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**Comments of the Max Planck Institute for Intellectual Property
and Competition Law on the
Proposal for a Directive of the European Parliament and of the
Council
on collective management of copyright and related rights
and multi-territorial licensing of rights
in musical works for online uses in the internal market
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Summary: The Max Planck Institute welcomes the initiative of the European Commission for a binding legal instrument on collective management of copyright and related rights in the EU. Numerous provisions are to be appreciated (paras 15 and 31, below). Yet the Commission seems to fail to take account of the full legal framework and factual circumstances that have structured the current system of collective rights management.

Disposing of natural monopolies in a two-sided market (paras 5-9, below), collecting societies (about this terminology, see footnote 2 below) should not refuse to grant access to their services to rightholders and users. Hence, it is strongly recommended that the European legislature follows the experience of numerous Members States and proposes an obligation to contract with rightholders (para 10, below) as well as with users (para 11, below).

The critique on the Commission's approach to cross-border licences for online rights on musical works as set forth in the Recommendation of 2005 (footnote 6, below) has unfortunately not been duly considered and the Commission's as-

* Authors of these comments are Professor Josef Drexl, Dr. Sylvie Nérissou, Felix Trumpe and Professor Reto M. Hilty.

essment of the practical effects of the Recommendation is mistaken (paras 9-10, 12, 17, 46 et seq., below).

Differences of substantive copyright law among Member States still constitute an obstacle to the establishment of an internal market for works. This is why the Institute deems the Commission's sectorial approach to the regulation of cross-border licensing to be problematic. Also such regulation would require further harmonisation of substantive copyright law (paras 13, 20 and 25 below).

Moreover, the Proposal fails to take account of statutory remuneration rights and cases of mandatory collective management (see paras 14, 18 and 36 below). Both pursue specific protection of original rightholders. In this regard the Proposal's refusal to distinguish between different categories of rightholders raises concerns (paras 15-18, 28, 55 below).

Since collecting societies manage copyrights and related rights arising from national law, and considering the benefits of an authorisation system (paras 57 and 69 et seq., below), which can be found in several Member States, the Institute advises the European legislature to clearly state that the intellectual property exception of article 17(11) of the Service Directive applies to collecting societies (paras 19-24, below).

The Proposal endangers the balance both between different categories of rightholders and between rightholders and users that the established system of collective management of copyright in Europe traditionally seeks to achieve (see paras 32-45, 64 below). It thereby compromises the laudable goal to foster the establishment of an internal market for online uses of works across Europe (paras 12, 26, 46-65 below).

The Max Planck Institute for Intellectual Property and Competition Law is a research institute within the Max Planck Society for the Advancement of Arts and Science. The Max Planck Institute undertakes research on fundamental questions of law in these areas. The Institute regularly advises governmental bodies and other organisations at the national and international level. It takes an international approach and places emphasis on the comparative analysis of law as well as economic and technological aspects of the legal development. The Institute hereby provides its comments on the Commission's Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.

- (1) The Max Planck Institute welcomes the long-awaited initiative of the European Commission for a binding legal instrument on collective management

of copyright and related rights in the EU.¹ The Institute is in support of the Commission's efforts to create a level playing field among collecting societies² by introducing EU-wide governance and transparency standards applicable to all societies. The Institute also appreciates the Commission's attempts to foster the grant of multi-territorial licences for the online uses of musical works and, in particular, the centralised grant of such licences for the repertoires of multiple rightholders and collecting societies (so-called one-stop shop).

- (2) With the proposal of a binding legal instrument, the Commission also responds to the Resolutions of 2004,³ 2007⁴ and 2008,⁵ in which the European Parliament called upon the Commission to consider or to take such action. Yet the Proposal does not react to all considerations expressed by the Parliament. This is especially so to the extent that the Parliament criticised the Commission's approach to cross-border licences for online rights regarding works in music under the Commission Recommendation of 2005.⁶

¹ A legislative initiative on collective rights management was first considered by the Commission in its Green Paper of 1995. See European Commission Green Paper of 19 July 1995 on Copyright and Related Rights in the Information Society, COM(95) 382 final, pp 69-78. Then, in 2004, the Commission considered whether the internal market is in need of specific European action in the field of collective rights management. See Communication from the Commission of 16 April 2004 to the Council, the European Parliament and the European Economic and Social Committee – The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final.

² As a matter of consistency, these comments adopt the term 'collecting societies' as used by the Commission Proposal. Yet the Institute would recommend adopting the term 'collective rights management organisations (CMOs)', which is more frequently used in the international debate and describes more broadly and adequately the activities of collecting societies (see also para 27, below). In contrast, the Institute does not advocate changing the term in other languages such as 'Verwertungsgesellschaften' or 'sociétés de gestion collective'.

³ European Parliament Resolution of 15 January 2004 on a Community framework for collective management societies in the field of copyright and neighbouring rights, 2002/2274(INI), [2004] OJ C 92 E, p 425.

⁴ European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), P6_TA(2007)0064, [2007] OJ C 301 E, p 64.

⁵ European Parliament Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, P6_TA(2008)0462, [2010] OJ C 8 E, p 105.

⁶ Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ L 276, p 54; Corrigendum, [2005] OJ L 284, p 10. Note that the Commission had to correct the date of the Recommendation from May to October 2005.

- (3) The Institute shares the economic considerations and policy objectives on which the Commission builds its Proposal. Yet the Commission seems to fail to take account of the full legal framework and factual circumstances that have structured the current system of collective rights management and which also have to be taken into account for any further legal action on the European level.
- (4) Given these weaknesses, these comments will first describe the broader economic and legal context of collective management of copyrights in Europe by highlighting core issues which, in the view of the Institute, are largely ignored by the proposal (at I and II, below), and then address the text of the Proposal in more detail (at III, below).

I. The broader economic context: Natural monopolies in a two-sided market

- (5) The Commission correctly points out that collecting societies play a ‘very important role, in particular where negotiations with individual creators would be impractical and entail prohibitive transaction costs’.⁷ Or to put it differently: collecting societies are institutions that save transaction costs. Indeed, collecting societies manage the grant of licences for mass use of copyright-protected subject-matter such as for the public performance of music, including online use. This explains why collecting societies historically developed on the initiative of the rightholders and were also accepted by users. Accordingly, as also stressed by the Commission, collecting societies ‘provide services to rightholders and users’.⁸ They thereby act as intermediaries in a two-sided market. Given that in most EU jurisdictions, collecting societies emerged as organisations of rightholders, legislation should recognise the autonomy of the collecting societies’ establishment and administration in principle and should only intervene to the extent this is required to respond to specific cases of market failure or an imbalance of bargaining power of the parties concerned.
- (6) Indeed, there are economic features of the market of collective rights management that justify such intervention. The field of collective rights management is characterised by the economics of a natural monopoly in particular. Even in Member States where the legislature does not provide for a legal monopoly – forms of legal monopolies can be found, for instance, in

⁷ Commission Proposal, Explanatory Memorandum, at 1.1. (p 2).

⁸ *Ibid.*

Italy and Austria – collecting societies typically hold a de facto monopoly for the categories of works and rights they manage in the individual jurisdiction. This is due to the economies of scale produced by an increasing number of works administered by an individual society. Given the fact that the fixed costs of administering a certain repertoire, irrespective of the number of works, are very high and the marginal costs of administering an additional work are relatively small, in a competitive environment, the society with the larger repertoire will act more cost-efficiently and, therefore, tend to attract all rightholders over time. Hence, the natural monopoly of collecting societies should be accepted as an efficient market solution. In principle, law should not try to impose competition on natural monopolies; otherwise it would endanger the efficiencies arising from the monopoly. Yet law should regulate the monopoly by addressing its anti-competitive effects and, more specifically, act against abuse of the market dominance of collecting societies (Article 102 TFEU). Accordingly, EU legislation on collective rights management should build on the practice of European competition law in the field.

- (7) Collecting societies provide services to both the rightholders and the users. Accordingly, their market-dominant position exists in two markets, namely, in the market for collective rights management services to rightholders and the market for the grant of licences to users.
- (8) In its Proposal, the Commission strives to introduce competition by establishing a level playing field across borders for different national collecting societies particularly with regard to multi-territorial licensing of the online rights for musical works. Given the fact that numerous collecting societies exist in the EU, such a policy is quite comprehensible. However, the Commission should also take into account that such a policy of introducing more competition in the market cannot act against the economic features of a natural monopoly. The consequence of such a policy may well be that only a very few – most likely the currently most powerful – societies will be able to grant such licences. In the worst case, the Commission’s approach may well lead to a single collecting society administering all music online rights within the EU. This is important to note in the light of the Commission’s rejection of the idea of creating a centralised portal for multi-territorial licensing without further discussion, based on the sole argument that the creation of such a portal would not comply with European law⁹ (see also para 65, below). The practical market outcome of the Commission’s policy may not be too different from such a portal.

⁹ See pp 46-47 of the Impact Assessment.

