

Communication from the Commission to the Council, the European Parliament and the European Economic and Social - Committee The Management of Copyright and Related Rights in the Internal Market (Text with EEA relevance) /* COM/2004/0261 final */

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL - COMMITTEE The Management of Copyright and Related Rights in the Internal Market (Text with EEA relevance)

Executive Summary

The term "management of rights" refers to the means by which copyright and related rights are administered, i.e. licensed, assigned or remunerated for any type of use. Individual rights management is the marketing of rights by individual rightholders to commercial users. 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.

In the period since 1991, the Community legal framework of copyright and related rights has developed with seven Directives on substantive copyright law in force and, more recently, a proposal for a Directive on the enforcement of rights (sanctions and remedies) that was presented by the Commission in January 2003. The management of rights has been dealt with only marginally in the *acquis communautaire* and has been largely left to the laws of Member States. Between 1995 and 2002, the Commission consulted widely on the question of management of rights - both individual and collective.

In concluding the consultation process, this Communication deals with both individual and collective management and considers whether current methods of rights management are hindering the functioning of the Internal Market, especially with the advent of the Information Society.

In Chapter 1, the management of copyright and related rights is presented, including its links to and impact on the Internal Market. On the issue of Community-wide licensing of certain rights, which have an impact across borders, several options for the way forward have been assessed. It should be market-driven and focus on creating more common ground on the conditions for collective management. Another issue addressed in Chapter 1 is the introduction of digital rights management (DRM) systems. In the view of the Commission, the development of Digital Rights Management (DRM) systems should, in principle, be based on their acceptance by all stakeholders, including consumers, as well as on copyright policy of the legislature. A prerequisite to ensure Community-wide accessibility to DRM systems and services by rightholders as well as users and, in particular, consumers, is that DRM systems and services are interoperable

In Chapter 2, in relation to individual rights management, the Commission has found that overall there is sufficient common ground in all Member States. At present, therefore, differences in national law have not given rise to concern with respect to the functioning of the Internal Market. National developments will continue to be kept under review.

Chapter 3 deals with the collective management of rights which is well established in all Community Member States. It has become an economic, cultural and social necessity for the administration of certain rights, also in the Accession Countries. The efficiency, transparency and accountability of collecting societies are crucial for the functioning of the Internal Market as regards the cross-border marketing of goods and provision of services based on copyright and related rights. A better functioning of the Internal Market in collective rights management can only be achieved if there is greater common ground which includes the establishment and status of collecting societies; their functioning and accountability subject

to rules of good governance; as well as their internal and external control, including dispute settlement mechanisms. Defining general conditions for these features through a Community framework instrument would achieve the objectives outlined in this Communication.

Introduction

The market for goods and services based on copyright and related rights comprises a large variety of products and services. While traditional analogue goods and services have always played a significant role for the exploitation of copyright and related rights, the Information Society is opening new markets in which protected works can be exploited through electronic products and interactive services.

The contribution to the economy of the copyright-based industries in the European Union ranges Community-wide above 5% of GNP [1]. For most forms of exploitation and in order to achieve economies of scale, the Internal Market has become the appropriate environment. The borders for the marketing of goods and services based on copyright or related rights are increasingly being removed. Copyright-based goods and services are nowadays, and should, where this is economically feasible, be available and marketed Community-wide.

[1] The economic importance of copyright and related rights protection in the European Union was the subject of a study commissioned by the European Commission. The results of the study are available since November 2003.

The legal framework for the protection of copyright and related rights in the European Union has to match these realities. However, the national structures of copyright law are based on different legal and cultural traditions. At the same time, for the Internal Market to function properly, without unnecessary obstacles to the free circulation of goods and services and without distortions of competition, the need for harmonisation of national copyright law became apparent in the 1970s and was highlighted by several decisions of the Court [2].

[2] Case 158/86 Warner Brothers and Metronome Video v Christiansen (1988) ECR 2605; EMI Electrola GmbH v Patricia Case 341/87 ECR (1989) page 79.

