; *Société Générale de la Ferme c. SACEM*, Cass. civ. I, decision of June 23, 1987.
[70] UCHTENHAGEN, *supra* note 27, at 32-33 § 133 *et seq.*, as well as 61-62 § 301 *et seq.* and 85-86 § 455 *et seq.*
[71] *Ministère Public v. Tournier*, decision of July 13, 1989, case 395/87, ECR (1989) 2521.
[72] FICSOR, *supra* note 21, at 44 § 90; Koenigsberg, *supra* note 25, at 385.
[73] *See*, in general, du Bois, *supra* note 42, at 74; SINACORE-GUINN, *supra* note 16, at 412 *et seq.*

for similar types of licenses in foreign countries[74]. Considering the global reach of the exploitation, especially on the Internet, performing rights societies cannot ignore the rates that have been set by their sister societies. Users may not understand why rates would significantly differ from one country to another for a similar business model, and societies would find it hard to justify such differences. More than that, the European Court of Justice expressly ruled in 1989 in *Lucazeau* that the imposition of significantly higher tariffs than those applicable in other Member States would constitute an abuse of dominant position, unless the differences are justified by objective and relevant factors[75]. For these reasons, rates for music on demand appear to be similar if not identical in most countries[76]. Second, the rates will depend upon the type of exploitation; a user who features music as a primary attraction, for instance in a concert hall, will obviously pay more for a musical performing rights license than a user who supplies music as background for its customers, such as in a restaurant or a hotel; in other words, "a collective will analyze each industry according to how it uses the creative work, how it earns its income, and what it can afford"[77]. Finally, performing rights societies will negotiate these rates keeping in mind a traditional rule of thumb recommended by CISAC since 1954[78], according to which the maker of a work participates with ten percent of the profits of that work[79]; this rule is even expressly mentioned in article 60.2 of the Swiss Copyright Act[80].

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[74] UCHTENHAGEN, *supra* note 27, at 74 § 387.
[75] *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811.
[76] See *infra* Part IV A 4: How Do Performing Rights Societies Operate in the Digital Environment – Authorized Distribution Channels – Current Practice of Performing Rights Societies.
[77] SINACORE-GUINN, *supra* note 16, at 414. The performance of music in restaurants and cafés was held to be for profit in 1917; see *Herbert v. Shanley Co.*, 242 U.S. 591, 591, 37 S.Ct. 232 (1917) and its depiction by GOLDSTEIN, *supra* note 25, at 55-56.
[78] UCHTENHAGEN, *supra* note 27, at 71 § 367.
[79] As to this rule, *see* : UCHTENHAGEN, *supra* note 27, at 69 *et seq.*, § 354 *et seq.* One will then have to apply this rule depending upon several circumstances. For instance, for public concerts, performing rights societies will

Needless to say, numerous rate schedules coexist, covering a wide range of performances depending either upon the type of location, such as nightclubs, concerts, restaurants, hotels, or the type of media used, such as radio, television, cable, analog or digital players, blank tapes, CDs or DVDs, cell phones or the Internet[81]. For instance, in 2006, GEMA counted more than 70 different rate schedules[82].

D. Accounting and Distributing Royalties

At regular intervals, the periodicity of which depends upon the licensing terms of each collective society[83], users will have to complete report forms recording the use they made of

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have to evaluate the amount of music which is copyrighted and the one which belongs to the public domain. When protected musical works are performed during a third of a concert, the rate will be of 3.3%. If half the time of a radio broadcasting is devoted to the performance of protected musical works, the appropriate rate will amount to 5% (i.e. 10% of 50%) of the gross income of the radio broadcaster.

[80] Both the Swiss and US Copyright Act try to provide some guidance in the establishment of these rate schedules. Art. 60 of the Swiss Copyright Act reads as follows: "1. When determining compensation, account shall be taken of: (a) the proceeds obtained from use of the work, performance, phonogram or videogram or broadcast or, subsidiarily, the outlay involved in the use; (b) the nature and quantity of the works, performances, phonograms or videograms or broadcasts used; (c) the ratio of protected to unprotected works, performances, phonograms or videograms or broadcasts, and other services; 2. Compensation shall normally amount to a maximum of 10 percent of the proceeds from or cost of utilization for authors' rights and a maximum of 3 percent for neighboring rights; however, it shall be determined in such a way that, subject to economic administration, the entitled persons receive equitable remuneration". Section 801 (b) 1 of the US Copyright Act provides that: "[…]. The rates applicable […] shall be calculated to achieve the following objectives: (a) to maximize the availability of creative works to the public; (b) to afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; (c) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; (d) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices".

[81] ASCAP : http://www.ASCAP.com/licensing/generallicensing.html; BMI: http://www.bmi.com/licensing/; GEMA: http://www.GEMA.de/engl/customers/; JASRAC: http://www.JASRAC.or.jp/ejhp/provisions/pdf/tariffs02.pdf; SABAM: http://www.SABAM.be/website/fr/home.htm; SACEM: http://www.SACEM.fr/portailSACEM/jsp/ep/home.do?tabId=2; SUISA: http://www.SUISA.ch/home_f.htm (*see* "utilisateurs", then "tarifs").

[82] http://www.GEMA.de/engl/customers/schnellsuche.shtml.

[83] The periodicity of the report forms delivered by users to performing rights societies should not be mistaken with the periodicity of the distribution of royalties. To take an example, ASCAP distributes the royalties to the

the repertoire. The forms differ depending upon the collective society as well as the type of activities carried out[84]. There is no international standard for reporting requirements which can differ for each society and each country. To make sure that users comply with these requirements, performing right societies maintain staffs of inspectors to identify potential users and audit users' accounting from time to time[85].

Considering the fact that performing rights societies deliver blanket licenses, they will receive from users a global amount of money that will have to be allocated as fairly as possible to the different rights holders. Before this allocation actually takes place, societies will take a certain percentage of royalties to cover their costs[86]; these costs may vary in a range from 10-20% of the collected amount. After having covered their expenses, performing rights societies will distribute the remaining royalties among the rights holders. To do this, they basically have two options. They can request the users to keep records of all the works used in a given period of time; this method is feasible when the amount of works involved is limited[87]. European performing rights societies tend to rely on complete census as much as can be. This is not the system chosen in the United States however, where performing rights societies consider that it would be prohibitively costly for several types of activities to keep track of all the works that have been performed; such a complete census is in particular unpopular for mass uses of works, because of the substantial transaction costs of assembling

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writers and publishers 8 times a year (4 times for the domestic distribution and 4 times for the international distribution) (http://www.ascap.com/about/payment/distribution.html); SUISA does it 14 times a year.

[84] For examples of report forms, *see*: ASCAP: http://www.ascap.com/licensing/generalreports.html; BMI: http://www.bmi.com/licensing/forms/Hotel%20_report.pdf (regarding public performances in hotels); SABAM: http://www.sabam.be/website/fr/012005.htm.

[85] SINACORE-GUINN, *supra* note 16, at 442-443.

[86] As to these administrative costs and expenses, *see* SINACORE-GUINN, *supra* note 16, at 448 *et seq.*; UCHTENHAGEN, *supra* note 27, at 105 § 558 *et seq*.

[87] For instance, a theatre will have no problem keeping records of all the movies that have been played during a year and for how long. According to Ficsor, a complete census generally takes place for concerts, recitals of classical music and certain other live concerts and events (FICSOR, *supra* note 21, at 46 § 97).

information on those uses[88]. Thus, as explained by ASCAP, it will conduct a complete count of performances in a medium whenever the cost of collecting and processing accurate performance information is a low enough percentage of the revenues generated by that medium[89]. As an alternative, US performing rights societies have developed sampling methods that are designed to be a statistically accurate representation of performances in a medium[90].

Generally speaking, distribution rules are fairly complicated. As an example, the German rules cover more than a hundred pages…For obvious reasons, I shall not go into the details of these regulations. While these methods may vary from one type of activity to another and from one performing rights society to another, they can be summarized as follows:

Whether they apply a complete census or sampling method, performing rights societies will try to break down their market according to revenue sources. These classifications may vary from one society to another: while SUISA has identified twelve primary sources of revenues, such as national public network, private networks, cable

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[88] SINACORE-GUINN, *supra* note 16, at 444.

[89] http://www.ascap.com/about/payment/keepingtrack.html. This is for instance possible in the licensing of mechanical rights, where the Harry Fox Agency can require the exact number of copies of phonograms sold that embody the works.

[90] According to Massarsky, while presenting some advantages, these sampling methods would nevertheless suffer four main drawbacks : first of all, it obviously misses all of the performances of a work; secondly, it can overcompensate certain performances through the statistical multiplier effect that extrapolates the sample to the universal value; thirdly, it can misappropriate the ranking of certain performances, in particular the activity of songs that are just below the hit level; finally, certain genres such as Latino or Country create poor proxies under the sample method since they should be subdivided into several categories (tropical, Mexican, tejano and pop for instance as far as Latino music is concerned) (Barry Massarsky, *Collective Licensing Today [non digital media] – Performing Rights: The Licensor Experience – Feature Broadcasts: the "Great" Debate Surrounding PRO Radio Sampling*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 67, 70-71 [2002]). These concerns are shared by Ficsor, who also points out the fact that performing rights societies may influence the distribution of remuneration in favour of certain categories of works (FICSOR, *supra* note 21, at 46 § 98).

networks, etc.[91], GEMA has identified twenty[92]. All these revenue sources will allow the creation of royalty pools such as television, radio, concert, motion picture or foreign income[93]. The creation of these pools are based upon what ASCAP traditionally refers to as the "follow the dollar principle", according to which the money collected from particular source of revenues is paid out to members for performances of their works on television and money collected from radio stations is paid out for radio performances[94].

Once these royalty pools have been precisely identified, the next step in accounting for and distributing royalty income will be to identify the number of times each work has been performed in a given pool. To do this, performing rights societies correlate the data obtained through their monitoring with their own documentation; this process is known as *rendez-vous* and is handled by computers. In practice, "a title match process requires that users report their uses via a computer readable data carrier compatible with the computer system owned and operated by the collective and formatted in conformity with the collective's data records. The collective will then use a specially designed software to perform the *rendez-vous*"[95].

From then on, one has to make a distinction between the complete census model usually referred to by European performing rights societies, and the sampling model used by the US societies:

European performing rights societies consider the length of time a musical work has been performed as the main criterion to calculate the shares of royalties to be distributed to the rights holders. In other words, for performances on radio or television stations for

[91] Art. 4.1 Distribution Rules of SUISA
[92] Art. VIII *Ausfürhungsbestimmungen zum Verteilungsplan der GEMA für das Aufführungs- und Senderecht*.
[93] SINACORE-GUINN, *supra* note 16, at 468. These were the pools used in 1991 by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN).
[94] Kendrick, *supra* note 40, at 32. *See* on these pools: UCHTENHAGEN, *supra* note 27, at 93-94 § 502 *et seq.*
[95] SINACORE-GUINN, *supra* note 16, at 460; UCHTENHAGEN, *supra* note 27, at 91 *et seq.* § 488 *et seq.*

instance, the societies will take into account the length of the broadcasting and the number of times the musical work has been performed.