- (9) In addition, the Commission's policy is only directed to introducing more competition in the market for collective rights management services to rightholders. The Proposal does not seek to, and will not, achieve more competition in the market for the licensing of copyrights to users. As regards the multi-territorial licensing of online rights for music, the Commission's policy, as it was implemented in the 2005 Recommendation,¹⁰ led to more competition among collecting societies for the repertoires of larger rightholders (the 'major' music publishing companies). Yet this policy did not produce any benefits to users, who, quite on the contrary, lost the advantage of the one-stop shop for multi-repertoire licences and now have to acquire parallel licences for separate repertoires.¹¹ In the light of a competition-oriented analysis, the different repertoires of large rightholders like the major companies are not substitutes but complementary products. For instance, an Internet radio station will seek the grant of a licence for the repertoire not only of one major company but of all major companies in order to be most flexible in playing popular music, and to be most adaptable to the emergence and disappearance of blockbuster songs belonging to different repertoires. In general, while the Commission's Proposal demonstrates awareness of the monopoly in the collective rights management market, it tends to ignore the regulatory challenges in the licensing market.

¹⁰ At note 4, above.

¹¹ It is true that, prior to the adoption of the Recommendation, users only enjoyed a one-stop shop for multiple repertoires on a territorial basis. The Recommendation seeks to promote multi-territorial licences at the price of giving up the one-stop shop for multiple repertoires. In contrast, a combination of multi-territorial and multi-repertoire licences is achieved under the IFPI Simulcasting model agreement for reciprocal representation agreements for related rights regarding music online services (simulcasting and webcasting). In this regard, see also Commission Decision of 8 October 2002, COMP/C2/38.014 – IFPI Simulcasting, [2003] OJ L 107, p 58 (where the Commission granted an individual exemption from ex-Article 81(1) EC – now Article 101(1) TFEU). In the framework of the adoption of the Recommendation, the Commission explicitly rejected the IFPI Simulcasting model as an option. See Commission Staff Working Document of 11 October 2005, Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, SEC (2005) 1254, available at: http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf. The Recommendation, which indeed convinced a number of major companies to withdraw their rights from the previous international system of managing multiple repertoires based on reciprocal representation agreements, destroyed the one-stop shop for multiple repertoires even for individual territories. As explained in the following considerations of these comments, this result should have been quite foreseeable for the Commission.

II. The broader legal context

Need for an obligation to contract with rightholders

- (10) The Commission takes full account of the fact that it is up to the rightholders to ‘entrust their rights’ to collecting societies.¹² Hence, party autonomy governs not only the establishment of collecting societies but also the assignment of rights to these societies. Party autonomy, however, is not a one-sided legal concept. When the Commission proposes a ‘right’ of rightholders to authorise a society of their choice (Article 5 No. 2), the question also arises of whether the chosen society will have an obligation to contract with all rightholders. The text of the Proposal is not clear in this regard. However, this question needs to be answered explicitly. For instance, the laws of Austria,¹³ Belgium,¹⁴ Germany,¹⁵ Poland¹⁶, Portugal¹⁷, Slovakia¹⁸ and Greece¹⁹ provide for such an obligation to contract not least in reaction to the assumed natural monopoly of collecting societies. If the EU Directive refrained from formulating such an obligation on the part of collecting societies, Article 5 No. 2 would simply restate the faculty of rightholders under general private law to negotiate their contracts freely. In contrast, introducing an obligation of collecting societies to contract with rightholders would enhance the goal of cultural diversity, which, as a general objective, is also acknowledged by the Commission in its Proposal²⁰ and very much advocated by the European Parliament. Collecting societies will only promote diversity of cultural expression ‘by enabling the smallest and less popular repertoires to access the market’²¹ if they may not refuse

¹² Commission Proposal, Explanatory Memorandum, at 1.1. (p 2).

¹³ Section 11 Act on Collecting Societies (Verwertungsgesellschaftengesetz, VerwGesG).

¹⁴ Article 65bis(2) of the Law of 30 June 1994 regarding copyright and related rights.

¹⁵ Section 6 Act on the Collective Management of Copyright (Urheberrechtswahrnehmungsgesetz, UrhWG).

¹⁶ Article 106(3) of the Law of 2 February 1994 on copyright and related rights as last amended
Dziennik Ustaw 2010 no. 90 pos. 631.

¹⁷ Article 11 of the Law of 3 August 2001 No. 83/2001.

¹⁸ Section 81 Copyright Act.

¹⁹ Article 57(1) of Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters. According to the overview of national regulatory frameworks of the Impact Assessment, similar provisions are to be found in the laws of Bulgaria, Hungary, Luxemburg, Romania and Slovenia. See Impact Assessment, at pp 120 et seq.

²⁰ Commission Proposal, Explanatory Memorandum, at 1.1. (p 2).

²¹ *Ibid.*

to administer rights in certain works solely on grounds of their cultural origin or background or of their limited economic value.

Need for an obligation to contract with users

- (11) The Proposal does not contain any rule under which a collecting society would be under an obligation to grant licences to all users who request such licences. Since collecting societies hold natural monopolies in both service markets (see paras 6 and 7, above), the Commission should also consider introducing such an obligation to contract in favour of users. Indeed, such a rule can be found, for instance, in Austrian,²² German,²³ Greek²⁴, Polish²⁵ and Spanish²⁶ law.

The Commission's mistaken assessment of the effect of the 2005 Recommendation

- (12) In its Proposal, the Commission admits that the effect of the Recommendation was 'unsatisfactory' and seems to explain this with the non-binding character of the Recommendation.²⁷ This analysis cannot be followed. The Commission seems to ignore the fact that the lack of implementation was essentially caused by the co-existence of different traditions of collective rights management in continental countries and the Anglo-American world. Continental collecting societies typically require rightholders to sign contracts that cover both their reproduction rights (so-called 'mechanical right') and their public performance rights. In contrast, Anglo-American collecting societies are established as 'performing rights organisations' (PROs) that only require the transfer of the public performance rights. This has important consequences for the licensing of online rights: Authors of musical works often join a collecting society at the beginning of their career and authorise this society to manage the rights for all their future works. If, at a later stage, they enter into a contract with a music publisher for the works they have meanwhile created, the latter will, in the Anglo-American system, only be able to acquire the mechanical rights, but not the public performance rights. These particularities lead to considerable legal uncertainty

²² Section 17 Act on Collecting Societies (Verwertungsgesellschaftengesetz, VerwGesG).

²³ Section 11 Act on Collective Management of Copyright (Urheberrechtswahrnehmungsgesetz, UrhWG).

²⁴ Article 56(2) of Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters.

²⁵ Article 106(2) of Law of 2 February 1994 on copyright and related rights.

²⁶ Article 157.1 a) Copyright Law (Texto Refundido de la Ley de Propiedad Intelectual, TRLPI).

²⁷ Commission Proposal, Explanatory Memorandum, at 1.3. (p 4) and Recital 5.

as to who holds rights and, consequently, is able to entrust rights to, or withdraw rights from, a collecting society. Also, the Anglo-American PROs themselves therefore cannot know whether they have been authorised by the original rightholders or the publishers to manage the public performance rights regarding a specific musical work.²⁸ Yet, if the collecting society which has been chosen by the original rightholder is an Anglo-American one (so-called Anglo-American repertoire), the publisher can at least be certain that it was able to acquire the reproduction (mechanical) rights. This has had important consequences already under the 2005 Recommendation. When the Commission recommended rightholders to withdraw their rights, this only had an effect on the powerful major companies, who saw a chance to renegotiate the terms of collective administration of their rights with individual collecting societies. However, since they could only expect to hold the ‘mechanical’ rights for their Anglo-American repertoire, they withdrew these rights and sought to cooperate with collecting societies holding the public performance rights with a view to organising the grant of multi-territorial licences for online use of their repertoires. This is why, in the case of CELAS,²⁹ the German collecting society GEMA entered into a joint venture with the British collecting society PRS-for-music for the grant of multi-territorial licences for the Anglo-American repertoire of EMI.³⁰ In the light of this analysis, the Recommendation can be criticised for exclusively benefiting large rightholders such as the major publishing companies. The Commission Proposal will not change this by making the rules of the Recommendation binding. Nor can anyone expect a more ‘satisfactory’ implementation under future binding rules. These rules will neither change the different licensing traditions in different parts of the EU and beyond nor solve the underlying problem of legal uncertainty as to the holder of the public performance rights regarding the Anglo-American repertoire

²⁸ Also as regards solving this very problem, collecting societies are important. A society that manages the rights of both the original rightholders and the publishers will work as a clearing house. In such a society, it does not matter who has entrusted the rights to the society for the purpose of guaranteeing that the rights can be licensed to users. However, the problem appears again when the royalties need to be distributed to the rightholders. Societies may solve this problem by allocating the royalties to original rightholders and publishers according to specific percentages on which these groups of rightholders agree as members of the collecting societies. In this regard, see also para 55, below.

²⁹ See <http://www.celas.eu>.

