

# The Future of Collecting Societies

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# COM(2004) 261 final: WHY?

## *The Management of Copyright and Related Rights in the Internal Market*

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

- (a) Community wide licensing;
- (b) DRM (levy tariffs; interoperability);
- (c) Individual licensing (© contracts);
- (d) Governance

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## Big v small

For mechanicals, CEL since 1987 (Polygram STEMRA)

“Those who join a collective system cannot then undermine it by demanding different arrangements where the transaction cost is low”  
(STIM 1997, cited in Wallis et al. 1999)

Cannes Agreement (major mechanicals reduced from 8% to 6%)

## Autocratic, impenetrable, inefficient

U2; pop v classical (UK Monopolies & Mergers Commission:  
Performing Rights; 1996; HMSO Cm 3147)

## Competition issues

GEMA decisions of 1971/1972 (groups of rights can be self-administered)

Simulcasting Agreement (ifpi & European broadcasters): choice of society for licence for simultaneous transmission by radio/TV of sound recordings; approved by EC 2002

Santiago Agreement (2001; EC competition intervention 2004)

# 19<sup>th</sup> century invention

Ernest Bourget (Ambassadeurs 1847);  
SACEM: 1851; 1903 GDT (Strauss);  
1914 PRS (Boosey)

## Proliferation:

Music (performing rights, mechanicals, phonograms, performers)

Word; Newspapers; Music editions; Visual arts; Photo;  
Film; Video; Satellite/cable transmission

GEMA annual turnover: near €1bn

# Institutions of a kind

## (A) two-fold monopoly

- user perspective: only one supplier of licences
- right holder perspective: only one provider of rights administration

## (B) Within CS, complex mix of interests

- authors & publishers
- socio-cultural features
- contested distribution: who gets what?
- self-organising bureaucracy

# Three views

- Response to market failure
  - Collecting Societies ‘solely exist for the benefit of right owners and users’
  - Royalty processing centre (cf. VISA)
- Reward for creators
  - ‘Schutzorganisation für den schöpferischen Menschen’ (GEMA)
  - Union roots?
- Regulatory mechanism
  - Policy goal???

# (1) Response to market failure

Solution to transaction cost problem creates monopolies

- User
- Right owner
  - No market mechanism for setting licensing tariffs

Regulation via competition law

- no cultural deductions
- no distribution variation for genres
- licensing tribunal (cf. BT broad band tariffs)
- competition between collecting societies?

Incoherence of approach

- differentials music, word, games
- relationship publishers and authors
- cross-subsidy big-small

# WIPO Reader

- Under a publishing contract signed with an author, the publisher is authorised to reproduce the work and to sell copies to the public. He will also try to have riders written into the contract granting him the rights of performance and broadcasting, in the hope that this “second serving” of rights will add to his income.
- If music publishers are kept out of the collective management of rights of performance and broadcasting, the collective management organization will not have access to the music publishing rights, which are in the nature of “extras” in the hands of publishers. This makes for serious gaps in the collective management, because published works have a vastly greater audience than handwritten works. Experience has shown that collective management without the incorporation of publishers quickly stagnates and loses its meaning. All the copyright societies of Europe and North America have therefore incorporated publishers who – as members or clients – assign all these “extra” rights to their collective management administration

## (2) Author reward

Often based on some form of author  
fundamentalism:

“Schützen, was man schützen kann. Vergüten, was man  
nicht schützen kann.” (Zypries)

“fair dealing” not an exception but a defence

Authors’ choice:

- Maximise income; force high tariffs on easy targets  
(GEMA: “aus der letzten Ritze pressen”)
- Authors must eventually understand that their  
interests are more aligned with citizens/users than  
commercial intermediaries

# (3) Regulatory mechanism

Danger: we ask collecting societies to remedy failures of the © regime (cf. “alternative compensation system”)

- Articulate purpose
- Users on board

Members free to withdraw repertoire (but: ‘creative commons’ v ‘cherry picking’)?

Competition between societies?

Discriminate in favour of local repertoire?

Discriminate in favour of life music?

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