There was an extensive period of consultation between 1995-2002 and the first harmonisation efforts concentrated on substantive copyright law. Seven Directives were adopted between 1991 and 2001 [3], which harmonised rights and exceptions and certain other features of substantive copyright law.

[3] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15); Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20); 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 (OJ L 167, 22.6.2001, p. 10); 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, 13.10.2001, p. 32).

Besides substantive copyright law, common ground is also needed with respect to the rules on the enforcement of rights, in order for the Internal Market of copyright-based goods and services to function properly. A Directive on this issue is therefore currently being adopted by the Community Legislator. The remaining aspect of intellectual property is the management of rights. Now that many aspects of substantive copyright law have been harmonised, a level playing field at Community level, of rules and conditions on rights management should also be ensured. The Commission in this Communication

concludes on the consultations that have taken place and proposes required follow-up.

1. Management of Rights in the Internal Market

1.1. The Background and Main Features of Rights Management

1.1.1. The Categories and Methods of Rights Management

Besides the more general economic aims of stimulating investment, growth and job creation, copyright protection serves non-economic objectives, in particular creativity, cultural diversity and cultural identity. Authors of literary or artistic works as well as holders of related rights enjoy exclusive rights to authorise or prohibit the use of their works or other subject matter for a fee or royalty payment. In cases where the rights cannot be enforced vis-à-vis individual members of the public or where individual management would not be appropriate, given the number and type of uses involved, rightholders are granted a remuneration right instead.

Rights management can be done either individually or collectively. Exclusive rights are traditionally managed individually by rightholders themselves, who license them to commercial users such as publishers or producers, or by intermediaries, such as publishers, producers or distributors. Individual rights management is usually by way of contractual licence, which may be either exclusive or non-exclusive, and which may authorise a type of use only or all uses. Remuneration rights are usually managed by collecting societies that function as rightholders' trustees.

1.1.2. The Existing Legal Framework

At international level, Articles 11bis(2) and 13(1) of the Berne Convention [4] and Article 12 of the Rome Convention [5], deal with collective management and state that Member States may determine the conditions under which certain rights may be exercised (see above mentioned Articles of the Berne Convention). Article 2(6) of the Berne Convention touches upon rights management, as it provides that "protection shall operate for the benefit of the author and his successors in title". Article 14bis(2)(b) of the Berne Convention provides that certain authors of a cinematographic work cannot exercise their rights separately.

[4] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (Paris Act as amended on September 28, 1979).

[5] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961.

At national level, significant differences exist with respect to both legislation and practice. In relation to collective management, in both Member States and Accession Countries there have been recent developments in legislation which seem to evolve further in different ways.

At Community level, the issue has been to a limited extent addressed in the *acquis communautaire* in several of the Directives. With respect to individual rights management, the Directives generally confirm that economic exclusive rights may be transferred, assigned or subject to the granting of contractual licences but do not address the conditions of rights management as such. Regarding collective rights management, in many instances, the Directives of the *acquis* contain references to management by collecting societies but again do not address the conditions of rights management as such [6].

[6] See point 3.2.1.

1.2. The Impact of the Internal Market on Rights Management

1.2.1. The Territorial Nature of Intellectual Property

Traditionally, the law applicable to the act of exploitation of any of the rights is the law of the place of exploitation. This principle is confirmed by Article 5(2) of the Berne Convention and recognised by national laws.

For the European Union, this implies that copyright protection is granted by each Member State. There is no Community copyright. The harmonisation of substantive copyright law has not sought to remove or limit the territorial nature of copyright and the ability of rightholders to exercise their rights territorially. The principle of territorial exploitation has been recognised by the Community legislature and has also been confirmed by the Court of Justice [7], though to a certain extent, it has diminished its impact. The Court has placed limitations on its exercise only in respect of the Community-wide exhaustion of the distribution right in circumstances where this conflicts with the free movement of goods and in respect of competition rules where it arises from restrictive agreements or concerted practices or an abuse of a dominant position.