³⁰ On its website, CELAS explicitly explains: ‘CELAS is able to license the *Anglo-American EMI mechanical shares*. The mechanical right consists of the right to copy the work and the right to issue copies of the work in public. This means that every time a work is copied, or a copy is issued to the public, (downloads, server copies, data storage devices etc), royalties generated from its licensing will be collected and distributed by CELAS. In addition, for those EMI shares, CELAS is able to include the associated performing right shares.’ (Emphasis added).

and the online rights in general for all other repertoires. Although the Commission claims that the management of rights should take place ‘in a comparable’ manner³¹ across the borders in the internal market, this is anything but guaranteed for the most important ‘online right’ for which the Commission seeks to promote multi-territorial licensing.

The Commission’s insufficient assessment of the copyright law acquis

- (13) The Commission also has to be criticised for creating the impression that substantive copyright law has sufficiently been harmonised.³² This conviction is indeed treacherous as far as ‘online rights’ are concerned. In the context of these rights,³³ the Commission quite rightly hints at Articles 2 and 3 of the Information Society Directive 2001/29/EC³⁴ that harmonise the reproduction right and the rights of communication and of making available to the public, which are regularly affected by online uses. Yet German courts, in proceedings relating to CELAS (see para 12, above), recently questioned the possibility of rightholders to withdraw only the reproduction right from the system of collective rights management in order to negotiate the grant of multi-territorial licences with individual collecting societies. Courts argued that, according to German copyright law, which only allows a fragmentation of rights in the form of licences to the extent that they make economic sense,³⁵ the rightholder, for the purpose of online use, is not able to assign the mechanical right and the public performance right separately.³⁶ This German litigation, which is currently pending on appeal before the Federal Supreme Court (Bundesgerichtshof),³⁷ highlights the kind of more intriguing legal issues for which the Information Society Directive does not provide any obvious answers. In particular, the issue of fragmentation of copyrights by way of licensing has not been explicitly ad-

³¹ Commission Proposal, Explanatory Memorandum, at 3.2. (p 7).

³² See, in general, Commission Proposal, Explanatory Memorandum, at 3.2. (p 7).

³³ See Article 3 lit. I) of the Proposal.

³⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167, p 10.

³⁵ This rule is based on an interpretation of Section 31(1) German Copyright Act (Urheberrechtsgesetz, UrhG).

³⁶ Landgericht München I (Munich District Court I), 25 June 2009, Case 7 O 4139/08, (2009) *Zeitschrift für Urheber- und Medienrecht* 788; Oberlandesgericht München (Munich Court of Appeal), 29 April 2010, Case 29 U 3698/09, (2010) *Zeitschrift für Urheber- und Medienrecht* 709 (confirming the judgment of the District Court).

³⁷ Case I ZR 116/10.

dressed in any Directive by the European legislature. Such unsolved substantive law issues, taken together with the still diverging national traditions of collective rights management, seriously affect the Commission's endeavours to create a coherent legal framework for multi-territorial licensing by only regulating collective rights management issues.

The Commission's failure to take account of statutory remuneration rights and mandatory collective rights management

- (14) While collecting societies emerged as market institutions for saving transaction costs, they now also fulfil functions that are allocated to them by the legislature. In particular, collecting societies manage statutory remuneration rights that are provided for by law. Examples of such remuneration rights can also be found in EU legislation. For instance, Article 1 of the Resale Right Directive³⁸ provides for a statutory right to a royalty. According to Article 6(2) of this Directive, Member States may provide for compulsory or optional collective management of this royalty.³⁹ Article 5 of the Rental Rights Directive⁴⁰ stipulates a non-waivable right of the authors and performers to 'obtain an equitable remuneration for the rental'. Also, this Directive allows the Member States to entrust the administration of this remuneration right to collecting societies representing the authors and performers and to regulate this administration of these rights in more detail (Article 5(3) and (4) of the Rental Right Directive). Even more important is the regulation of the right to fair compensation if Member States provide for a private use copying exemption (Article 5(2)(b) Information Society Directive⁴¹). In this regard, the EU legislature does not specifically provide for how this right should be managed. However, it is clear that such management will not be possible without involvement of collecting societies on the national level.⁴² In its Proposal, the Commission refers to these Directives in

³⁸ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, p 32.

³⁹ See also Recital 28 of the Directive, stating that management by a collecting society is one possibility by which Member States can ensure the exercise of the resale right.

⁴⁰ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] OJ L 376, p 28.

⁴¹ At note 34, above.

⁴² Note that EU law sometimes even makes it mandatory that certain exclusive rights be managed by collecting societies: Article 9(1) of 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 ([1993] OJ L 248, p 15) obliges the Member States to provide that the right to grant or refuse retransmission by cable can only be exercised through a collecting society.

a very general way and at the same time refrains from considering the impact that the management of statutory remuneration rights must have on the regulation of collective rights management. This is the more surprising in the light of recent endeavours of the Commission to address the regulation of copyright levies⁴³ and major EU court decisions regarding the administration of such levies by collecting societies.⁴⁴ This omission gives rise to two major criticisms on the current Commission Proposal, which will be discussed further below: (1) Statutory remuneration rights are typically conceived as non-waivable rights of authors and performers.⁴⁵ In this context, collecting societies, when they manage such rights, play a major role in protecting the rights of original rightholders against entities of the copyright industries, such as publishers, who can become rightholders themselves based on licences and assignments of rights. The first criticism therefore addresses the failure of the Commission to distinguish between different categories of rightholders and the potential conflict of interests that may exist or arise in particular in the context of statutory remuneration rights. This is especially relevant for the internal structure of many collecting societies in the EU that represent both authors and publishers and consider themselves as institutions that help to solve conflicts of interest between these two groups of rightholders.⁴⁶ (2) Statutory remuneration rights ('levies'), even if they are mandated by EU law, are regulated by national copyright law. In this regard, a close link exists between domestic copyright law and the more procedural rules applicable to collecting societies. This particular linkage between substantive copyright law and the law on collective rights management is not taken account of in the Proposal when the Commission argues that the Service Directive is also applicable to the services provided by collecting societies (see also paras 19 et seq., below).

⁴³ The Commission conducted public consultations on this issue in 2008. Information available at: http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm.

⁴⁴ See Case C-467/08 *Padawan* [2010] ECR I-10055; Case C-462/09 *Thuiskopie* [2011] ECR I-0000 (not yet officially reported).

⁴⁵ This was also pointed out by the CJEU with regard to the right to fair compensation according to Article 5(2)(b) Information Society Directive. See Case C-277/10 *Luksan* [2012] ECR I-0000, para 100 (not yet officially reported).

⁴⁶ In this regard, it has now become very questionable in Germany whether collecting societies have the authority to split up the income from such statutory rights among original rightholders and publishers. According to the decision of a first instance court which is still on appeal, a collecting society is under an obligation to pay the whole income arising from the use of a work to the original rightholder who has entrusted his rights for all future works to the society prior to the conclusion of a publishing contract. See Landgericht München I (Munich District Court I), 24 May 2012, Case 7 O 28640/11, (2012) *MultiMedia und Recht* 618. It may well be for the CJEU to say a word on this in the light of its *Luksan* judgment (note 45, above).

The Commission's failure to distinguish between different categories of rightholders

- (15) In the 2005 Recommendation, the Commission expressly espoused a principle of non-discrimination regarding the categories of rightholders.⁴⁷ This 'recommendation' was understood as a call on collecting societies to not privilege original rightholders (authors and performers) vis-à-vis the publishers and, thereby, seemed to be directed against those societies that only accept original rightholders as members.⁴⁸ The Proposal no longer provides for such a general principle. Article 5(2) of the Proposal only bans discrimination based on the country of residence and the nationality of the rightholder.⁴⁹ The Institute welcomes this decision. Collecting societies can play an important role in moderating conflicts between original rightholders and firms of the copyright industry as subsequent rightholders by accepting both as members and managing the rights of both groups.⁵⁰ Yet this function requires autonomy and flexibility of the collecting society with regard to appropriate solutions. The Commission recognises this in Article 6(3) of the Proposal by stipulating that the representation of different categories of members in the decision-making process must be fair and balanced. Still, the Commission should also take into account conflicts of interest that exist between original authors and the copyright industry in economic and legal terms. Such conflicts may specifically concern the distribution of revenue.
- (16) Yet, as regards the distribution of royalties, the last sentence of Article 12(1) of the Proposal takes up the ban of discrimination based on the category of rightholders by requiring 'equal treatment of all categories of rightholders'. The wording of this rule only relates to the 'distribution of the payments' and, thereby, is unclear as to whether it also applies to the shares that are to be paid to different categories of rightholders. If the latter were the case, this rule would be highly problematic. In principle, it has to be assumed that the royalties have to go to the rightholder who has entrusted the underlying rights to the society. Also, substantive law has to be taken into account, which, in several instances, guarantees that certain remuneration rights cannot be waived or transferred by the original

⁴⁷ Para 13(a) of the Recommendation stipulates: 'any category of right-holder is treated equally in relation to all elements of the management service provided'.