> Example[96]
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> Let us imagine that a broadcaster pays an annual fee of USD 200'000 for the use of copyrighted works. If his report mentions a total of 142'027 works performed for a total lapse of time of 454'486 minutes, each minute performed will have a value of USD 0.44 (200'000/454'486). If your work has been performed for a total of 17 minutes by this broadcaster, your royalty will amount to USD 7.48.

In most cases, United States performing rights societies will not measure the actual use of each musical work within a given pool. Instead, a certain number of credit value will be given to each musical work. To weigh these credits, several criteria are used, such as the genre of the music and the place where it is played, because "The economic value of a featured musical performance is greater to a user than is the value that user might attach to the use of music as background for either a commercial or a dramatic program"[97]. ASCAP's distribution rules are very detailed as to how different types of use are weighed differently[98]; while the duration of the performance is taken into consideration as in Europe[99], section VI of ASCAP's distribution rules make a distinction between musical works performed as "theme", "background music", "jingle", "cue music", "bridge music" or "feature

[96] *See* UCHTENHAGEN, *supra* note 27, at 95 § 508.
[97] SINACORE-GUINN, *supra* note 16, at 466.
[98] As to ASCAP sampling method in particular, *see*: Koenigsberg, *supra* note 25, at 394 *et seq.*
[99] *See* Art. VII lit. E and F Distribution Rules of ASCAP (Weighing Formula); Art. 53 Distribution Rules of SACEM ; Art. 3.2.1 Distribution Rules of SUISA; Art. X to XII *Ausfürhungsbestimmungen zum Verteilungsplan der GEMA für das Aufführungs- und Senderecht*. For a criticism of ASCAP's subjective value judgment basis for valuing different types of music instead of focusing mainly on an objective durational basis as European performing rights societies, *see* Paul Katz, *Collective Licensing Today (non digital media) – Performing Rights: The Licensor Experience – Background Uses: Collective Licensing of Background Music Today*, *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 73, 75 (2002).

performance"[100]. The time of the day when the music was performed is also taken into account for television programs[101]. Once a credit value has been assigned to all of the works in a given pool, the total number of credits will be divided into the amount of royalties collected in this pool to create a monetary value for each credit[102].

Example

Let us imagine that, luckily for you, your musical work becomes a "hit". It is performed nationwide several times a day on numerous radio stations, totaling a number of 10'000 performances in three months. Let us imagine that the applicable distribution rules consider that the performance of a musical work on radio carries 2 credits[103]. Consequently, your number of credits for the performances of that particular work on radio stations will be 20'000 (10'000 x 2). Let us imagine that the total number of credits in the radio pool amounts to 1 million. If the global amount of royalties collected from the users assigned in this radio pool is of USD 5 million, the monetary value for each credit will be USD 5. Since you have 20'000 credits in the radio pool, you are entitled to recover USD 100'000 from that pool (i.e. 20'000 x 5).

The truth is that, whether in Europe or in the United States, you will never recover this global amount. First of all, as mentioned previously, performing rights societies will deduct a certain percentage of the collected royalties to cover their administrative costs and expenses. Secondly, collective societies play an important role in the areas of social, educational and cultural activities, especially in Europe. These societies are indeed concerned with the

[100] http://www.ascap.com/reference/drd_rev060705.pdf.
[101] Art. VII lit. D Distribution Rules of ASCAP.
[102] du Bois, *supra* note 42, at 76; SINACORE-GUINN, *supra* note 16, at 468.
[103] The example is hypothetical and no distinction is made here between national or local radio stations or the time of the day when the work is performed, which might in reality be weighed differently depending upon the applicable rules.

protection of their domestic repertoire and cultural diversity. To protect and encourage their own members, performing rights societies have thus developed and implemented pension and welfare plans that are subsidized thanks to a deduction upon the amount of royalties collected[104]. While this social deduction may seem justified, it is fairly controversial in the international arena. One of the principal problems is that funds are taken from the total amount of royalties collected, including foreign owners who usually generate far more money than domestic members in Europe; yet, domestic affiliates will ultimately be the only ones to enjoy the benefits of these funds, at the exclusion of foreign authors who have to suffer this deduction from their income without any compensation in return[105]. Thus, as strange as it may seem, while the need for financial support from European performing rights societies is partly due to the predominance of the US repertoire[106], the fund itself happens to be mainly funded thanks to the exploitation of this foreign repertoire. As a compromise, the CISAC Model Contract allows each society to deduct up to ten percent of the sums that would otherwise be payable to a foreign collective for use in social, cultural and educational programs[107]. This deduction did not remain unchallenged; in 1994, the British Academy of Songwriters,

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[104] On these issues, *see* du Bois, *supra* note 42, at 75; Rigg, *supra* note 65, at 25-26; SINACORE-GUINN, *supra* note 16, at 477 *et seq.*; Peter Lerche, *Rechtsfragen der Verwirklichung kultureller und sozialer Aufgaben bei der kollektiven Wahrnehmung von Urheberrechten, insbesondere im Blick auf den sogen. 10%-Abzug der GEMA*, *in* GEMA Jahrbuch 1997/1998, available at http://www.gema.de/kommunikation/jahrbuch/jahr_97_98/feature/teilc.shtml#iii4b, who considers that such a deduction does not infringe the principle of national treatment, first of all because this principle cannot be opposed to performing rights societies as private entities, secondly because this deduction is not related to the exercise of an exclusive right that would be covered by the TRIPS Agreement or the Berne Convention; UCHTENHAGEN, *supra* note 27, at 33 § 139 *et seq.*, as well as 129 *et seq.*, § 688 *et seq.*; FICSOR, *supra* note 21, at 47 § 99; Cohen Jehoram, *supra* note 42, at 137; André Chabeau, Remark *in* WIPO INTERNATIONAL FORUM ON THE EXERCISE AND MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF THE CHALLENGES OF DIGITAL TECHNOLOGY 110 (1998).

[105] SINACORE-GUINN, *supra* note 16, at 39 and 641.

[106] Corbet, *supra* note 45, at 25, indeed writes: "The more widespread domination of the international repertoire has dangerous implications for both regional and local culture and even threatens its very existence. The societies have therefore realised that they must move away from their cold managerial role and involve themselves in safeguarding their cultural heritage".

[107] Art. 8 II CISAC Model Contract of Reciprocal Representation between Public Performing Rights Societies.

Composers and Authors, joined by PRS in 1996, complained that GEMA's deductions from non-German repertoire was in breach of European antitrust legislation as the deductions discriminated against non-German authors[108]. PRS however never brought its complaint into Court[109] and, today, most if not all collective societies still deduct close to ten percent of the collected royalties for social purposes[110].

> Example:
>
> Let us go back to our previous example and imagine that the collective society deducts 10% of the collected royalties to cover its administrative costs and expenses, plus 10% for its social funds. The allocation among the right holders will take place upon the remaining amount, i.e. USD 80'000.

This does still not mean that you will be entitled to recover the entire USD 80'000. One has to find out how many people have rights upon the musical works performed. In most cases, a musical composition involves at least three categories of right holders: a composer, a music arranger and a lyricist. The three will be entitled to receive a certain share of the royalties. Statutory rules regulating the distribution among rights holders are exceptional. Such an example can be found at § 114 (g) of the US Copyright Act, which however deals with sound recordings at the exclusion of musical works; according to this provision, 45% of the money paid by noninteractive webcasters for the right to broadcast sound recordings over the Internet must be paid to featured artists, 2.5% to nonfeatured musicians, 2.5% to nonfeatured vocalists and the remaining 50% to the companies holding the sound-recording

[108] Rigg, *supra* note 65, at 26.
[109] Information provided by GEMA.
[110] Art. XVII Section 1 lit. b Articles of Association of ASCAP; § 1.4 lit. a Distribution Rules of GEMA; Art. 33 Statutes of SACEM; Art. 8.3.6 Statutes of SUISA;

copyrights[111]. In most cases, unless you have an agreement stipulating the way the distribution should be made among yourselves regarding your musical work, and such agreements are allowed - which is not the case in all countries - the distribution rules of the concerned performing rights society will apply. In practice, rights holders usually voluntarily submit themselves to the default distribution rules[112]. Since each performing rights society is free to adopt its own distribution rules[113], these rules will vary depending upon the type of use and the concerned society[114]. If we refer to our example and admit, hypothetically, that the amount has to be shared equally with your arranger and lyricist, which is the default rule of SACEM distribution scheme, you will be entitled to receive USD 26'666. Once you get your money you will still have to share it with your publisher, in accordance with the agreement you have with him.

Now that the principles governing the performance of collecting societies have been presented, time has come to wonder how these societies try to reconcile their territorial structure with the needs of an online environment without any border.

III. HOW DO PERFORMING RIGHTS SOCIETIES OPERATE IN THE DIGITAL ENVIRONMENT?

A. Authorized Distribution Channels: Online Music Stores

[111] According to WILLIAM W. FISHER III, PROMISES TO KEEP 185 (2004), such statutory rules would also be found in the Greek legislation.
[112] According to SUISA, its distribution rules apply in 95% of the cases. Same opinion: UCHTENHAGEN, *supra* note 27, at 31 § 119.
[113] Art. 7 II CISAC Model Contract.
[114] *See* § 4 Distribution Rules of Gema (default rule: 7/12 composer, 1/12 arranger; 4/12 lyricist) ; Art. 9 Statutes of SACEM and Art. 54 Distribution Rules of SACEM (default rule: 1/3 to each one); Art. 2.1.2 and 2.1.3 Distribution Rules of SUISA.

1. From the Sydney Agreement to the EU Recommendation

Collective societies have been organized on a territorial basis since their inception, meaning that users[115] have to acquire a separate license in each country where works will be performed. As discussed previously, cooperation occurs via reciprocal agreements that allow performing rights societies to monitor a worldwide repertoire in their territory[116]. This model was a viable solution in the analog era, but is outdated now that cross-border trading of copyrighted works has become the rule. The need to adapt existing structures to the specificities of the digital environment is particularly felt in the European Union, where users may have to seek permission from 25 different performing rights societies. In contrast, users in the United States only need licenses from ASCAP, BMI and SESAC. As stated by Charlie McCreevy, European Commissioner for Internal Market and Services, "Europe's model of copyright clearance belongs more to the nineteenth century than to the 21st. Once upon a time it may have made sense for the member state to be the basic unit of division. The internet overturns that premise"[117]. For this reason, we shall focus our attention on European performing rights societies and refer to Japan and the United States for a comparative perspective.

This European focus does not mean that US performing rights societies do not feel constrained by their structures. ASCAP, BMI and the Harry Fox Agency actually tried to

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[115] "Users" are defined as entities which have to require a license to exploit copyrighted works.
[116] See *supra* Part II A: Did you Say Collective Societies – Introduction.
[117] http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/588&format=HTML&aged=0&language=EN&guiLanguage=en.

request an antitrust exemption for a "uni-license proposal" in 2005. This proposal would have led to the creation of an agency to deliver one license to digital users for performing and mechanical rights regarding musical works in the United States. The money collected would have been divided amongst the societies and then distributed to their respective members. Unfortunately, the stakeholders could not reach agreement about the applicable rate, because the societies felt that users' demands were "ludicrous". As a result, multiple licenses granted by multiple societies remains the model in the United States.