[7] See Case 62/79, *Coditel v. Ciné-Vog Films* (1980) ECR 881; Case 262/81, *Coditel v. Ciné-Vog Films* (1982) ECR 3381. In *Coditel II* (para. 14), the Court clarified that "just as it is conceivable that certain aspects of the manner in which the right is exercised may prove to be incompatible with Articles 59 and 60 it is equally conceivable that some aspects may prove to be incompatible with Article 85 where they serve to give effect to an agreement, decision or concerted practice which may have as its object or effect the prevention, restriction or distortion of competition within the common market".

1.2.2. The Cross Border Exploitation of Copyright and Related Rights

For most forms of exploitation and in order to achieve economies of scale, the Internal Market has become the appropriate economic environment.

With the advent of the digital environment, cross-border trade in goods and services based on copyright and related rights has become the rule, notably for the rights of reproduction and communication to the public and the making available right. These rights would be implicated in any digital transmission and were harmonised, for this purpose, under Directive 2001/29/EC.

1.2.3. Obstacles to an Internal Market in Rights Management

Hence, off-line licensing has increasingly become a cross-border activity, and on-line licensing permits by definition a cross-border activity. However, as the law of the country of exploitation applies to licensing, where exploitation extends to more than one Member State, different rules apply.

As far as the individual management of rights is concerned, there are different rules on ownership and authorship, conditions applying to copyright contracts, or on points of attachment (criteria for protection). Conditions of rights management also vary in Member States with respect to collective management. A lack of common rules regarding the governance of collecting societies may potentially be 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.

1.2.4. The Call for Community-wide Licensing

A recurrent theme throughout the consultation process has been the call for more Community-wide licensing, in particular by commercial users notably for the growing market in the on-line environment [8]. In this context, Community-wide licensing may be used as an umbrella term to describe the grant of a licence by a single collecting society in a single transaction for exploitation throughout the Community.

[8] In a similar context, the Commission notes an increasing call for access to protected satellite TV broadcast originating from a Member State other than the one in which viewers are resident. While current conditional access technologies make it perfectly possible to determine exactly what the paying

audience is within the footprint of the satellite, business models and contractual arrangements often result in service offerings based on territory. While this issue is related to the call for Community-wide licensing addressed in this section, it is based more on conditional access control than on copyright and related rights and their licensing. In that respect, see the Commission Report on the Legal Protection of Electronic Pay Services, COM(2003)198final, 24.04.2003, point 4.4.

Stakeholders are already seeking contractual and technological solutions to ensure adequate access to protected works and other subject matter on a European or even worldwide scale.

Direct Community-wide licensing used to be provided by the framework agreement between authors' collecting societies and the association of phonogram producers (the BIEM/IFPI Agreement), which concerns mechanical reproduction rights. More recently, as regards transmission by electronic means including webcasting and on-demand transmission of music by acts of streaming or downloading, authors' collecting societies have notified to the Commission a set of agreements with a view to negative clearance or an exemption under Article 81 of the EC Treaty. The parties' intention is that, as a rule, the Community-wide licence will be granted by the society of the country where the content provider is operating. In the area of music performing rights, nearly all the major authors' collecting societies representing authors have concluded a reciprocal trial agreement (the "Santiago Agreement"), which allows each of them to issue multi-territorial licences of public performance rights to be used on-line. Yet another model concerns the remuneration rights of phonogram producers for the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals (the "Simulcasting" Agreement). Users (in this case broadcasters whose signals originate in the EEA) may obtain a Europe-wide license from any society within the EEA. Under another model, a Community-wide licence for on-line uses of works of art and photography can be obtained from any of the participating collecting societies, and under the same conditions (OnLineArt Agreement).

The first issue in this context is whether it should be left for the market to develop Community-wide licensing further, while respecting the basic rules of intellectual property protection, including its territorial nature, or whether the Community legislator should seek to facilitate greater Community-wide licensing.

At the outset, it should be noted that a legislative measure, which would require rightholders to grant a Community-wide licence, could amount to a compulsory licence. A careful assessment would be required of the compatibility of such a measure with the Community's international obligations under the Berne and the Rome Conventions and the more recent WIPO Treaties WCT and WPPT. A similar evaluation would be needed with respect to Article 295 of the Treaty. These considerations are naturally without prejudice to the powers of the Commission in this respect under Article 82 of the EC Treaty, in line with the previous practice by the Commission, by the Court of First Instance and the European Court of Justice and the Community's international obligations.