⁴⁸ Examples of such a purely authors' society are the Polish collecting society ZAIKS and the French SACD.

⁴⁹ This reading seems to be confirmed by Recital 8.

⁵⁰ With regard to this function see also note 28, above.

rightholder.⁵¹ Against the background of these concerns and substantive copyright law in particular, the last sentence of Article 12(1) is highly misleading and should be deleted. At best, this rule provides unjustified ammunition for representatives of the copyright industry to curtail the revenues of original rightholders. The procedural guarantee of fair and balanced participation in the decision-making process for the different categories of rightholders pursuant to Article 6(3) of the Proposal seems perfectly sufficient to protect the interests of subsequent rightholders. Also, leaving the determination of the shares of different categories of rightholders to the collecting societies not only corresponds to the society's autonomy. It will also allow the society to define the most efficient mechanism for calculating these shares and the payments that go to the individual rightholders.

- (17) In this context, it is important to note that one of the traditional functions of collecting societies lies in the defence of the weaker bargaining party, the author or the performer, against commercial users, and, if both as rightholders join the same collecting society, in promoting a balance of interests between these two categories of rightholders.⁵² This is also the purpose of rules that make collective management mandatory for certain rights.⁵³ Yet, in line with the approach of the 2005 Recommendation, the Proposal mostly and quite systematically refers to rightholders without distinguishing between original and subsequent rightholders. As a consequence, the Recommendation of 2005 has inappropriately favoured the interests of the major publishing companies, since only these companies had sufficient market power to withdraw their rights from the existing system and to negotiate better terms for multi-territorial licensing with single collecting societies. Hence, strengthening the position of 'rightholders' as such may well only benefit the economically most powerful rightholders in the market. This is most unfortunate in an area where the protection of the party with the weaker bargaining position, the creator, has been considered in earlier legislative instruments as the very justification of a limitation of party autonomy. Here again, the approach of the Commission in its Proposal is worrying since it refuses to take notice of the full current legal framework for copyright applicable in the European Union.

⁵¹ This was most recently acknowledged by the CJEU in its interpretation of some provisions of European copyright law. See Case C-277/10 *Luksan* [2012] ECR I-0000 (not yet officially reported).

⁵² Commercial users are not limited to resellers, broadcasting corporations or online service providers. Also, subsequent holders of copyright, such as publishers and producers, are commercial users.

⁵³ See for instance Recital 12 and Article 5(4) of the Rental Rights Directive 2006/115.

(18) In Article 6, the Proposal addresses the issue of membership in collecting societies. This article is inspired by the goal of guaranteeing that collecting societies act in the best interest of their members.⁵⁴ In it, however, the Commission ignores the fact that collecting societies do not only manage the rights of members but also of other groups of rightholders.⁵⁵ Most importantly, the rules of collecting societies define certain objective thresholds, mostly based on the amount of royalties allocated to individual rightholders, as a requirement for becoming members. Rightholders that do not qualify as members still have access to the service of the collecting societies by entering into a service contract with the society according to which this society will provide collective rights management services in the interest of the rightholder. Especially in jurisdictions where societies have a statutory duty to manage the rights of all rightholders that want to entrust their rights to these societies, a large portion of the revenue may therefore be distributed to non-members. And finally, there can even be a third group of rightholders. Sometimes authors that only have created a single work, or very few works, are not aware of the possibility to generate income by joining a collecting society prior to the creation or publication of the work. Yet collecting societies may nevertheless distribute royalties to such rightholders, and this in absence of any contractual relationship, when such rightholders claim their part of the society's income *ex post*. Payment to such rightholders even seems mandatory where the law stipulates that certain rights can only be licensed or claimed through a collecting society. This is confirmed by Article 9(2) of the Satellite and Cable Directive,⁵⁶ which provides that 'where a rightholder has not transferred the management of his rights to a collecting society', 'he shall be able to claim those rights' from the collecting society that is deemed to be mandated to manage the retransmission right. In addition, collecting societies may also collect royalties for non-members in the context of extended collective licences. The Nordic extended collective licensing regime allows for the extension of collective agreements between collecting societies and users to non-members in some areas.⁵⁷ In these cases, the collecting society has not only the duty to manage the outsiders' exclusive rights in the most careful way, but it is

⁵⁴ See also Recital 10.

⁵⁵ Note that the different language versions are not always consistent when they use the terms 'rightholders' and 'members'. In Recital 17, the English version uses the term 'its rightholders', whereas the German version uses the term 'ihre eigenen Mitglieder' and the French version the term 'ses membres'.

⁵⁶ See note 42, above.

⁵⁷ See, for instance, Art. 42(a) *et seq.* Swedish Copyright Act and Art. 50 *et seq.* Danish Copyright Act.

also obliged to try to distribute the money to all rightholders, ie members and non-members.⁵⁸ The Institute therefore recommends clearly distinguishing between these different groups of rightholders in the Proposal as well.⁵⁹ In particular, the Commission could consider recognising certain, however limited, rights to participate in the decision-making process of rightholders that have not, or may not, become members of the society. In more general terms, the Proposal should highlight the role of the collecting society as a trustee of the rights it administers, whether the rightholder is a member or not, and should stipulate the duties of the collecting society as a trustee.

The Role of the Service Directive and Article 40 of the Proposal

- (19) Collecting societies are in need of state control in the light of their monopoly vis-à-vis rightholders and users and the public interests involved. This also seems to be confirmed, at least in substance, by the Commission in Articles 37 through 40, where the Proposal acknowledges the need for state supervisory authorities and for sanctions. Yet, with the exception of Article 40, relating to multi-territorial licences, the Commission is not sufficiently clear as to which national authority should have power to control collective rights management activities of individual societies. This issue relates to the applicability of the Service Directive 2006/123.⁶⁰
- (20) The Commission states that the Service Directive applies to the services supplied by collecting societies.⁶¹ In this regard, the Recitals to the Proposal explain that ‘collecting societies should be free to provide their services across borders, to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States’.⁶² Hereby, the Proposal is not sufficiently clear as to whether also Article 16 of the Service Directive applies to collecting societies. If this were the case, Member States would not be allowed to impose an authorisation requirement on foreign collecting societies that manage rights, and grant licences, for the territory of this Member State. Indeed,

⁵⁸ See Art. 42(a) (4) s.3 Swedish Copyright Act, Art. 51(1) Danish Copyright Act.

⁵⁹ In this context, a major issue of the constitution of collecting societies relates to the requirements that need to be fulfilled by rightholders to become members. On this issue see para 34, below.

⁶⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] OJ L 376, p 36.

⁶¹ Commission Proposal, Explanatory Memorandum, at 1.4. (p 5).

⁶² Recital 3.

the Commission argues in favour of the applicability of Article 16 of the Service Directive in a footnote to the Impact Assessment.⁶³ Yet the answer to this question depends on the reading of the intellectual property exception contained in Article 17 No 11 of the Service Directive. The Institute is of the opinion that this exception also applies to collecting societies. Copyrights and related rights as a form of intellectual property rights are of a territorial nature. Countries, such as Germany or Poland, that provide for an authorisation system therefore limit the territorial outreach of the authorisation to the management of rights under their domestic law. This means that an authorisation granted by the competent authority of Germany will only cover the society's activity with regard to rights arising from the German Copyright Act. If a society established in Germany granted a multi-territorial licence for online use of works today, the German authorisation would not cover the licences granted under foreign law. This explains why the application of Article 16 of the Service Directive to collective rights management services runs the risk of creating a regulatory vacuum. In addition, the rights arising from national legislation are highly diverse. Even if Germany decided to extend the geographic outreach of its authorisation to other Member States, its authorities would then be required to ascertain whether the German society managed rights in accordance with the domestic law of other countries as well, which may involve not only questions of substantive copyright law but also the need to gather facts abroad.

- (21) In sum, it seems that the Commission tends to argue in favour of Article 16 of the Service Directive mostly with a view to fostering the grant of multi-territorial licences for online use of musical works. This is also why the Commission, in Article 40 of the Proposal, requires the competent authorities also to monitor compliance of their national societies with Title III when they grant multi-territorial licences. Even in this regard, however, it would not suffice that the competent authority only controls the respect of Title III of the Directive. Substantive law also matters: If, for instance, a non-German collecting society granted a multi-territorial licence that also covers Germany, in the light of currently on-going court proceedings regarding CELAS (see para 13, above), the question would arise whether such a licence can be recognised under the German rules on fragmentation.⁶⁴ After all, the collecting society is asserting its ability to grant a valid licence. Whether every national authority is well placed to answer such a complex copyright issue under foreign copyright law is rather questionable. At least,

⁶³ Impact Assessment, p 11 (note 43).

⁶⁴ See note 35, above.

the example shows that state control is not only about procedural issues but also about substantive copyright law, which is exempted from the application of Article 16 of the Service Directive. Moreover, the Commission overlooks the fact that the application of Article 16 of the Service Directive would not only apply to the grant of multi-territorial licences for online use of musical works, but for all activities of domestic societies regarding the grant of licences for other Member States.