In spite of Mr McCreevy's words, Internet Age is not the first time that European collective societies have been confronted with cross-border trading in copyrighted works. A centralization trend already exists in the field of phonogram production; since large phonogram manufacturers are concentrating their production in a few countries, they are given "central licenses" by the society of the country where the production or distribution of these copies takes place[118]. This is made possible thanks to negotiations among the different societies responsible for the granting of mechanical licenses.

The advent of direct broadcasting satellites in the 1980s also allowed transmission of copyrighted programs to several countries. To deal with these cross-border activities before the enactment of the E.C. Cable and Satellite Directive in 1993[119], CISAC adopted in 1987 an addendum to its model contract concerning direct broadcasting satellites, usually referred to

[118] FICSOR, *supra* note 21, at 124 § 334.
[119] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, October 6, 1993, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0083&model=guichett. The Sydney Agreement is however wider in its scope as it is not limited to the European Union.

as the Sydney Agreement[120]. According to this Agreement, licenses to broadcast the programs are delivered by the society of the originating country. If the broadcasts are communicated to several countries, the collective societies of the concerned countries have two alternatives: either agree that the license granted by the originating country is valid for all countries, or require that extraterritorial validity is subject to their approval, and then define the conditions under which such cross-border authorizations might be delivered for their respective country.

The Sydney Agreement was used as a model by the International Federation of the Phonographic Industry (IFPI) for the "Simulcast" Agreement in 2002[121]. The "Simulcast" Agreement intends to facilitate the grant of international licenses to radio and TV broadcasters to engage in simulcasting[122]. Given that simulcasting on the Internet involves the simultaneous transmission of a signal to several countries, a multi-license model seemed appropriate. The parties to the Agreement thus developed a "one stop shopping" license scheme, according to which simulcasters located in the European Economic Area (EEA) can obtain a multi-territorial license from any collective society in the EEA which is party to the Agreement, and then simulcast into the signatories' territories[123].

According to Article 81(1) of the E.C. Treaty, concerted practices among undertakings which may affect trade between Member States are however prohibited. Since collective

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[120] *See* FICSOR, *supra* note 21, at 111 *et seq.* § 305 *et seq.*

[121] Simulcasting, as defined by the parties to the agreement, is the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals.

[122] Commission Decision of October 8, 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI "Simulcasting"), OJ L 107/59, April 30, 2003.

[123] It is worth noting that Article 3.1 of the first version of the Agreement stated that the license had to be granted by the collective society of the country of origin, i.e., the one where the signal originated from. On June 21, 2002, however, the IFPI provided the Commission with an amended version of the Reciprocal Agreement, according to which broadcasters whose signals originated in the EEA could approach *any* collecting society in the EEA that was a party to the Agreement. The freedom to select the society is a key element for the European Commission as proved by the proceedings related to the Santiago Agreement described below.

societies are undertakings within the meaning of Article 81(1) of the E.C. Treaty due to their monopolistic position, the *Simulcast* Agreement was considered a concerted practice. However, Art. 81 (3) of the E.C. Treaty permits exemptions where the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Parties to the *Simulcast* Agreement requested such an exemption from the European Commission. The Commission decided that the Agreement, which gave rise to a new product, i.e., a multi-territorial simulcasting license, was responding to a need in the digital environment and was thus justified[124]. While granting the exemption, the Commission nevertheless required collective societies to disclose separately the amount charged to users for the copyright royalty on one side, and for the administration fee on the other[125]. Implicitly, the Commission believed that by turning the traditional single license model into a multi-territorial one, users were to be able to choose among several collective societies that competed on cost and efficiency. The *Simulcast* decision proves that, since 2002, the desire to enhance competition among collective societies is a major priority in the European Commission's regulation of copyright management.

Due to different goals among CISAC's members, performing rights societies did not immediately reach an agreement similar to the Sydney Agreement to deal with the online exploitation of musical works. However, in 2000, five societies (BMI, BUMA (Netherlands), GEMA, PRS and SACEM) adopted an Agreement during CISAC Congress at Santiago de

[124] OJ L 107/74, § 84-88.
[125] OJ L 107/76-77, § 99 *et seq.* For an analysis of the decision, *see* Dorothea Senn, *Competition Law Aspects of Digital and Collective Rights Management Systems*, *in* DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 123, 129 *et seq.* (Christoph Beat Graber et al. ed., 2005).

Chile, known as the Santiago Agreement[126]. According to the Agreement, users were allowed to get a multi-territorial license from the performing rights society in their country of economic residence, i.e., the country of their residence from which they conduct their activities. Over forty additional societies quickly joined the Santiago Agreement, and in September 2001, at its congress in Barcelona, BIEM's affiliates adopted an identical Agreement known as the "Barcelona Agreement" to deal with mechanical reproduction rights.

These agreements received unanimous support from performing rights societies, not only in Europe, but also in Japan and in the United States. While the Santiago and Barcelona Agreements were following the trend, initiated by the Simulcast Agreement, to allow multi-territorial licenses, they contained one main difference that would ultimately lead to their demise: unlike the Simulcast Agreement, users could not acquire a license from any performing rights society but had to seek permission from the society in their country of economic residence. In other words, enhanced competition among collective societies, as envisioned in the Simulcast Agreement, could not be achieved in the Santiago and Barcelona Agreements because users were unable to choose their society. For this reason, on May 17, 2001, the Commission published a Notice on these Agreements and invited interested third parties to submit observations[127]. On the basis of the comments received, the Commission issued a Statement of Objections on April 29, 2004. In this Statement, the Commission ruled

[126] For more details on the Santiago Agreement, *see*: FICSOR, *supra* note 21, at 114 *et seq.* § 311 *et seq.*; Lucie Guibault, *A quand l'octroi de licences transfrontières pour l'utilisation de droits d'auteur et de droits voisins en Europe*, 8 *et seq.*, at http://unesdoc.unesco.org/images/0014/001400/140025f.pdf; Senn, *supra* note 125, at 134 135.

[127] Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 – BUMA and COMP/C2/39151 SABAM (Santiago Agreement – COMP/C2/38126), OJ C 145/2, May 17, 2001.

that the exclusive competence of a single society in any given case[128] did not create any incentive for performing rights societies to increase efficiency or reduce their costs. The cross-licensing arrangements foreseen in these Agreements thus led to an effective lock up of national territories, transposing into the Internet the national monopolies the societies had traditionally held in the offline world, monopolies that were no longer justified in the digital environment. For this reason, the Commission preliminarily ruled that the Santiago Agreements did not meet the conditions required by Article 81(3) of the EC Treaty. While most performing rights societies strongly opposed the ruling of the Commission, SABAM and BUMA did not; both agreed that the economic residency requirement infringed the freedom of movement mandated by the EC Treaty. In letters dated April 20 and May 10, 2005, BUMA and SABAM respectively declined to be a party to any licensing agreement for online use containing an economic residence clause[129].

The Commission ruling is only a preliminary one and proceedings are still pending. The investigations have currently been suspended due to the legislative process undertaken by another institution within the European Union, the Internal Market and Services Directorate General. While the Directorate General for Competition was investigating the Santiago and Barcelona Agreements, the Directorate General for Internal Market had indeed initiated a survey related to copyright management in the European Union[130]. For the Directorate, creating a regulatory framework for copyright management was a logical step after achieving

[128] i.e. the one where the user has its actual and economic location.
[129] http://europa.eu.int/eur-lex/lex/LexUriServ/site/fr/oj/2005/c_200/c_20020050817fr00110012.pdf.
[130] Communication from The Commission to The Council, The European Parliament and The European Economic and Social Committee, COM(2004) 261 final, April 16, 2004, at http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0261en01.pdf.

substantive harmonization through the different directives[131]. The survey concluded that abstaining from legislative action was no longer a viable option[132]. Such was not the opinion of performing rights societies which, through GESAC, considered the enactment of a Directive on the collective management of copyright inappropriate[133]; the societies were of the opinion that the music industry was undergoing rapid and constant changes, and that it was up to the market, not to the legislator, to meet the demand for pan-European licenses. According to the societies, the Santiago and Barcelona Agreements represented a market-based solution that satisfied all stakeholders.

In spite of these objections, the Directorate for Internal Market commissioned a study on the benefit of cross-border collective management of copyright that was published on July 7, 2005[134]. According to the Commission, the gap between 2004 revenues generated by the online exploitation of music works in the United States and Europe was primarily due to the structure of collective societies, which limited the scope of licensing by territory[135]. As we have seen in *Simulcast* and in *Santiago*, improved regulation of copyright management was motivated by the desire to enhance competition among collective societies. Since the monopolistic position of these societies was not justified in the digital environment due to the cross-border trading of musical works, they had to comply with Art. 81-83 EC Treaty and compete with each other. For the Directorate, recent moves aimed at providing users with

[131] COM(2004) 261 final, at 5.
[132] *Id.*, at 19.
[133] GESAC, COMMUNICATION OF APRIL 16, 2004 ON THE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE INTERNAL MARKET, June 2004, at http://europa.eu.int/comm/internal_market/copyright/docs/management/consultation-rights-management/gesac_en.pdf.
[134] COMMISSION OF THE EUROPEAN COMMUNITIES, STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT, July 2005, at http://europa.eu.int/comm/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf.
[135] *Id.*, at 5.

multi-territorial licensing were insufficient because they did not enable rights holders to comply with the performing rights society of their choice. The study proposed three options: (1) do nothing and let the market operate freely; (2) eliminate territorial restrictions and discriminatory provisions in the reciprocal agreements concluded between the societies; (3) give rights holders the option to choose the society of their choice to grant online rights for the entire EU[136]. The first option was not seriously taken into consideration by the Commission. The second one would have introduced a single entry point and choice for users, who could have required a license from any collective society as in the Simulcast Agreement; however, this would not have increased competition at the level of the rights holders, which was the ultimate goal of the Commission. The basic difference between the latter options was indeed that option 3 introduced competition in the relationship between right holders and collective societies, while option 2 introduced competition at the users' level[137]. Obviously, the study favored the third option, the only one to actually allow competition at the level of the rights holders by giving them the right to join any society[138].