A most effective option would be to provide through Community legislation that any licence regarding the rights of communication to the public or making available, at least as regards activities with a cross-border reach, authorises by definition acts of use in the entire Community. Under this option, once an act of communication to the public or making available has been authorised anywhere in the Community, it could be legally performed also in any other Member State. This option would amount to a partial removal of the principle of territoriality.

A less radical option would be to adopt the model chosen for satellite broadcasting under Directive 93/83/EEC to the rights of communication to the public and making available. Under this model, according to Article 1(2)(b) of the Directive, the relevant act of communication to the public "occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth". However, if this model is applied to copyright and related rights without limiting the contractual freedom of the parties, as was done under Directive 93/83/EEC, it does not necessarily yield the desired result of multi-territorial licensing [9], as it only determines the applicable law and does not by itself result in extending the licence to the footprint in question.

Alternatively, one could seek to reduce the exclusive communication to the public and making available rights to a remuneration right subject to mandatory collective management (which presupposes an efficient functioning of collecting societies). However, since both Directive 2001/29/EC and the WIPO "Internet Treaties" WCT and WPPT establish and harmonise these rights for authors and the right of making available also for holders of neighbouring rights as exclusive rights, it could be held that this option is not available. Another possible option could grant commercial users the freedom of choice as to the collecting society in the EEA granting the required licence. Such a model has been put in place by the Simulcasting agreement which has been established by collecting societies representing certain rightholders in the context of on-line use, and combines freedom of choice with increased transparency obligations on the part of collecting societies [10].

[9] See the Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM(2002) 430 final, 26.07.2002.

[10] See point 3.4.

In order to enhance access to the rights in question even further, collecting societies could be mandated, under certain conditions, to offer Community-wide licences. This solution, too, would require efficient and accountable collective rights management across the Community, including the existence of the necessary reciprocal agreements between collecting societies, which put them in a position to clear rights also for territories other than their own.

At the less interventionist end, another model would be to focus exclusively on the modalities of collective management by collecting societies, as they are mostly in charge of the management of those rights for which the claim for Community-wide licensing has been strongest. Collecting societies do already provide for a one-stop-shop of licensing of the respective group of rightholders' world repertoire for their territory of operation. This constitutes a significant advantage for rightholders and users alike and should not be jeopardised. At the same time, centralised licensing arrangements, like the ones described above, could be fostered by eliminating further any disparities in Member States' laws regarding the conditions of collective management and introducing at EU level good governance rules for the functioning of collecting societies.

1.2.5. Digital Rights Management (DRM) Systems

In the context of the discussions on the management of copyright and related rights in the new digital environment, digital rights management (DRM) has become a key issue. The availability of DRM services through a technological infrastructure for the management of copyright and related rights is relevant to both individual and collective management.

DRM systems can be used to clear rights, to secure payment, to trace behaviour and to enforce rights. DRM systems are, therefore, crucial for the development of new high volume, low transactional value business models, which include the pricing of access, usage, and the service itself, subscription models, reliance on advertising revenue, credit sales or billing schemes. DRM systems are a means to an end, and as such, clearly are an important, if not the most important, tool for rights management in the Internal Market of the new digital services.

The legal framework in which DRM systems are administered is set out in Directive 2001/29/EC. By legally protecting technological measures and electronic rights management information, which rightholders may apply to their protected content, the Community legislature has established the legal parameters of DRM systems and laid the groundwork for their development. Articles 6 and 7 and relevant recitals deal with the protection of technological measures and rights management information respectively.