- (22) If, as argued here, Article 16 of the Service Directive does not apply to collecting societies, application of national rules on the control of such services, including the rules on a national authorisation system, will still have to be in conformity with the general principles of free movement of services under Article 56 of the TFEU. Hence, Member States may in principle require collecting societies to apply for an authorisation if they intend to grant licences for the national territory. But the underlying national rules need to be appropriate and must not go beyond what is necessary (proportionality principle).
- (23) From a broader perspective, the Commission fails to address the requirements under which collecting societies may be established and start providing their services. The Institute strongly recommends considering the definition of a European standard for such criteria (see para 70, below). Only if such a standard were implemented and respected could a rule such as Article 40 be considered acceptable to all Member States.
- (24) From a policy perspective, application of Article 16 Service Directive and, more specifically, the concentration of control by Article 40 of the Proposal regarding multi-territorial licensing would allow forum shopping and run the risk of triggering a race to the bottom among collecting societies. Societies could easily choose the country with the weakest control standard as its country of establishment. Indeed, the better option for implementing a centralised system of control would therefore consist in the creation of a European agency that authorises and controls at least societies that grant multi-territorial licences.

III. More detailed comments on the text of the Proposal

Scope and definitions

- (25) With its Proposal, the Commission takes action in two areas, namely, with regard to generally applicable rules on governance and transparency on the one hand and on the grant of multi-territorial licences for online use for

musical works on the other hand. These two areas are certainly related. However, throughout the Impact Assessment and the Proposal itself, the reasons for addressing both areas at the same time and in the same instrument remain unclear. It is not apparent why the European legislature could not first adopt governance and transparency provisions and wait to see if they take hold and then proceed to submitting a proposal for a Directive on multi-territorial licensing. One clear advantage of such a staggered approach would be the additional time given to collecting societies to further develop data processing standards and capacity. In addition, dispute over the more controversial issue of multi-territorial licensing could block adoption of adequate governance and transparency rules for a long time.

- (26) The precise scope of the Directive is also an issue from the start. Mentioning related rights in the title creates the impression that such rights are covered by the whole Proposal. This, however, is misleading with regard to Title III on multi-territorial licensing. The lack of applicability of this Title to related rights is unfortunate since the aim of facilitating music online services through multi-territorial licensing can hardly be reached if the related rights are not covered (see also para 48, below).
- (27) The Proposal provides for a definition of collecting societies in Article 3(a). This definition is faulty in several regards. First, it does not sufficiently emphasise the ‘collective’ character of collecting societies. This is even more blatant where the Commission defines ‘collective rights management’ in the Impact Assessment as

the provision of the following services: the grant of licences to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to right holders.⁶⁵

If it stressed the collective aspect, the Proposal would recognise the association of individual rightholders as one of the pillars of the system of collective rights management, namely, for the purpose of raising the bargaining power when collecting societies negotiate with often very powerful users and groups of users. This objective is recognised under EU competition law as the reason for limiting the rightholders’ freedom of contract in relation

⁶⁵ Glossary of the Impact Assessment, p 195. There is no further definition for ‘management’, a difference to be noted in comparison with the leaked proposal of early July which contained a quite similar definition of ‘rights management’ (the word ‘collective’ being omitted) in Article 3.

to the collecting societies.⁶⁶ Internally, collecting societies are built on the principle of solidarity among different categories of rightholders.⁶⁷ This implies unified tariffs for all works of the repertoire as well as blanket licences in most cases; both are simultaneously essential tools for the minimisation of transaction costs. This, in turn, fosters legal certainty, which makes the grant of licences through collecting societies attractive to users.

- (28) Second, Article 3(a) fails to express in a sufficient manner that collecting societies act as trustees for the rightholders. This particular feature is only addressed in Article 4, where the Commission states general principles of collective rights management. Expressing the trusteeship in the very definition of collecting societies is however important for distinguishing collecting societies from other entities belonging to the copyright industry, such as publishers, who acquire rights from several rightholders and manage them on their own account, although, depending on the publishing contract, publishers often pay continuous royalties to the authors. In this regard, the definition of collecting societies as contained in the 2004 Commission Communication expresses much better the trusteeship of the societies. There, the Commission states:

Collective rights management is the system, under which a collecting society as trustee jointly administers rights and monitors, collects and distributes the payment of royalties on behalf of several rightholders.⁶⁸

- (29) Third, as compared to this definition of 2004, the wording of Article 3(a) also seems too narrow in that it requires ownership or control of the society by its members. By this wording the Proposal excludes other forms of organisations, such as corporations with shareholders, who are not rightholders themselves, from the scope of application of the Directive. In particular, the definition runs the risk of allowing circumvention. Collecting societies in the sense of Article 3(a) may build up corporate sub-structures in the form of joint ventures with other collecting societies or individual right-holders in

⁶⁶ See Case 127/73 R *BRT v SABAM* [1974] ECR 1974, 313, paras 8-10; Commission Decision of 12 August 2002, Case COMP/C2/37.219 – *Banghalter & Homem Christo v SACEM* (only available in French), pp 10-12, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf.

⁶⁷ Such as authors of musical works and publishers of musical works.

⁶⁸ Commission Communication (2004), note 1, above, at p 4.

order to avoid application of the Directive.⁶⁹ Indeed, the Commission in Article 31 allows establishment of corporate subsidiaries for multi-territorial licensing. Whether, however, such entities can be considered as collecting societies remains unclear. In its Impact Assessment, the Commission considers such entities, including CELAS, as ‘licensing agents’ and not collecting societies.⁷⁰ The Institute recommends clarifying the definition in Article 3(a) with the effect of making the Directive also applicable to such entities.

- (30) It is also worth mentioning that the definition of ‘collective rights management’ in the Impact Assessment (see para 27, above) mistakenly limits licensees of collecting societies to commercial users. The scope of copyrightable subject-matter is not to be discussed here, but copyright royalties can, in the current legal framework, be owed for both commercial and non-commercial uses.⁷¹

Obligations imposed on all collecting societies (Articles 4-20)

- (31) The goal of more transparency is a step in the right direction as it will help to create a level playing field within the internal market and enhance the control that creators, performers, publishers and other rightholders have over their rights. The Institute welcomes binding provisions which help harmonise the legal framework regarding governance and transparency of collective rights management. However, several issues addressed by the Commission Proposal deserve closer scrutiny.
- (32) The concern of the Commission regarding discrimination based on nationality and residence in Article 5(2) is justified. As pointed out above, the Proposal does not require the implementation of a generally applicable principle of non-discrimination regarding different categories of rightholders (para 15, above). Indeed there are objective reasons for distinguishing between original and subsequent rightholders: due to weak bargaining power, individual creators and performers often have a problem successfully pursuing their interests in the market and, therefore, have to rely more on collective management than does the copyright industry. This is even more so in the case of authors and performers of commercially less rewarding

⁶⁹ An example is CELAS, a corporate entity with limited responsibility under German corporate law, which was established by the German GEMA and the British PRS for the grant of multi-territorial licences for online use of musical works. See also notes 28-29, above.

⁷⁰ Impact Assessment, at 24.4.2 (p 162).

⁷¹ For example, the Christian churches are among the debtors of the German GEMA; and public education institutions are debtors of collecting societies that administer rights in writings.

works and performances compared to rightholders of the mainstream Anglo-American repertoire.

- (33) The principle of fair and balanced representation of different categories of members in the decision-making process (Article 6(3)) should take these considerations into account, and it should give room to the representation of authors with relatively low revenue.
- (34) In this regard, it may not be sufficient to simply stipulate, as Article 6(2) does, that rightholders may become members if they fulfil the membership requirements. A major conflict between original rightholders and collecting societies relates to the requirements for becoming members. Especially authors and performers may complain about their inability to take part in the decision-making process of societies since the membership thresholds are too high. Therefore, the Commission should consider the introduction of substantive criteria that exclude excessively high barriers to becoming members.⁷²
- (35) As pointed out above (para 10), the freedom of rightholders to choose the society to which they entrust their rights can only be understood in the context of the general private-law principle of party autonomy. Also, the freedom for rightholders both to choose the collecting society to which they would like to entrust their rights and to define the scope of the rights entrusted (Article 5(2)) has been enshrined in the practice of European competition law since the 1970s.⁷³ However, these freedoms have been limited by the recognised common interests of authors and collecting societies in having a stable and strong repertoire and in balancing the pressure that commercial users may place on individual authors. Consequently, the freedom to tailor the scope of rights entrusted was, and still is and should remain, relatively limited. It is therefore recommended that Article 4 clearly states that ‘the best interest of the members of the collecting society’ and the objective necessity that conditions any obligations imposed by the society on its members are to be understood according to the case law mentioned above. Without the boundaries set by this case law, an unreasonably wide freedom of rightholders to determine the scope of the entrustment could lead to an unwanted fragmentation of repertoires.