The Commission, obviously keen on going forward with the adoption of a directive, irritated many by purposefully setting a twenty day deadline in the middle of August to receive comments. Though this period is particularly inappropriate for public participation because most Europeans are on vacation, 80 organizations submitted comments. Contrary to what had been assumed by the Directorate in its study, CISAC pointed out that Article 11 (II) of its Model Contract, according to which affiliates had to be nationals of the country in

[136] *Id.*, at 34 *et seq.*
[137] *Id.*, at 40.
[138] *Id.*, at 54.

which their performing rights society operated, had been removed in March 2004[139]. In other words, the primary restriction which had justified an initiative towards cross-border management, i.e., the so-called impossibility for rights holders to join the society of their choice, simply did not exist. Moreover, the figures demonstrating that revenues generated in the United States would be eight times higher than in Europe were misleading because they did not take into account several trends. Revenues generated by ring tones are much higher in Europe than in the United States, and iTunes had not yet been launched in Europe. As expected, collective societies rejected both options 2 and 3. Even though option 2, which favored competition at the users' level, was built upon the reciprocal agreements that had been fundamental to collective societies for over 150 years, it enabled users to "forum shop", a situation the societies felt was untenable. Besides, it would lead users to seek out the least demanding society, thus encouraging a "race to the bottom" where collective societies became less effective because they were cutting costs to be cheaper and thus more attractive to users, to the detriment of authors[140]. To favor competition at the rights holders' level as retained by option 3 was even more worrying because the study concluded that "With respect to cross-border distribution of offline royalties, we believe that Option 3 will also be the most sustainable long-term model"[141]; in other words, in the long term, the model would also be

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[139] CISAC, PRELIMINARY SUBMISSIONS ON EUROPEAN COMMISSION STAFF WORKING DOCUMENT "STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT" 4, July 2005, at http://forum.europa.eu.int/irc/DownLoad/kmeVAKJ_miGUbpJEH26CRWRYCx3NtriCkiQAkJdVT-JQOHHeHf6zk2q2y0-rNHpIbVUB8GNUJuLwovTIbUYIq_4DRRUS7cuq/G6-/CISAC_en.pdf. This provision is also at the origin of the investigation launched by the Competition Directorate of the Commission against CISAC Model Contract (*see* http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=Web-2005-EUSO).

[140] *See* GESAC, WORKING DOCUMENT OF 7 JULY 2005 FROM THE DIRECTORATE-GENERAL FOR THE INTERNAL MARKET ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT – GESAC'S PRELIMINARY COMMENTS, July 2005, at http://www.gesac.org/eng/positions/download/GCOLLECT094ipen05.doc .

[141] COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 134, at 54.

extended to the offline exploitation of copyrighted works. The study thus aimed at revolutionizing the whole model upon which collective societies had been built. GESAC tried to draw the Commission's attention to several unanticipated consequences of option 3: first, large publishers were likely to adhere to foreign collective societies having substantial financial resources like GEMA or SACEM, while individuals would remain members of their small or medium size national societies; this situation would lead to considerable difficulties regarding documentation and distribution of royalties, and thus significantly increase the costs of management. Second, contrary to the Commission's prediction, to favor competition at the rights holders' level threatened small collective societies and, consequently, cultural diversity[142].

Unfortunately for performing rights societies, the battle was lost almost before it began. The Commission unsurprisingly considered that favoring competition at the rights holders' level was the most promising to enhance competition and satisfy the needs of stakeholders. However, in a nod to the strong opposition, the Commission turned the foreseen directive into a Recommendation on September 30, 2005[143]. The Recommendation's main provisions for our purpose are the third and fifth ones:

> "3. Right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights

[142] GESAC, *supra* note 140, at 19 *et seq.*
[143] Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services, at http://europa.eu.int/comm/internal_market/copyright/docs/management/rec_crm_en.pdf.

manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder.

[…]

5. With respect to the licensing of online rights the relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should at least be governed by the following: (a) right-holders should be able to determine the online rights to be entrusted for collective management; (b) right-holders should be able to determine the territorial scope of the mandate of the collective rights manager; (c) right-holders should, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder; (d) where a right-holder has transferred the management of an online right to another collective rights managers, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded amongst them."

How did performing rights societies react to the adoption of this recommendation?

2. Performing Rights Societies' Concerns

a) General Remarks

At first glance, the Recommendation may not seem to change much to the current situation. After all, unlike what the Commission thought, Art. 11 II of the CISAC Model

Contract no longer existed. Moreover, *GEMA* had already made it clear in 1971 that rights holders could join any performing rights society within the Community and were allowed to allocate their rights to different societies in different territories[144]. In 1993, *U2* had confirmed that authors had the right to withdraw their affiliation and individually manage their copyrights[145]. Yet performing rights societies were worried because the central licensing agreements encouraged by the Recommendation made much more sense in the online world than offline, and because it enabled the "central" society to deliver cross-border licenses without the need to refer to reciprocal agreements, thus threatening the territorial structure upon which performing rights societies have been built.

During the interviews, European performing rights societies wondered whether cross-border licensing is a model that is responsive to actual needs of users. GEMA and SACEM explain that "most users are interested in the deliverance of local licenses rather than cross-border ones". For example, in July 2005, GEMA stated that only two out of 41 ring tone companies and zero online music store had requested a cross-border license; for instance, while GEMA offered Apple a license covering Austria, Czech Republic, Germany and Switzerland, the company, assuming that GEMA would apply its high rate to these countries as well, refused and sought the cheaper licenses from each country[146]. While large users like iTunes may be able to suffer the necessary transaction costs to negotiate with each collective society, most small players will not. Interestingly, SUISA points out that "cross-border licenses might paradoxically favor small users who are financially unable to seek licenses from different performing rights societies". Another hindrance to the development of cross-

[144] See *supra* Part II B Did You Say Collective Societies – Nature and Ownership.
[145] See *supra* Part II B Did You Say Collective Societies – Nature and Ownership.
[146] Information provided by GEMA.

border licenses might be the language of users' websites; for instance, JASRAC explains that, in general, its users provide services to the Japanese public in Japanese, so that there is no real practical need for cross-border licenses.

In spite of these observations, cross-border licenses can be expected to gain traction over years as proved by the central licensing agreement that was announced during the annual session of MIDEM in Cannes on January 23, 2006 by GEMA and PRS/MCPS, according to which EMI Music Publishing had decided to work with them to build a one-stop shop to clear the rights of EMI's Anglo-American songs across Europe for online and mobile usage[147]. The possibility for European performing rights societies to conclude central licensing agreements with right holders and, as a result, to deliver cross-border licenses to users raises concerns of both small, medium and large performing rights societies:

b) Small performing rights societies concerns

Whether large or small, the performing rights societies interviewed agree that, by encouraging central licensing agreements, the Recommendation endangers the role of reciprocal agreements and, consequently, threatens the existence of numerous small and medium performing rights societies. As stated by SABAM, "major publishers now have a clear interest in reducing transaction costs by assigning all their rights to large performing rights societies such as GEMA, PRS or SACEM and closing the local offices of their sub-publishers". The disappearance of local sub-publishers, better informed about local needs, may ultimately impoverish cultural diversity, a result that conflicts with the recent signature

[147] http://www.gema.de/engl/communication/press_releases/pm20060123.shtml.

by performing rights societies of the UNESCO Convention, whose main purpose is to recognize and celebrate the importance of cultural diversity[148]. The utilitarian approach taken by the European Commission would thus be unable to properly consider the multiple functions performed by the societies, in particular their cultural and social roles.

SUISA, another small performing right society, obviously shares SABAM's concerns, with one major difference: unlike SABAM, SUISA does not believe that individual authors would be influenced by the majors to join large performing rights societies. The Swiss performing right society believes that proximity matters for individuals, a feeling also shared by SACEM. The rights of authors to assign their rights to any society since *GEMA* was never really used; according to SUISA, "in practice, it is important for individuals to be in direct contact with their local society, with whom they share a common language and have developed trust". For the Swiss performing rights society, the recommendation may lead to the development of a dual system: one for the majors, whose rights would be assigned to large performing rights societies, and one for individuals, who would remain affiliated to their local society. As a result, small performing rights societies would be unable to offer the majors' repertoires and would be limited to the management of only their members' works, a far less attractive and lucrative situation for users. Deprived of their primary source of revenue, small and medium size societies may no longer be viable.

GEMA, which has also opposed option 3, concedes that this risk may exist. However, at this stage, "any such assertions would be merely speculative". For GEMA, "cultural

[148] This fear was reinforced by a delegation of six prominent songwriters and music composers who, in February 2006, addressed the European Commission to defend their rights and shared their fears that the Recommendation may indeed undermine cultural diversity and their longstanding and effective relationship with performing rights societies (*see* http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2006-02-McCreevy).

diversity has already disappeared to a great extent without any centralization; such is the case in particular with radio stations, which do not offer a wide repertoire, instead performing the same hits days and nights".

In its impact assessment report published on October 10, 2005, the Commission sweeps these fears aside and states that, to the contrary, the retained option will allow all societies to compete for members irrespective of their nationality or domicile. Therefore, a performing rights society which does not have a strong repertoire may attract rights holders from other jurisdictions based on its efficiency[149]. One cannot deny this possibility, as the central licensing agreement concluded on April 30, 2004 between SABAM and Universal for eighteen months proves[150]. However, the parallel drawn by the Commission between costs and efficiency is strongly criticized by all performing rights societies interviewed, which unanimously agree that their efficiency cannot be mirrored by their costs. It depends on what services societies perform for those costs, and their effectiveness in performing those services. Far from being a sign of efficiency, administration costs significantly lower than the one charged by sister societies are likely to reflect less valuable management to the detriment of the rights holders[151]. GEMA in particular insists on pointing out that "monitoring copyrighted works, auditing users, compiling necessary documentation, drafting detailed reports and setting up DRM are expensive, much more so than the European Commission seems to

[149] COMMISSION OF THE EUROPEAN COMMUNITIES, IMPACT ASSESSMENT REFORMING CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS FOR LEGITIMATE ONLINE MUSIC SERVICES 30, October 2005, at http://europa.eu.int/comm/internal_market/copyright/docs/management/sec_2005_1254_en.pdf.

[150] http://www.sabam.be/website/data/universalangl.doc. According to SABAM, the agreement was considered to be an experimental one. It will however not be renewed, for reasons that have not been disclosed.

[151] FICSOR, *supra* note 21, at 47 § 100 and 57 § 127. Eliminating a satisfactory quality of documentation and reporting leads to a higher risk that the royalties will be distributed to the wrong right holders, thus leading to deficient collective management.

believe". One cannot logically require collective societies to produce a complete census and simultaneously reduce their administration costs, as the European Commission does.

Small and medium size performing rights societies know that they will not be able to afford the costly infrastructure described above if they are forced to compete without the majors' repertoires. If central licensing agreements develop as can be expected, small and medium performing rights societies are likely to have no choice but to reduce their costs to survive. Questioned as to possible solutions to reduce their costs of management, GEMA and SABAM consider that small societies will have to combine their resources and create joint ventures to consolidate technical investments and back office administration. Joint ventures have already been created among collective societies, both at the national and international level: for example, PRS/MCPS, SACEM/SDRM and BUMA/STEMRA share certain elements of management regarding the common exploitation of performing and mechanical rights[152]. On the international scene, several cooperative agreements have been signed: between SABAM and BUMA/STEMRA regarding the joint management of mechanical rights and IT support, data synchronization and process harmonization[153], in the Carribean region[154] and the International Music Joint Venture (IMJV) put in place by PRS/MCPS, BUMA/STEMRA, ASCAP and SOCAN to use a single shared database[155].

c) Large (potentially central) performing rights societies' concerns

[152] FICSOR, *supra* note 21, at 49 § 106.
[153] http://cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=CN-2004-04-SABAM-BUMA.
[154] FICSOR, *supra* note 21, at 121 § 328.
[155] Remark by Tony Pool (Boosey & Hawkes Music Publishers Ltd.), *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 232 (2002).

While the situation is particularly worrying for small performing rights societies, larger ones also expressed some concerns during the interviews. GEMA believes that "delivering cross-border licenses is one thing, but monitoring the exploitation of works performed in other countries is entirely different". The European Competition is wrong in its belief that DRM are a solution to every problem. Several management steps still must be performed offline: how can one society granting a cross-border license confirm that documentation provided by users accurately reflects the exploitation that took place? Auditing will obviously be required. Who will be entrusted to audit the accounting of users located in other countries and speaking different languages? For GEMA, the "central" society "must have access to users' location to check the configuration of their IT support and DRM to determine whether reports accurately reflect the consumption of musical works. Circumvention by users who would put in place their own infrastructure is very easy and, in most cases, access to users' software is impossible". GEMA concedes that it already faces difficulties getting reports from German ring tone companies[156], and wonders how to effectively safeguard its members' interests at the international level. If users refuse to pay their royalties, how could enforcement be achieved? Would the granting society have standing in other countries to sue the users? These are serious practical hindrances against an effective cross-bordermanagement [157]. Strangely enough, at a time when competition between performing rights societies has significantly increased, the need for cooperation and information sharing has never been so urgent.

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[156] GEMA mentions the fact that it had requested ring tone companies to insert a chip in their software to precisely monitor the exploitation of works. The companies however did not want that level of transparency and refused, arguing that this chip would lead to interoperability problems with their software.

[157] *See* also GESAC, GESAC ANSWERS TO THE QUESTIONNAIRE OF MRS MERCEDES ECHERER ON "COLLECTING SOCIETIES" 11, March 2003, at http://www.gesac.org/eng/positions/download/GCOLLECT039EN03QUESTECHERER.doc (cited ANSWERS).

Finally, SUISA draws our attention to the fact that the delivery of central licensing agreements will raise concern regarding the scope of the rights covered by these agreements: "In practice, one author may already have assigned its rights to a society before contracting with a publisher. In this case, the agreement between the author and publisher can obviously not cover the rights which have already been assigned to a performing rights society. In the traditional license model, the issue to know whether the rights upon a certain work are managed by the performing rights society of the author or the one of the publisher does not matter, since each performing rights society monitors a worldwide repertoire on its own territory based upon reciprocal agreements. The situation gets different in the case of central licensing agreements, where the "central" performing rights society will have to find whether all the works of a given author are covered by the central licensing agreement or not, since it will only be entitled to deliver cross-border licenses for the works covered by the agreement". According to SUISA, this delimitation didn't need to be made previously and will involve significant transaction costs, thus creating a serious practical hindrance.

d) Towards a New Environment

All in all, performing rights societies agree that the adoption of the EU Recommendation changes the atmosphere and has an impact upon their prior solidarity. Competition increases at several levels: performing rights societies do not only have to compete against each other, with the large and small societies seeking different goals, but also have to confront the major publishers. While DRM may serve the interests of collective

societies and help solve the problems described above as well as enhance cooperation[158], they can also be implemented by the rights holders themselves. Should DRM be regarded as a step towards individual management, and consequently the demise of collective management?

3. Digital Rights Management (DRM): a Friendly Enemy?

According to Professor Hugenholtz, "Copyright levy systems have been premised on the assumption that private copying of protected works cannot be controlled and exploited individually. With the advent of DRM, this assumption must be re-examined. In the digital environment, technical protection measures and digital rights managements systems make it increasingly possible to control how individuals use copyrighted works"[159]. Therefore, the possibilities conferred to rights holders to directly control the exploitation of their works through DRM should enable them to fully exercise their exclusive rights. Thanks to DRM, the implementation of exceptions (such as private use) and levies on blankets or devices that go with them could be phased out. Rights holders would thus be in a position to get better compensation than they used to get through the levies distributed by collective societies. Individual management could thus replace collective management.

Questioned about Hugenholtz' position and the possible implementation of DRM as a substitute to collective management, performing rights societies share the same viewpoint; whether European, American or Japanese, they strongly reject Hugenholtz' assertions, for several reasons. First, individual management is extremely costly and even prohibitive for a

[158] Daniel Gervais, *The Evolving Role(s) of Copyright Collectives*, *in* DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 27, 41 (Christoph Beat Graber et al. ed., 2005).
[159] Bernt Hugenholtz/Lucie Guibault/Sjoerd van Geffen, *The Future of Levies in a Digital Environment*, 1 and 10 *et seq*, at http://www.ivir.nl/publications/other/DRM&levies-report.pdf (2003).

vast majority of authors. Second, to monitor the exploitation of the works requires an expertise that rights holders do not have. Third, European performing rights societies in particular believe they play an important social role. They represent a lobbying force to negotiate against powerful users with far more leverage than the authors alone[160]. Without performing rights societies, authors would be at the mercy of users and producers.

If individuals do not have the financial resources and expertise to manage the exploitation of their works, one may wonder why the major publishers could not withdraw their repertoire from these societies, self-monitor the exploitation of their repertoire and thereby increase their profit margins. Among the societies interviewed, only SUISA concedes that this possibility raises serious long term concerns. ASCAP however wonders "Why a publisher would feel like engaging the costs of direct licensing when there is an amazingly effective system [i.e. collective management] at disposal? Far from increasing their profit margin, publishers might lose money"[161].

Performing rights societies have suggested two factors that may indeed prevent publishers from engaging in individual management, at least on a short-term basis:

First, users do not want to acquire several licenses from different entities; they want to exploit a worldwide repertoire with only a single license. Performing rights societies are still the only entities to provide such a service. While it is true that the majors may agree among themselves to offer a similar service in the future, such agreements would suffer two

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[160] Opinion shared by Thierry Desurmont (SACEM), *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 203 (2002); Gervais, *supra* note 158, at 31.

[161] This view is shared by several prominent scholars in this field: FICSOR, *supra* note 21, at 97-98 § 260 *et seq.*, considers that, far from decreasing, the role of joint management will probably increase; Adolf Dietz, *Rationales of Copyright and Collective Administration in the Information Society (comment)*, *in* DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 57 *et seq.* (Christoph Beat Graber et al. ed., 2005). *See* also Alfred Meyer (chief executive of SUISA), *DRMS Do Not Replace Collecting Societies (comment)*, *in* DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 61 *et seq.* (Christoph Beat Graber et al. ed., 2005).

shortcomings: they would most likely be considered a concerted practice that would fall under the scrutiny of competition authorities due to the dominant position of the majors[162], and would probably lead to an increase in the amount of royalties sought, thus encouraging opposition from users. Regardless, this first argument seems pretty weak. The United States example clearly demonstrates that the need to acquire a reasonable number of licenses is not a serious hindrance for users; the situation of iTunes, which preferred to acquire several licenses rather than to accept the single one proposed by GEMA for Austria, Germany and Switzerland is another example. Truth remains that users have a similar interest as rights holders to the existence of performing rights societies.

A second argument is more decisive. All performing rights societies agree that there is no uniform standard for DRM so far, and that companies are unlikely to reach an agreement. At this stage, the establishment of a global and interoperable technical infrastructure on DRM systems based on a consensus among the stakeholders is far from being achieved[163]. A study published in July 2004 by the High Level Group on Digital Rights Management, a study group created by the European Commission, states that "the timescale to see meaningful progress towards mass-market deployment of interoperable solutions would likely be in the

[162] This assumption is confirmed by the class action lawsuit brought in March 2006 by *Bulcao et al. v. Sony BMG Music Entertainment et al.* in the Northern District Court of California against the major records labels, alleging federal and state antitrust violations based upon an alleged conspiracy to fix inflated prices in the online music space that would restrain the availability of online music (*see* http://www.svmedialaw.com/cat-content.html, http://www.zdnet.fr/actualites/internet/0,39020774,39316239,00.htm, of March 3, 2006).

[163] The opinion of the performing rights societies is shared by the European Commission: see *supra* note 313, at 10-11, as well as by some scholars: John Palfrey, *Holding Out for an Interoperable DRM Standard*, *in* DIGITAL RIGHTS MANAGEMENT: THE END OF COLLECTING SOCIETIES? 1 *et seq.* (Christoph Beat Graber et al. ed., 2005); Reinhold Kreile/Jürgen Becker, *Rechtsdurchsezung und Rechteverwaltung durch Verwertungsgesellschaften in der Informationsgesellschaft*, 4, *in* GEMA Jahrbuch 2000/2001, available at http://www.gema.de/kommunikation/jahrbuch/jahr_00_01/themadesjahres.shtml.

range of two to five years"[164]. In addition to what precedes, GESAC adds that "DRM are not by themselves a satisfactory solution to the needs of protection of authors in term of control of the exploitation of their works, court proceedings, fight against piracy, negotiation of fair terms of remuneration with users etc…"[165]. According to GESAC, for the time being no user suggests that DRM could effectively replace authors' societies in rights management[166]. Universal even shares this opinion, believing that "collective licensing may well have a future and certainly is a viable business model for licensing in the context of on-line delivery mechanisms. In fact it may be the only viable method of licensing. It remains to be seen whether the existing copyright societies can reform themselves sufficiently to be able to deliver collective licensing in this context, or whether the members should seek alternative collective solutions"[167]. For these reasons, performing rights societies firmly believe the solutions offered by scholars, according to which levy schemes could be abandoned thanks to DRM and possibilities of individual management[168], are totally unrealistic.

Performing rights societies are nevertheless deeply aware that their business model, based upon 19th century needs, has to be adapted to the needs of the digital environment. Performing rights societies view DRM not as a competitor but as "a helpful tool that

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[164] HIGH LEVEL GROUP ON DIGITAL RIGHTS MANAGEMENT, FINAL REPORT 11, March-July 2004, at http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/040709_hlg_drm_2nd_meeting_final_report.pdf.

[165] GESAC, WORKSHOP OF 28 FEBRUARY 2002 ON DIGITAL RIGHTS MANAGEMENT SYSTEMS 2, April 2002, at http://www.gesac.org/eng/positions/drmdowload/drm2002.doc (cited WORKSHOP).

[166] GESAC, CONFERENCE ON COPYRIGHT FOR CREATIVITY IN THE ENLARGED EUROPEAN UNION: PROFILE, PERCEPTION, AWARENESS 4, August 2004, at http://www.gesac.org/ENG/NEWS/others/download/OTHERSEN_20040620_Conference%20on%20copyright%20in%20Dublin.doc.

[167] Remark by Crispin Evans (Universal Music Publishing), *in* INTERNATIONAL ASSOCIATION OF ENTERTAINMENT LAWYERS, COLLECTIVE LICENSING: PAST, PRESENT AND FUTURE 209 (2002).