⁷² For instance, one could think of a rule that forces collecting societies to change their membership requirements if more than a specific percentage of their total income is distributed to non-members.

⁷³ See, in particular, the ECJ decision of 21 March 1974, Case 127/73 R *BRT v SABAM* [1974] ECR 1974, 313 paras 7-11; Commission Decision in *Banghalter & Homem Christo v SACEM*, note 66 above, pp 10-12.

- (36) Moreover, the requirement to obtain express consent from rightholders for different aspects regarding the rights they entrust to a collecting society (Article 5(6)) causes some frictions with the existing system of collective rights management. Notably in the context of mandatory collective rights management – such as pursuant to Article 9(1) of the Satellite and Cable Directive regarding the cable retransmission right – or with regard to extended collective licensing regimes (or a presumption-based model) explicit consent by all rightholders will never be possible. In fact, the obligation of collecting societies as stipulated by Article 5(7) to inform rightholders of their rights under Article 5(1) through (6) before obtaining their consent to manage their right ignores the fact that, in such cases, collecting societies are also under obligation to manage the rights of outsiders.
- (37) The possibility to withdraw rights, categories of rights or works upon serving reasonable notice not exceeding 6 months according to Article 5(3) of the Proposal may seem appropriate for rights regarding online use. But its application to analogue uses would destabilise the system of collective rights management in its present form. The stability of the repertoire managed by collecting societies is actually one of the key elements of the legal certainty given to users getting blanket licences. In fact, the freedom to opt out of collective management regarding certain categories of rights and works can be risky for some currently well-functioning collecting societies that are active in specific sectors. The possibility to withdraw any right from a society without any qualification of the circumstances of such withdrawal goes beyond what EU competition law requires and what should be considered ‘necessary for the protection of the rights and interests of these rightholders’ in the sense of Article 4 of the Proposal. Under EU competition law, collecting societies as market-dominant undertakings in the sense of Article 102 of the TFEU are already under strict control when they impose limitations on rightholders. They are only allowed to impose restrictions to the extent this is strictly necessary to provide the society with sufficient bargaining power vis-à-vis powerful users.⁷⁴ In its decision in *Banghalter & Homem Christo*,⁷⁵ the Commission has shown flexibility to adapt these requirements to the online world by holding that for online uses it was no longer justified for a collecting society to require a member to entrust the relevant rights at all to any collecting society. Yet, for analogue uses, the result of this weighing may still be different. Hence, the Institute recommends amending Article 5(3). While the term of six months can be

⁷⁴ See, for instance, Commission Decision in *Banghalter & Homem Christo v SACEM*, note 66, above, p 10.

⁷⁵ *Ibid*, pp 10-12.

maintained, this provision should also safeguard the possibility for collecting societies to impose restrictions that are in conformity with EU competition law.

- (38) On a different note, the lack of possibility to withdraw single works from the system of collective rights management or to opt for the free licensing of certain works does not adequately reflect increasing non-commercial uses and sharing of copyrighted works.⁷⁶ In this regard, the legislature could conceive a rule that specifically safeguards rightholders' capability to allow such non-commercial use while the same rights are entrusted to a collecting society for commercial uses.
- (39) The provision regarding the general meeting of the members of collecting societies (Article 7) and the one regarding the mandatory establishment of a supervisory function (Article 8) directly affect the corporate law structure of collecting societies. Whether Articles 7 and 8 are compatible with corporate law in the Member States deserves closer scrutiny.⁷⁷
- (40) Article 12 of the Proposal has raised fierce criticism from the creative community, as it does not put collecting societies under more pressure to locate rightholders and to distribute royalties promptly.⁷⁸
- (41) Effective enforcement of the obligation of collecting societies stipulated by Article 15(2) to determine tariffs vis-à-vis users according to the economic value of the rights in trade may often turn out to be illusive. This is especially true for statutory remuneration rights, since a corresponding commercial market will mostly be inexistent.
- (42) The scope of obligations of collecting societies to provide information to rightholders, members, other collecting societies and users on request (see Article 18) needs to be balanced with the legitimate interest of collecting

⁷⁶ As can be observed in the music sector, in the sector of academic and scientific writing and generally with regard to the increasing use of *Creative Commons* licences.

⁷⁷ See the motion of the French Sénat of 26 October 2012, Résolution européenne portant avis motivé sur la conformité au principe de la subsidiarité de la proposition de la directive concernant la gestion du droit d'auteur et des droits voisins et la concession de licences multiterritoriales de droits portant sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur (COM(2012) 372, available at: www.senat.fr/leg/tas12-017.pdf, p 2 (criticising that the Commission Proposal may be in contravention of the subsidiarity principle).

⁷⁸ 'EU copyright law plan angers Radiohead, Pink Floyd', Reuters, 11 July 2012, available at: <http://in.reuters.com/article/2012/07/11/eu-copyright-idINL6E8IB3QK20120711>; 'Proposed royalty law fails to satisfy musicians', *irishtimes.com*, 12 July 2012, available at: <http://www.irishtimes.com/newspaper/finance/2012/0712/1224319858418.html>.

societies, the rightholders and the users to keep such information secret. Overall, it seems that Article 18 achieves an appropriate balance. More concretely, Article 18(1)(a) should be understood in the sense that users can only request information on standard licensing contracts and applicable tariffs that are applicable to them but not to other categories of users. Otherwise, the bargaining power of collecting societies in negotiating such licensing contracts and tariffs with individual groups of users would be considerably curtailed.

- (43) Similarly, Article 18(2)(c) obviously has to be read in the sense that collecting societies are not required to make accessible the full text of their representation agreements. Yet the Commission should consider whether it would be appropriate to require the publication of reciprocal representation agreements and model agreements. If publication of this information seems excessive in terms of protecting the trade secrets of the parties, an alternative would consist in making this information available to a party with a legitimate interest, ie users and rightholders who are affected by the application of such agreements.
- (44) It is questionable whether collecting societies should be allowed to charge fees for the provision of information pursuant to Article 18. A German court recently stated that the pricing of 15 Euros for the exact list of uses and the amounts due for the uses of identified works, is to be considered as fair.⁷⁹
- (45) One can also wonder why the information listed in Article 18 is to be made available only upon request. The information listed in this provision relates to the contractual rights and duties of the persons who are entitled to present a request. Collecting societies could be obliged to make this information available to these persons in form of limited and secure online access.

Rules regarding multi-territorial licensing of online rights in musical works

- (46) The objective of Title III (Articles 21 through 44) of the Proposal is to facilitate multi-territorial licensing and to reach a satisfactory level of aggregation of repertoires in the music sector. The Proposal thereby builds on the principles that the Commission already set out in its Recommendation of 2005.⁸⁰

⁷⁹ Landgericht München I (Munich District Court I), 24 May 2012, Case 7 O 28640/11, (2012) *MultiMedia und Recht* 618, para 7.

⁸⁰ Note 6, above.

- (47) Apart from a very few big rightholders, who were able to negotiate new schemes of multi-territorial licensing of their Anglo-American repertoire (see para 12, above), the effect of the Recommendation of 2005 has been negative for most of the stakeholders concerned. This is true for both the users who are now no longer able to get licences for all repertoires at one licensing point⁸¹ and other rightholders for whom access to the new system of multi-territorial licensing did not succeed. In the Proposal, the Commission does not completely depart from the questionable approach of the Recommendation. Yet the Commission tries to address these two problems by enhancing the transparency for users regarding the composition of the repertoires that are licensed and by facilitating access of all rightholders to the system of multi-territorial licensing.
- (48) Title III takes a sectorial approach by addressing only musical works and only online rights in such works, without justifying such limitations. In its *CISAC* decision, the Commission obviously advocates the view that multi-territorial, or at least cross-border, licensing could also work for the licensing of satellite transmission and cable retransmission.⁸² In the future, the proposed scheme may also have to be discussed for the grant of multi-territorial licences of the online rights in e-books and also pictures.
- (49) Most importantly, Title III only relates to rights ‘in works’ and thereby excludes the related rights of performing artists and phonogram producers (see para 26, above). The wording of the Proposal may not be totally clear as to whether the licensing of related rights is covered. Yet, in the Impact Assessment, the Commission expressly refers to the difficulties that exist with regard to the ‘licensing of authors’ rights for the online use of musical works’ and clearly distinguishes between the authors’ rights and the related rights.⁸³ Based on the IFPI Simulcasting model agreement,⁸⁴ the collecting societies for the related rights have implemented a completely different system of multi-territorial licensing. Since it is clear that users will need licences for both the copyright and the neighbouring rights in order to play music without violating the law, anything less than a uniform approach to both fields remains unsatisfactory. By not addressing related rights, the Commission seems to avoid entering into a debate about setting back the

⁸¹ This fragmentation is also acknowledged by the Commission. See Impact Assessment, p 13.

⁸² Commission Decision of 16 July 2008, Case COMP/C2/38.698 – *CISAC*, C(2008) 3435 final.