[168] *See* in particular: Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1*et seq.* (2004); Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, to be published *in* 28 HASTINGS COMM. & ENT. L.J. __(2005), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=801124; Hugenholtz *et al.*, *supra* note 159.

facilitates the identification and accurate tracking of the use of works"[169]. They are already used to a great extent in the United States: in August 2005, BMI acquired a digital audio recognition technology called BlueArrow, which enables BMI to accurately measure the performance of music on radio, television and the Internet[170]; and ASCAP uses Mediaguide, a digital verification device to track the use of various music by US radio stations[171]. ASCAP claims that, thanks to these technological tools, the sample gets closer to a complete census. However, the use of DRM is not limited to tracking the exploitation of music works on radio stations or television channels. In November 2005, BUMA/STEMRA announced that they had reached an agreement with the Dance Music Interest Association to digitally monitor the exploitation of works during live events[172]. International initiatives also exist. One of the most ambitious projects to respond to the challenges of digital technology is the CISAC's Common Information System (CIS), whose goal is to create a database that would be accessible to any performing right society. This database would enable societies to track music works using only a single identification number in any area of the world[173].

In conclusion, stakeholders agree that DRM are unlikely to replace performing rights societies. Far from being viewed as a competitor, the societies believe that DRM will help them to adapt their structure to this new environment. Technological tools will enable them to

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[169] Results of interviews (quote from GEMA) confirmed by GESAC, ANSWERS, *supra* note 157, at 6.

[170] http://www.bmi.com/news/200508/20050830a.asp.

[171] http://www.mediaguide.com. This entity is 50% owned by ASCAP. According to ASCAP, the database contains millions of sound recordings which have been digitally fingerprinted. The device tunes in to all radio stations and analyzes the signal that is being broadcast. It digitally fingerprints the signal, identifies it and compares it with the one in the database, without any input from radio broadcasters.

[172] http://www.cisac.org/web/content.nsf/Builder?ReadForm&Page=Article&Lang=EN&Alias=web-2005-bumadance.

[173] *See* as to the CIS project: FICSOR, *supra* note 21, at 101 *et seq.* § 273 *et seq.*; UCHTENHAGEN, *supra* note 27, at 52 *et seq.* § 252 *et seq.* For other examples of technological tools used by performing rights societies at the national or international level, *see* GESAC, HEARING ON COLLECTIVE MANAGEMENT OF RIGHTS 9, April 2001, at http://www.gesac.org/eng/positions/download/GCOLLECTHEARINGNOV2001069en01.doc.

operate with more efficiency by enhancing cooperation and transparency through the creation of common standards and IT support in particular.

4. Current Practice of Performing Rights Societies[174]

a) Introduction

BMI and ASCAP started to license online exploitation of musical works in 1995. Today, all performing rights societies interviewed deliver online licenses. Until December 31, 2004, European performing rights societies and BMI were applying the Santiago Agreement and thus delivering pan-European licenses to users who had their economical residence in their territory. Considering the Statement of Objections delivered in April 2004 by the European Competition Commission, the societies decided not to renew the Agreement after its initial term set on December 31, 2004.

Since January 1, 2005, European performing rights societies have returned to the traditional single license model, which is also used by the United States and Japan. With a single territorial license model, performing rights societies deliver blanket licenses covering a worldwide repertoire, but limited to the territories of their competence[175]. Theoretically, performing rights societies could also deliver worldwide licenses for their own local members' works; however, a dual system that would establish cross-border licenses for the

[174] By "performing rights societies", I mean the performing rights societies interviewed, and do not claim that the practice described is followed by any other performing rights society.

[175] For instance, ASCAP can deliver licenses for the United States, its territories and possessions, and the Commonwealth of Puerto Rico, SUISA for Switzerland and Liechtenstein, and SACEM for France, Luxembourg and Monaco.

local repertoire and licenses limited to their territory for the repertoires of their sister societies would be too cumbersome to monitor, without mentioning the difficulties to identify one's own repertoire.

b) The granting of territorial licenses in the absence of central licensing agreements

In the absence of central licensing agreements, performing rights societies thus grant licenses limited to their own territory. As a consequence, it is important to understand the criteria referred to by these societies to define their competence. Interviews demonstrate a lack of uniformity so that the criterion will differ from one society to another: the first, used by JASRAC and SABAM, considers the residence of users as decisive. In other words, a user located in Japan or Belgium will have to ask for a license from JASRAC or SABAM, even though the services would not be provided to the Japanese or Belgium public. The location of the server is not considered relevant, because of the "forum-shopping" it would encourage in users. A second point of attachment relates to the origin of the transmission; this criterion is used by ASCAP which, according to article 6 lit. c of its experimental license agreement for Internet sites[176], is competent to grant a license to any user whose signal originates from the United States or its possessions. In other words, ASCAP is "not competent to deliver a license to a US company whose signal is transmitted from its facilities in the United Kingdom". Under the third criterion, the point of destination (end-user principle) is decisive. This viewpoint has been adopted by SACEM, which considers its competence justified each time a user provides its services to the French public. SABAM also attaches importance to the

[176] http://www.ascap.com/weblicense/.

market as an alternative to the residence of users, since it considers the existence of a domain name registered under the "*.be*" ccTLD as relevant to define its competence. Finally, BMI and SUISA consider both the points of origin and of destination to be relevant criteria, since both constitute points of attachment to their territories.

> Example:
>
> A French company originates its transmission from Belgium to provide its services to the US and Swiss markets. The French company will neither have to ask for a license from SACEM, since the services are not offered to the French public, nor to ASCAP, since the transmission does not originate from the US. While the transmission originates from Belgium, SABAM does not consider the point of origin to be a relevant criterion, so that the French company does not need the deliverance of a license from SABAM either. Considering the fact that it offers its services to the US and Swiss markets, the French company will have to acquire a license from BMI and SUISA, because both these societies consider the point of destination to be a relevant criterion to define their competence.

While practice shows that users assume the point of destination to be the relevant criterion and thus acquire a license in each country where they intend to provide their services, the application review process is far from harmonious. The relevant criteria can vary with each society and with each country. Such a solution may lead to disputes: for instance, a Belgium company that would originate its transmission from the United States for the French market should not only acquire a license from SACEM (point of destination), but from SABAM (economic residence) and ASCAP (point of origin) as well. There is no doubt that a common standard would be highly desirable to achieve legal certainty. According to

SABAM, discussions would be taking place among performing rights societies on these points since the adoption of the EU Recommendation.

c) The applicable rate schedule(s) in case of a central licensing agreement

When rights holders sign a central licensing agreement with a performing rights society to assign all their rights on a worldwide basis, the society will have the ability to offer cross-border licenses to users. Since the works will be exploited in different countries, presumably with different cost structures, one may wonder whose rate schedule will apply. Does the granting society apply its rate schedule, no matter where the exploitation takes place, or will it apply the rate schedule used by the relevant society in each country where the works are exploited? Performing rights societies dealing with offline central licensing agreements have always applied the second alternative, in compliance with the principle of the country of destination. In the first online central licensing agreement ever concluded between Universal and SABAM, the latter however unilaterally decided to apply its own rate schedule for all performances, without the prior consent of its sister societies[177]. Performing rights societies strongly reacted to what was considered a violation of the principle of the country of destination. While SABAM points out that the licensing agreement never gave rise to any concern from competition authorities and was perfectly valid[178], it did defer to the strong

[177] http://www.sabam.be/website/data/universalangl.doc.

[178] One should view this assertion with a critical eye. Art. 41 of the Swiss Copyright Act requires anyone who administers copyrights to have an authorization granted by the Swiss Institute of Intellectual Property, which confirms that the concerned entity fulfils certain requirements. By managing the online exploitation of Universal's repertoire in Switzerland, SABAM obviously violated this provision since it did not have any authorization from SUISA. Generally speaking, the application of one's rate schedule without the prior consent

reaction of its sister societies and now recognizes that "negotiations among collective societies are always needed to conclude cross-border licenses". Several proposed cross-border licenses have already been negotiated and finalized: iTunes got a license from SACEM covering not only France, Luxembourg and Monaco, but also Belgium; telecommunication companies such as Nokia and Ericson also received cross-border licenses from the performing rights society of their respective countries for mobile phone use of the world music repertoire.

The country of destination is a key consideration for performing rights societies, whose primary goal is to protect their own members. Accordingly, they assert that their rate schedule will have to apply to every exploitation that takes place in their country. Technically, the geographical scope of a cross-border license may cover the entire European Union, but the granting society will thus have no choice but to apply 25 different rate schedules to take into account the geographical exploitation of the works.

To avoid the application of several rate schedules by the granting society, European performing rights societies would favor the adoption of a pan-European rate schedule. Such a solution is at least several years in the future according to GEMA and SACEM, which still consider the online distribution of music works to be at its infancy. Due to the differential penetration of online music distribution in various countries, these societies believe a centralized rate structure is premature. The French society adds that collective societies take several factors into consideration each time they adopt a rate schedule[179], including social and economical conditions and previous existing rate schedules. Though each country is different,

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of sister societies infringes the principle of territoriality, according to which one should refer to the applicable regulations of the concerned country for any act occurring in this country.

[179] See *supra* Part II B : Did You Say Collective Societies ? – Granting Licenses.

SUISA hopes that harmonization among countries with similar socio-economical conditions is nevertheless possible. The European Competition Commission would most likely favor the adoption of a common rate schedule as proved by *Simulcast*, where the rate schedule was an aggregate of the rates applicable in the different countries, provided however that the rate clearly makes a distinction between the royalty and the commission so as to enhance competition[180].

In practice, the current diversity among applicable rate schedules is not a significant hindrance. Since *Lucazeau*, the imposition of significantly higher tariffs than those applicable in other European Member States constitutes an abuse of dominant position, unless the differences are justified by objective and relevant factors[181]. As a result, the applicable rates as to the online exploitation of copyrighted works are very similar in the European Union:

[180] UCHTENHAGEN, *supra* note 27, at 59 § 292 correctly points out that a shared rate schedule without any distinction between the royalty and the commission would most probably be considered a concerted practice by competition authorities.
[181] *Lucazeau v. SACEM*, decision of July 13, 1989, cases 110/88 and 241/88, ECR (1989) 2811. See *supra* note 75.

	Music On Demand (downloading)	Music On Demand (streaming)	Ring Tones[182]
ASCAP[183]	Sampling method	Sampling method	Sampling method
BMI[184]	Sampling method	Sampling method	Sampling method
JASRAC[185]	1. If fee: 7.7% of the fee per work per request, with a minimum of 7.70 Yen per title downloaded. 2. No fee: 6.60 Yen per title downloaded if the website generates advertising revenues, 5.50 Yen otherwise. 3. If the monthly royalty is below 5'000 Yen. a flat fee of 5'000 Yen.	1. If fee: 4.5% of the fee per work used, with a minimum of 4.5 Yen per work streamed. 2. No fee: 50'000 Yen per year.	1. If fee is charged: 7.2% of the fee per work per request, with a minimum of 5 Yen per title downloaded; 2. No fee: 5 Yen per title downloaded. 3. If the monthly royalty is
GEMA[186]	- 12.5% of prices paid by consumers, with a minimum of 0.15 per download until December 31, 2006; - 15% of prices paid, with a minimum of-	- 12.5% of prices paid by consumers, with a minimum of 0.1125 per title downloaded until December 31, 2006; - 15% of prices paid by consumers, with a	15% of prices paid by consumers, with a minimum of 0.125 .
SABAM[187]	8% of prices paid by consumers, taxes excluded, with a minimum of 0.08 per title downloaded.	Same rate	12% of prices paid by consumers, with a minimum of 0.10 per
SACEM[188]	12% of prices paid by consumers, temporarily reduced to 8%, with a minimum of 0.07 per download, and		12% with a minimum of: (a) 0.25 if charged 3 ; (b) 0.18 between 2-
SUISA[189]	8% of prices paid by consumers, with a minimum of 0.10 Swiss franc per	Same rate	

The applicable rates among European performing rights societies are thus nearly identical[190], with the notable exception of Germany. Questioned as to the *rationale* for this difference, GEMA answers that "current rates are far too low and no longer reflect the value of the rights holders' contributions". According to the German society, "labels get up to 70% of the revenues generated, causing unreasonable financial loss for artists; a rate of approximately 20% would be the ideal". SUISA agrees that current rates do not reflect market realities in music distribution where music prices are getting cheaper each year thanks to technological innovations. Article 60 of the Swiss Copyright however mandates that the royalty should not exceed 10% except under exceptional circumstances. An amendment may therefore be necessary to raise rates to appropriate levels. SACEM ambitiously intends to increase its rate to 12% over the next years, a policy that GEMA and SABAM deem unrealistic given the historical difficulties in raising rates once they are set.

The rates of European performing rights societies nevertheless show slight differences. For instance, SUISA and GEMA are the only European societies that consider the length of the music downloaded[191]. Unlike SACEM, which requires an additional royalty of 100 per month if pre-listening is possible, SABAM does not require any additional royalty for pre-listening. On the other hand, GEMA has a special rate schedule for pre-listening, i.e., the streaming of works up to 45 seconds for sampling purposes[192]. All these differences are considered as minor by SACEM, according to whom "the management of cross-border licenses should not lead to a significant cost increase".

Differences in the rest of the world are more significant than in Europe. To compare the situation among these performing rights societies, the table only refers to blanket usage license agreements delivered for commercial purposes. Rates are however structured

differently from one continent to another. In Japan, JASRAC has a particularly detailed rate schedule regarding interactive transmissions and distinguishes whether the license agreement is a blanket one or not, whether the service is commercial in nature or not and the type of works downloaded (sound recordings or lyrics or other). The Japanese rate schedules were negotiated between the Japanese collective society and a trade organization representing online music service operators, Network Music Rights Conference (NMRC). According to JASRAC, the existence of NMRC as a representative entity leads the prosperity of the Japanese market for online distribution of music. In the United States, ASCAP and BMI both refer to sampling methods that not only take into account the number of works consumed, but also other factors such as the revenues generated through advertising[193].

Since performing rights societies have to comply with the principle of fair and equitable treatment, identical rate schedules have to apply to all users conducting similar activities on the same market. The societies thus strongly affirm that users cannot re-negotiate the royalty rate, unless they can demonstrate that their business model differs from existing ones in a way that justifies differential rates. According to SACEM, "users often try to make such a demonstration, for instance by stating that their online store differs from iTunes because they cannot rely upon revenues generated by the sales of iPods". Unfortunately for them, this argument has been rejected by SACEM since "iPods and iTunes are legally distinct from each other". The definition of the relevant market nevertheless remains a key issue to avoid any problem with competition authorities. Separate rate schedules are thus adopted every now and then when a new business model appears. While the table only mentions the most lucrative ones, performing rights societies have adopted the following rate schedules to reflect the different types of online exploitations of musical works: background music on

websites (GEMA, SABAM and SACEM), webcasting (all performing rights societies), video on demand (GEMA), podcasting (BMI) and online karaoke for commercial uses (JASRAC). While the royalty rate of the license agreements are hardly negotiable, SABAM believes that "one could possibly negotiate a discount on the administrative costs, for instance if users demonstrate that their revenues exceed a certain amount, or if users provide perfect sales reports, which is far from being the case today and leads to an increase of costs of management".

d) The distribution of the royalties in case of a central licensing agreement

Once performing rights societies have applied a rate schedule and collected the royalties in compliance with the principle of the country of destination, they will have to distribute the money among the different rights holders. There are two general alternatives for this process: either to apply the distribution rules of each country of destination and distribute the royalties to the different rights holders, or to allocate the money due to its sister societies in the concerned countries, which would then take care of the distribution in compliance with their respective distribution rules. The first alternative is considered too expensive by all performing rights societies and would ultimately lead to a significant increase of the costs of management and, consequently, to lower royalty rates to the prejudice of the rights holders. For this reason, the second alternative is the only one applied, both for offline and online central licensing agreements. Traditional distribution rules remain applicable since no performing right society has adopted specific rules for the online exploitation of musical works.

The society to which rights holders have assigned all their rights through a central licensing agreement will thus allocate the amount due for each country of destination based on its own valuation. Therefore, performing rights societies will depend upon the "central" society for their share of royalties. In spite of a growing competitive environment, cooperation and transparency thus become particularly important. GEMA made it clear that its cross-border licenses would have several requirements: "first, users must secure the rights to obtain a multi-territorial license (for example the adaptation rights for ring tone companies); second, the agreement itself will be subject to strict conditions regarding respect of moral rights, reporting and management infrastructure". Cooperation among performing rights societies will be important with the development in online music stores, which makes it difficult for societies to audit the accuracy and relevance of sales reports. While one can easily appraise the valuation made by a sister society regarding the number of audience members in a movie theater, SUISA concedes that "a lack of technical expertise makes it difficult to accurately monitor the number of downloads reported". This lack of sophistication[194] may result in different claims from performing rights societies against their sister societies and protests from users. To resolve disputes related to royalties, GEMA has established an arbitration system[195] whereby it opens an escrow account with the concerned user. The amount in dispute is placed in the escrow account, and the rest directly paid to GEMA. In this way, "the user only pays the amount that it considers fair, and the rest is put in the escrow account". After the settlement, the effects of the decision are retroactive and the money on the escrow account is distributed in compliance with the decision. According to GEMA, "this could be a problem for users like Napster, which contests a substantial amount of royalties due, and would thus have to pay a large amount in to the escrow account".

While the design of alternative dispute resolution mechanisms (ADR) will be needed to solve cross-border disputes related to the central management of musical works[196], ADR will not get rid of the necessity to enhance transparency and cooperation among societies. Standards, database and form requirements will have to be standardized; at a time of centralization, it makes no sense for users to have to complete form reports structured differently for each country. Cooperation through the creation and exploitation of common database such as the CIS project is thus crucial to register and keep track of performances, as well as to avoid duplication on the documentation side to improve efficiency and users' convenience[197].

B. Unauthorized Distribution Channels: Enforcement and P2P

The unauthorized distribution of musical works takes place in two ways: through unauthorized streaming or downloading websites or through p2p file exchange systems. How do performing rights societies approach these channels? How can they improve their monitoring systems?

1. Enforcement mechanisms

All performing rights societies interviewed actively prevent the proliferation of illegal websites by monitoring the web. GEMA' surveillance system relies not only on its own staff, but also on third parties and lawyers to police the web. SABAM also proactively contacts ring tone companies to grant licenses for Belgium. At this stage, revenues generated by online

music stores however remain limited[198] and do not allow a systematic intervention of performing rights societies which focus their efforts on important websites.

Once a website allowing unauthorized performances of musical works is discovered, performing rights societies will contact the owner and invite him to request a license. In most cases, owners agree. In the few cases where the owners refuse, the societies will request the intervention of Internet service providers (ISPs). The ISPs have to react diligently in compliance with articles 12-14 of the E-Commerce Directive if they don't want to be held liable for infringement occurring on these websites[199]. The cooperation of ISPs has even been made official in France through the signature in July 2004 of a Charter against piracy[200]. This Charter can be invoked not only to secure the intervention of ISPs against websites' owners, but also against ISPs themselves. It has already been used by SACEM "to oblige access providers like Tiscali and Wanadoo to enjoin their advertising campaigns promoting their broadband capacities to enable fast downloading of musical works". On the whole, cooperation with ISPs is considered effective by European performing rights societies and proves to be an efficient way to legalize the situations. Once an ISP threatens a website owner with a shut down of his service, the latter will almost always ask for a license. While this cooperation seems to be effective in Japan, ASCAP and BMI remain disappointed with the US situation and believe that the safe harbor provisions in section 512 of the DMCA are to blame. Though these provisions were supported by these societies at the time of their enactment, ASCAP and BMI now believe that "they were not the best way to handle the problem".

While effective, cooperation between ISPs and European performing rights societies is more difficult in two situations. First, when the website is hosted abroad, pressure exercised

by performing rights societies cannot be as strong as within their territory. In this case, one can expect performing rights societies to cooperate to handle these cases within their respective territory. Second, ISPs are reluctant to intervene when the unauthorized distribution of music occurs through chats, discussions forums or p2p, since they do not consider themselves liable for traffic generated by consumers. This scenario led to a lawsuit brought by SABAM against Tiscali, an access service provider, in the *Tribunal de première instance de Bruxelles* on June 24, 2004[201]. SABAM would like a ruling that would require ISPs to filter musical works and prevent their transmissions through these websites. On November 26, 2004, the Court invited experts to determine whether the technical solutions proposed were feasible. While the *Tribunal de première instance de Bruxelles* seems to be responsive to the arguments raised by SABAM, the case is still pending. Similarly, in July 2005, GEMA requested that 42 access providers take steps to block access to certain illegal websites that enable copyright infringement[202]; negotiations are ongoing.

2. p2p file exchange systems

The development of authorized platforms like iTunes and lawsuits against consumers has led to a decrease of p2p systems usage[203], but the exchange of musical files will continue through new means of distributions such as instant messengers or reader devices[204]. Performing rights societies are deeply concerned by this situation but none of them is yet able to suggest a miracle way to solve the problem.

Whether American, European or Japanese, performing rights societies all consider the actions brought by the RIAA against individuals to be detrimental to public relations. While

consumers are without doubt liable for uploading and thus enabling an unauthorized distribution of works[205], ASCAP considers it more effective to sue providers which actually derive benefit from the situation. By analogy, ASCAP states that "one will neither sue a band that performs music in a pub without required authorization nor consumers, but the owner who ultimately profits from this situation"[206]. The same should apply on the Internet. ASCAP and GEMA nevertheless understand that "the RIAA currently has no alternative to protect its members' interests". From its perspective, SABAM considers these actions to be mostly ineffective, which explains its choice to sue an access provider like Tiscali rather than consumers. The goal is however not to shut down the websites - the more people consume works, the better it is – but to get fair remuneration for the authors. BMI believes that, if one admits that most downloaders are students, "the best way to handle the problem may be to launch educational campaigns in schools".

Performing rights societies feel that only the introduction of a compulsory license can improve the situation. Most societies agree that there is a danger of turning exclusive rights into remuneration rights, and thereby transforming the right to exclude in a mere right to get paid. Some feel that this may lead consumers to believe that they can exchange musical files "for free", but it is the lesser of two evils; they find it hard to imagine any other way to receive fair remuneration for their members.