⁸³ See Impact Assessment, p 24 and also p 10 as well as p 12 (where the Commission relates to the different traditions of licensing of authors’ rights and other rights).

⁸⁴ See also the Commission Decision exempting this agreement from the prohibition of Article 101(2) of the TFEU, note 11, above.

clock and promoting the IFPI Simulcasting model for authors' rights as well.⁸⁵

- (50) In a nutshell, the approach of the Recommendation and the Proposal consists in abandoning the network of the reciprocal representation agreement and the enhancement of competition among collecting societies in the market for collective rights management services to rightholders. By its attempt to repair the abovementioned deficiencies of this approach (para 47, above), the Commission refuses to respond adequately to the more fundamental criticism that was expressed on this approach by many commentators and even the European Parliament.⁸⁶
- (51) To facilitate access of all rightholders to multi-territorial licensing, the Commission opts for the so-called European Licensing Passport (option B2 in the Impact Assessment). The passport allows licensing on a multi-territorial basis and obliges the collecting society to fulfil specific requirements. The passport requires that

collecting societies wanting to license the online rights of musical works on a multi-territorial basis comply with a set of conditions defined by legislation [Article 21], which would aim at ensuring that collecting societies engaging in multi-territorial licensing have sufficient data handling and invoicing capacities [Article 22], comply with certain transparency standards [Articles 23 and 24] towards rightholders [Article 26] *and users* [Article 25] and allow for the use of a dispute resolution mechanism.⁸⁷

- (52) The Proposal would oblige the Member States to ensure this system and to vest 'competent authorities' with the ability to monitor the compliance of the passport entities with the requirements in terms of MTL processing capacity (Articles 21 and 22). The latter arises from Article 37, according to which all stakeholders (members of a collecting society, rightholders, users and other interested parties) are able to file complaints to the competent authorities 'with regard to the activities of collecting societies which are covered by the directive'. Member States must also provide the competent

⁸⁵ This option is not even considered by the Commission in the Impact Assessment that underlies its Proposal, although the choice between the IFPI Simulcasting model and the model implemented by the Recommendation dominated the Working Paper of 2005.

⁸⁶ See, in particular, the 2007 Resolution of the European Parliament, note 4, above.

⁸⁷ See Impact Assessment, p 43. A list of the obligations regarding users and rightholders/members imposed on these societies is presented on the same page.

authorities with the power to take appropriate administrative sanctions and measures (Article 38). Further, Member States must make alternative dispute resolution systems available to the members of collecting societies, rightholders and users (Articles 34-36).

- (53) The most important provisions of Title III are Articles 29 and 30. Both provisions pursue the goal of enabling all works to enter the system of multi-territorial licensing by obliging passport entities to additionally manage the multi-territorial licensing of the full repertoires of smaller collecting societies that do not hold the passport (Article 29) and the repertoire of individual rightholders (Article 30).
- (54) Article 29 seems to provide an effective way of opening the door for less attractive repertoires to multi-territorial licensing by allowing collecting societies that do not hold a passport to request a passport entity to enter into a representation agreement for the grant of multi-territorial licences (Article 29(1)). Through this system, the Commission also seems to counter the argument that the Recommendation had a negative impact on cultural diversity by benefiting the large Anglo-American repertoires only. Yet also Article 29 has its problems. First, Article 29(1) only works if the requesting society is the source society that holds the rights for all EU Member States. Second, the provision will not help if it is not clear whether the rights were first entrusted to a collecting society by the author or the publisher and the two have chosen different societies.⁸⁸ For such cases, cooperation of all collecting societies through reciprocal representation agreement is still needed to achieve a clearing of rights. Third, Article 29(1) is most likely to, and is meant to, be used by smaller national collecting societies of the EU. This leads to a situation in which rightholders affiliated with these societies only gain access to the system of multi-territorial licensing through the intermediary of an additional collecting society. In this regard, the system of Article 29 resembles the IFPI Simulcasting model of multi-territorial licensing of online rights based on reciprocal representation agreements in which the management of online rights always requires the cooperation of several collecting societies, each of them producing administrative costs. The Commission rejected this IFPI Simulcasting model in its Recommendation of 2005. Since rightholders from smaller countries with music that is less popular in the international market may have difficulties getting direct access to passport entities, and therefore have to rely on indirect access through smaller collecting societies without a passport, the Proposal may still create disadvantages for such rightholders and, thereby, produce a negative impact on cultural diversity. Fourth, the 2nd indent of Article 29(2) intro-

⁸⁸ On this concern see also para 12, above.

duces an upper threshold for what the passport entity can charge the requesting society. This may also include a reasonable profit margin. In the context of reciprocal representation agreements profit margins are not such an issue, since the societies assume that the agreements are in their mutual interest. However, in the framework of Article 29 there is only a one-sided provision of a service. Hence, a profit margin may appear justified. Yet this also shows that the system of Article 29 may become more expensive than multi-territorial licensing based on reciprocal representation agreements, and make access to the system of multi-territorial licensing through smaller collecting societies without a passport much less attractive.

- (55) By complementing Article 29, Article 30 strives to enhance the ability of individual rightholders to grant multi-territorial licences themselves or through other collecting societies if the collecting society to which the rightholder has entrusted the online rights fails to grant such licences within one year after the expiry of the transposition period of the Directive. The attempt of the Commission to address the failure of the Recommendation of 2005 to actually enable all rightholders to make use of their online rights in the framework of multi-territorial licences is certainly laudable. Yet there are considerable doubts whether this system can work. Most importantly, Article 30 presupposes that it is always clear which person has entrusted a collecting society with the online rights. As explained above (para 12), it is often very unclear whether these rights were entrusted to a collecting society by the author or the publishing company. In such a situation, Article 30 may lead to a situation in which both the author and the publisher assert the copyright. In short, by proposing Article 30, the Commission ignores the fact that collecting societies also function as clearing houses for the purpose of licensing when it is unclear whether the rights are still with the author or have been transferred to the publisher. It is also easy to see that Article 30 may especially harm the interests of authors, since the publishers are more likely, just as after the adoption of the Recommendation of 2005, to seek a centralised grant of multi-territorial licences while the authors will tend to rely on their collecting societies to bring a request pursuant to Article 29.
- (56) In addition, Article 30 seems to deny passport entities the possibility to refuse the administration of smaller repertoires. This principle is also set out more explicitly in Article 29(2) 1st indent in case a collecting society entrusts its whole repertoire to a passport entity for multi-territorial licensing. While this is in line with the obligation to contract that the Institute recommends in general (para 10, above), one also has to note that the system of passport entities rests on the assumption that there will be a number of

such entities competing for rightholders. Hence, as long as no passport entity has gained a market-dominant position, restricting the legal autonomy of such entities to decide with whom they want to contract lacks sufficient justification. In this regard, Article 30 appears to be a disproportionate restriction of the passport entities' freedom to do business. Yet one has to remember here that the grant of multi-territorial licences will also be characterised by the economics of collective rights management which, due to the economies of scale, tends towards a natural monopoly (para 6, above). This may well mean that in the end Articles 29 and 30 will lead to one single collecting society within the EU that attracts all the business regarding multi-territorial licensing (see also para 8, above).

- (57) The Commission's approach to multi-territorial licensing raises several other issues: The first relates to the formal requirements for acquiring the passport. Articles 21(1) and 22(1) oblige the Member States to ensure that the collecting society which grants multi-territorial licences fulfils the abovementioned (para 51) conditions. Whether this mandates an authorisation system, which would be supported by the Institute (see also para 23, above and para 70, below), is not sufficiently clear. If so, the question would be which Member State has authority to decide on the authorisation within the framework of the Service Directive (see also paras 19-21, above). Article 40(1) allocates the power to 'monitor' compliance of passport collecting societies with Title III to the authorities of the Member State where the collecting society is established. Although this provision follows a 'country of origin' approach similar to Article 16 of the Service Directive, it does not explicitly require prior authorisation. A requirement of prior authorisation would also provide more sense to Article 38 on sanctions: The ultimate sanction for non-fulfilment of the obligations under Title III would consist in the withdrawal of the passport from the collecting society. In sum, within the Commission's approach, the European legislature would be well advised to make prior authorisation mandatory, since such authorisation would guarantee most efficient fulfilment of the Member States' obligations under Articles 21 and 22. In this regard, a centralised authorisation scheme on the European level seems more appropriate than leaving the authorisation and the sanctions to the authorities of the Member States, since this would guarantee a uniform standard of control and preclude the problem of forum shopping (see also para 24, above and para 72, below).
- (58) Another question relates to the legal consequences for the underlying contractual relationships and especially the licences granted to users if the competent authority came to the conclusion that a passport entity did not comply with the requirements of Title III. Withdrawal of the passport should not have any retroactive effect on the validity of the licences.