Such a levy already exists in one form or another in some countries. While Japan has refused to introduce a rate schedule applicable to reader devices such as MP3 players or iPods, Germany and Switzerland already have one. For SUISA, such levy schemes for reader devices are all the more important in the digital age because new business models allow the consumption of music for a cheaper price, provided that consumers purchase expensive

readers to play the works. They are by far the primary source of revenues, and rights holders have no reason to be deprived of revenues made possible thanks to their creations.

While compulsory licenses upon blanket media and reader devices are already disputed in most countries, things get even worse when one proposes a compulsory license for ISPs. GEMA believes that "telecommunication operators should pay royalties for the transmission of musical works they facilitate"; according to the German society, "it is time for Governments and European authorities to understand that these operators make a lot of money through the distribution of illegal content, to the detriment of the rights holders, and that they should pay for it". The French Legislature first seemed to agree; in December 2005, the National Assembly proposed a bill that would have compelled ISPs to pay a flat royalty rate through their subscription fees, and create a global license upon exchange files systems in return. Unlike GEMA, SACEM opposed such a scheme, asserting that a global license would not have reflected the actual consumption of each work – which is made possible to a certain extent by other compulsory licenses such as the one upon the sales of blank media for instance - and would ultimately have been detrimental to the rights holders. On March 9, 2006, the French Parliament finally rejected the proposal for a global license and decided to encourage the development of DRM by keeping the proprietary model as the default regime[207].

While the introduction of new levy schemes such as those imagined by GEMA, the French National Assembly or various scholars[208] might be the only way for authors to receive fair remuneration for the exploitation of their works through file exchange systems at this stage[209], compliance with the three steps test enacted in Art. 9.2 of the Berne Convention and

10.1 of the TRIPS Agreement is highly doubtful. As stated by Peukert[210], these treaties mandate exclusive rights and anti-circumvention provisions as the statutory default regime in national copyright laws. In other words, one could only give rights holders the choice to voluntarily opt for compensation instead of control. To that extent, the solution finally retained by the French Parliament to let the rights holders freely choose their mode of remuneration fully complies with a voluntary system[211].

In any case, without broaching the subject of new levy systems, existing schemes already face strong opposition from the software industry as well as manufacturers of recording devices and blank media. These industries' representatives allege that private copying schemes could now be phased out in favor of DRM. Several countries seem to be responsive to these assertions. The European Commission recently began an investigation into the need to adapt the private copy remuneration schemes which exist in 22 out of the 25 Member States; these schemes would also be under review in other countries such as Australia, Canada, Japan and Mexico[212]. However, as previously discussed, DRM are still in their infancy and unable to efficiently protect rights holders; collective societies, CISAC, BIEM and GESAC in particular, constantly affirm that the abolition of these schemes would be detrimental to the rights holders and to creation of works in general[213].

Based upon what precedes, one cannot expect a global consensus to emerge to solve the problems created by exchange file systems at the international level in the next months. This being said, p2p seem to raise more concern for the entertainment industry than for authors themselves. Thus, according to a Pew Report published in December 2004, artists are divided about file sharing; while a majority believes that unauthorized file sharing of copyrighted works should be illegal, most authors use the internet to gain inspiration and do

not consider file exchange systems to be a big threat to creative industries[214]. Whatever the solution, collective management is likely to go on playing a significant role. As stated by Ficsor, "collective management or some other system of joint exercise of rights, however, is also needed in the majority of cases where mere rights to remuneration are recognized, namely, in those cases where mass uses are involved or where it is otherwise particularly difficult to monitor uses"[215]. Exchange files systems are a typical example of mass use where one finds it hard to imagine that the mere implementation of – possibly – effective DRM in the future would be able to solve every problem and allow complete individual management.

IV. CONCLUSION

Collective management plays an important role when high transaction cost prevents individual management. The field of musical works is a typical example of mass use where rights holders are financially unable to monitor the exploitation of their works. As stated by Sinacore-Guinn, "The very fact that collective administration of copyright has become standard practice in all developed countries and the vast majority of developing countries which have copyright or related rights is in itself evidence that such a method of organization serves society well"[216]. Performing rights societies indeed provide useful services to all stakeholders: to authors, by monitoring the exploitation of their works and bargaining on their behalf against powerful users or publishers; to publishers, by providing them efficient services to monitor the exploitation of their repertoire against moderate fees; to users, by enabling them to acquire a single license per territory thanks to reciprocal agreements concluded among collective societies (single territorial license model); finally, to society in

general, by keeping track of all musical works created so far and encouraging musical diversity thanks to their welfare plans and social actions.

The digital age is unlikely to change that premise. While some argue that DRM would now enable individual management, performing rights societies consider this assumption to be short-sighted. DRM are expensive to put in place and individuals cannot afford them. Even though the major publishers may have the financial resources to install such monitoring systems, three reasons make individual management unlikely to happen: first, DRM remain ineffective and lack the interoperability that would be necessary to allow efficient individual management; second, publishers lack technical expertise: to have a piano is one thing, to master it is another one; finally, they have no interests to get rid of a system which proved its efficiency over the years and which provide them with services for a price possibly cheaper than the costs they would have to incur if they were to put monitoring systems in place.

Although the Internet does not yet represent a major source of income in the music distribution process, performing rights societies agree that its potential to surpass the traditional methods of music delivery over the next decades makes a focus on this area imperative. The assumption according to which the development of online music stores will likely lead to a substantial increase of the royalties collected on the Internet was confirmed on March 13, 2006, when ASCAP announced that revenues generated by online music stores in 2005 had increased by 50% in comparison with 2004, for a total amount of USD 8.1 million[217]. Societies thus recognize that they have to adapt to the digital environment. This adaptation takes place at several levels:

First, societies have to respond to new business models that emerge and react accordingly to ensure fair remuneration to their members. While societies had no difficulty in enacting new rate schedules for online music stores, webcasting or ring tone companies, exchange file systems remain an issue of serious concern. As shown in part III, when new modes of exploitation develop, users' groups usually first try to argue that the new use should not be protected and, if that argument fails, then argue that these modes should be made subject to nonvoluntary licensing schemes. History however proves that, to implement these remuneration rights, individual management must not only be impractical, but even impossible; we saw in part III that the issue of compulsory licenses is directly related to the one of private copying, and that these schemes were in particular enacted to respond to the development of blank media and reader devices to copy and perform musical works in private homes. Unsurprisingly, discussions thus turn around the issue to know whether exchange file systems like p2p should be submitted to compulsory licenses. Unlike the situation with blank media or reader devices, individual management with these systems however does not appear impossible (thanks to the possible implementation of DRM), but merely unpractical. The three steps test encompassed in article 9.2 of the Berne Convention and 10.1 of the TRIPS Agreement, as well as cases described in part II like *GEMA, BRT v. SABAM*, *U2* or *Banghalter* make it clear that the proprietary regime and individual management through exclusive rights has to remain the default one, and that compulsory license schemes related to exchange files systems would have to remain voluntary.

Second, to increase their efficiency and confront the "fragmentation" described by Gervais as "the lack of cohesion, standardization, and, to a certain extent, effective organization of both copyright law and collective management *per se*"[218], performing rights

societies need to set up common IT infrastructure and database such as the CIS project under development. In the online world, territorial borders have no role to play; technical infrastructure and documentation thus need to be standardized at regional levels if not worldwide on the long term. Standardization is also needed as to form reports, which remain different in each country and unnecessarily lead to an increase of transaction costs for users. Cooperation and transparency will be key factors in this new environment for performing rights societies to reduce their costs of management and continue to provide costly efficient services to all stakeholders. “Collective” administration may thus lean towards “cooperative” and “centralized” administration in the future.

Third, in spite of this necessity for cooperation, European performing rights societies will have to evolve in a competitive environment for the first time. The monopoly of these societies is justified regarding the offline exploitation of musical works where performances occur on a territorial basis. The existence of a single performing rights society per country thus makes sense to reduce transaction costs. However, considering the ubiquitous nature of the Internet, these monopolies are no longer justified when performances occur online. To force performing rights societies to compete against each other, the European Commission adopted a Recommendation in September 2005 that enables rights holders to assign all their rights for Europe to a single society (central licensing agreement). This society is then entitled to grant cross-border licenses to any user, thus erasing the need to maintain reciprocal agreements.

By enabling central societies to grant multi-territorial licenses, the European Commission leaves no choice to performing rights societies but to compete against each other. It is the Commission’s belief that competition will force these societies to reduce their

costs and become more efficient. Ultimately, societies should be able to provide better services to users for a cheaper price as the management cost should get lower. The result of the interviews conducted shows that performing rights societies strongly disagree: first, efficiency has not correlation with costs, on the opposite; technical infrastructure and common database are costly to put in place, even when they are shared. Second, the Commission tries to create an artificial market upon the costs to favor users, while the primary goal of performing rights societies is to serve their members' interests, not the ones of the users. Third, centralization endangers the existence of small societies. The reciprocal agreements upon which performing rights societies have been built enabled them to maintain a local repertoire thanks to the social funds that were, arguably, primarily collected through the use of the majors' repertoires. The possibility given by the Recommendation for central societies to grant cross-border licenses however puts an end to the need to refer to reciprocal agreements. Deprived from the majors' repertoires, the management of small societies would be limited to the one of their local repertoire. Considering the lack of interest of users for repertoires others than the ones of the majors, their viability would be in danger and, consequently, cultural diversity as well.

In the end, one may regret the European Commission's decision to treat music as any commodity and to have forgotten the social and cultural significant roles played by European performing rights societies since their inception. This utilitarian approach, which mirrors the one taken in the United States for decades, contradicts the "*droit d'auteur*" tradition upon which continental copyright legislations are built upon; far from fostering music creation, the approach taken by the Commission may favor the Anglo-Saxon repertoire to the detriment of

regional repertoires. Ultimately, local genres may thus suffer from this shift of policy in copyright management.

At this stage, several questions remain open: will the traditional utilitarian *rationale* of copyrights, i.e., to provide an incentive for creation, be defeated by the structure imposed by political institutions to manage these copyrights? Will the fate of cultural diversity ultimately be left to the good will of private initiatives and sponsorships as already is the case for classical music? Will public entities have to implement quota regulations and subsidize the music industry as already done successfully in France to protect the French movie industry[219]? Or, on the contrary, will the development of digital music encourage music creation by substantially reducing transaction costs for authors and enable the growth of niche markets? Any answer would be premature. Truth remains that the structure of European performing rights societies is likely to change in the coming years, and that this evolution, driven by a balance to be found around key concepts like "centralization", "cooperation" and "competition", may influence the future of music. Strangely, cultural diversity may thus depend more upon the way musical works will be managed in the coming years than upon the future of copyrights itself. It remains to be hoped that conglomerization of the entertainment industry and its lobbying will not weigh the balance towards an impoverishment of cultural diversity that would ultimately lead to a serious defeat of the very reason of being of copyrights.