- (59) Article 27 of the Proposal allows the ‘outsourcing’ of services relating to multi-territorial licensing. In a similar manner, collecting societies can transfer multi-territorial licensing to subsidiaries (Article 31). In the light of the latter – and its wording confirms this reading – Article 27 only seems to allow the outsourcing of some services, such as the monitoring of the licences, while the grant of the multi-territorial licences as such remains with the collecting society. Yet this does not exclude the creation of separate corporate entities, such as CELAS (see para 12, above), for the grant of multi-territorial licences, for instance, based on joint ventures among different collecting societies or collecting societies and individual rightholders. Such ‘complete’ outsourcing is indeed recognised by Article 31, which makes certain rules of the Directive applicable to the subsidiaries of collecting societies that offer or grant multi-territorial licences. Yet Article 31 seems very problematic to the extent that only very few rules of the Directive would apply to these subsidiaries directly. Most importantly, this would exclude sanctions against these subsidiaries pursuant to Article 38. Also, one wonders why there is no reference to Title II of the Proposal. The establishment of subsidiaries should not enable collecting societies to circumvent especially those obligations that are stipulated by Articles 4 and 5. The Institute would strongly advise the European legislature to clearly state that such subsidiaries have to be considered collecting societies themselves and, therefore, have to fulfil the requirements of all Titles and provisions of the Directive.
- (60) Another concern is that the requirements to be met by passport entities are very high. For instance, Article 22(2)(e) on the ability to identify and resolve inconsistencies in data held by other collecting societies granting multi-territorial licences seems very difficult to enforce. The question is how the collaboration between collecting societies in this field can effectively work without the establishment of common data bases.
- (61) As regards data processing, the lack of obligations imposed on users and rightholders raises concerns. Both groups dispose of the required information. And regarding rightholders, they choose the collecting society which will manage their rights. It would seem more appropriate to oblige rightholders and users to provide information to collecting societies and oblige these societies to centralise such information and establish common or interoperable databases.
- (62) In the light of the preceding analysis, the question remains whether the overall approach of the Proposal with its reliance on the passport solution deserves to be supported at all. Indeed, the Proposal does not provide sufficient guarantees that the solution advocated by the Commission will

reach its objectives. In the Explanatory Memorandum and in the Impact Assessment, the Commission expresses its concerns regarding cultural diversity, as well as the need for collecting societies that manage rights of ‘smaller repertoires’ to access the market of multi-territorial licences, and the need for consumers to access wide online offers. These concerns are well founded. Nevertheless, the Institute is unable to see that the Proposal would respond to these concerns. Most importantly, the Proposal does not remedy the fragmentation of repertoires which has been triggered by the Recommendation of 2005.

- (63) In the light of the objective of facilitating multi-territorial licensing by collecting societies of authors’ rights in musical works for the provision of online services and the objective of fostering legal certainty, the emergence of competing societies with unstable repertoires – due to the freedom given to rightholders to entrust and withdraw the rights, categories of rights or types of works of their choice – constitutes a severe obstacle to the emergence of a sustainable system of multi-territorial licensing within the EU.
- (64) The decision of the Commission in 2005 to favour a system based on competition in the market for collective management services to rightholders (‘competition for rightholders’) has broken the foundations of collective rights management as it had developed. The previous system emerged because it adequately responded to the economic needs of both rightholders and users. The savings in transaction costs were not only due to economies of scale. The unique repertoire aggregating the works of all rightholders (enabled by reciprocal representation agreements and natural monopoly positions of collecting societies in the national markets) as well as blanket licences (both impossible in a model where repertoires are different and licences are only granted based on individual bargaining⁸⁹) solved most of the abovementioned problems. Forcing collecting societies to compete among each other for their respective repertoires collides with fundamental ideas of collective rights management. Competing for an attractive repertoire and managing a copyright catalogue is the core business of publishers and record companies, not of collecting societies.
- (65) Finally, it is regrettable that the option of a centralised licensing portal (Option B5 of the Impact Assessment) was not studied in further detail.⁹⁰ The Commission rejects this idea due to competition law considerations. These arguments are not sufficiently convincing. First, collecting societies would

⁸⁹ Impact Assessment, p 25.

⁹⁰ See the Impact Assessment, pp 46 et seq.

entrust the task of granting multi-territorial licences to the portal only on the basis of non-exclusive licences. This would make sure that the current system that dominates the licensing of online rights, namely, based on the accumulation of territorial licences, would not be substituted but only complemented. Second, while it is certainly true that licensing via the centralised portal is economically superior to decentralised licensing, this only proves the efficiencies generated by the centralised system and corresponds to the very economic features that characterise collective rights management as a natural monopoly. In its practice on EU competition law, the Commission has never argued against the existence of such a monopoly, but has always been ready to control the activities of collecting societies under Article 101 and 102 of the TFEU. Third, to the extent that the Commission mostly argues with the anti-competitive price-fixing character of the centralised portal, it is to be remembered that also under the ‘passport system’ advocated by the Commission, users would only find one licensing point where they could acquire a licence for a specific repertoire. Since the repertoires of different rightholders are to be considered complementary products rather than substitutes, collective rights management cannot escape the monopoly position in the licensing market (see also paras 7-9, above). Quite on the contrary, the centralised system provides peculiar advantages to users in the form of a one-stop shop for not only multi-territorial licences but also licences covering a multitude of repertoires. The conformity of the centralised portal has to be assessed in the light of the *IFPI Simulcasting* decision of the Commission.⁹¹ There, the Commission granted an exemption pursuant to ex-Article 81(3) EC (now Article 101(3) TFEU) for reciprocal representation agreements that facilitate the grant of such licences. In this regard, the problem is however that a centralised portal does not allow users to choose among several collecting societies from which to acquire the licence. The decentralised *IFPI Simulcasting* model, at least to a limited extent, would guarantee some price competition in favour of users, which would not be possible in a system with a centralised portal. Yet the centralised portal may well produce efficiencies that are not possible under the *IFPI Simulcasting* model. And even if one considered a centralised portal as anti-competitive in the light of the *IFPI Simulcasting* decision, the Commission would have to provide an answer to the question why it refuses to advocate the *IFPI Simulcasting* model.

Enforcement measures (Articles 34-40)

- (66) The control of the activities of collecting societies as provided for by Title IV of the Proposal represents progress when compared to the scarce and

⁹¹ Note 11, above.

mostly non-binding provisions that can be found in the existing copyright directives so far. However, the Proposal does not go far enough (see also paras 19-20, above). The relevant provisions also demonstrate a number of mostly structural weaknesses.

- (67) First, Title IV starts with rules on dispute resolution procedures to be implemented in the framework of the governance of collecting societies and only subsequently refers to state control of collective rights management. This creates the misleading impression that problems and conflicts of interest can and should be solved by self-regulation and that state control is of subordinate importance. However, Member States have to guarantee dispute resolution within collecting societies (Article 34(1)), which presupposes state control. Hence, Title IV should take a more structured approach by setting out the power and competences of the authorities of the Member States to control the activities of collecting societies.
- (68) Second, the more concrete provisions on state control are likewise structured very badly. Article 37 as the first provision in this regard starts with the possibility to lodge complaints with the competent authorities, while the competent authorities are only addressed in more general terms in Article 39.
- (69) Even more importantly, the Proposal only addresses the need for sanctions (Article 38) while it remains silent on the need for an authorisation system (see paras 20-23, above). According to the wording of the Proposal, it would be up to the Member States to decide on the introduction of such a system. This is particularly confusing with regard to the monitoring of passport entities that grant multi-territorial licences according to Article 40, although one would quite naturally assume that a 'passport' system cannot be conceived without ex-ante control by an authority that 'hands out' the passport.
- (70) The Institute strongly recommends introducing a coherent system of authorisation that applies not only to multi-territorial licensing but to all collecting societies. In this context, the Proposal has to be criticised for being largely incomplete in Title II. It does not suffice to stipulate certain principles of collective rights management regarding the conditions of how rights are entrusted to collecting societies and the participation rights of the members. More importantly, the Directive should regulate substantive and objective conditions required for the operation of collective rights management activities, including professional and financial standards and the ability to process large amounts of data. This is particularly required for col-

lecting societies that administer statutory remuneration rights under EU and/or domestic copyright law.

- (71) Efficient control has to rely on a coherent system consisting of an authorisation requirement, effective monitoring tools and effective sanctions in case of violations of the law. These sanctions should also include the possibility of having the authorisation withdrawn.⁹² Harmonisation of the principles underlying such systems on the national level would be very useful.
- (72) Yet a centralised system with a European authority would be even more preferable, given that – as the Impact Assessment itself repeatedly states – even in the case of territorial licences and offline use, the rights of nationals and residents of other EU Member States are regularly affected. Since the rights of foreign rightholders are typically administered in the framework of reciprocal representation agreements, collective rights management always presents a cross-border issue. Such a European system would complement, and build on, the current control of collecting societies under EU competition law.

⁹² In this regard, however, one has to note that the withdrawal of the authorisation runs the risk of harming those in particular who are to be protected, namely, the rightholders who will fail to collect any royalties until they find a new collecting society to which they can entrust their rights.