Member States also have to take into account the application or non application i.e. the degree of use (Recital 35) of technological measures when providing for fair compensation in the context of the private

use exception as permitted under Article 5(2)(b). The Directive requires Member States to arrive at a coherent application of the exceptions. The extent to which this has been achieved in relation to the application of the requirement for fair compensation will be assessed when reviewing implementing legislation. Any such review will include, in particular, the criteria which Member States refer to or will refer to in order to take such application or non-application of technological measures into consideration when determining remuneration schemes in the context of the exception for private copying. The Commission has a specific mandate to do so within the context of the Contact Committee established under Article 12. A wider availability of DRM systems and services can only bring additional value to both rightholders and consumers if it contributes to the availability of protected content and facilitates the access of end-users to protected content. Transparency on the criteria and elements that Member States use or will use to take into consideration the application or non-application of technological measures must therefore be ensured and clarification provided through the required implementing measures.

Arguably, the widespread deployment of DRMs as a mode of fair compensation may eventually render existing remuneration schemes (such as levies to compensate for private copies) redundant, thereby justifying their phasing down or even out. At the same time, in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other rightholders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators...) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature. In this respect, the Commission is also under a duty to examine within the context of the Article 12 Contact Committee, whether acts permitted by law are being adversely affected by the use of effective technological measures (so called "technological lock up").

In terms of technology that is applied to DRM systems, Directive 2001/29/EC acknowledges that technological developments will facilitate the distribution of protected content, notably on networks. However, it also recognises that differences between technological measures could lead to an incompatibility of systems within the Community.

While the choice of the appropriate business model remains for the rightholders and commercial users to make and the use of DRM systems and services remain voluntary and market-driven, the establishment of a global and interoperable technical infrastructure on DRM systems based on consensus among the stakeholders appears to be a necessary corollary to the existing legal framework and a prerequisite for the effective distribution and access to protected content in the Internal Market.

The achievement of an internal market will better serve the general interest. To this end, research projects and standardisation efforts towards open standards have been supported at EU level, the results of which have contributed to demonstrate that an interoperable infrastructure can be established. As demonstrated by the CEN/ISSS report on DRM standardisation and interoperability, there are commercially available solutions that have experienced some use in the market, even though interoperability between them remains an issue to be addressed. In the absence of any substantial progress towards the implementation of interoperable DRM systems and services in the short future, a recommendation will be envisaged to reinforce the requirement for interoperability of DRM systems and services. Such recommendation would encompass the publication of available open standards on the basis of which global and interoperable DRM systems and services can be provided with the objective to avoid the starting fragmentation of the market to become firmly established. Doubts about the viability of the available technology have been expressed by several stakeholders and have proven to be a disincentive to use DRM systems. As is the case with any protected technological systems and devices, the risk of DRM systems being circumvented cannot be fully eliminated. Protecting DRM systems against circumvention, against the production and marketing of circumvention devices and protecting copyright and related rights against any form of piracy is, therefore, an indispensable condition to reduce this risk to its lowest level and to ensure legitimate use of protected content and acceptance among rightholders, commercial users and consumers alike. Indeed, acceptance among consumers is a key for the success of DRM systems, but wider acceptance is yet to be reached. Rightholders, commercial users and governments have begun, and should continue, to inform and educate the public about whether the medium of delivery should affect the price and to foster a

culture of licensing protected digital content that counteracts the perception that if protected content is available on the Internet it is necessarily for free. In so doing, both the freedom of choice (for equipment, network, services and content) and at the same time the preservation of privacy (including the ensuring of security) should be maintained as essential elements contributing to consumers' trust. Although DRM systems and remuneration schemes are both designed to manage and facilitate access to protected content, they have a different function and follow a different rationale. Remuneration schemes operated by efficient collecting societies acting as trustees should provide access to potential end users while safeguarding the economic shares of all rightholders, including small and non-corporate ones. DRM systems used by individual rightholders provide access on the discretion of the latter only (or their licensees), as those systems operate on the basis of direct exercise of exclusive rights (to authorise or prohibit use).

The decision, as to which rights management system is preferred, should in principle be left to stakeholders and the development of the marketplace and will eventually be based on the relevant copyright policy. In this perspective, a close monitoring of the market developments is essential to ensure the public interest is safeguarded.

1.3. Conclusions

Reflections on rights management in the Internal Market should be based on the inherent principles of intellectual property protection. An operational framework for the management and marketing of copyright and related rights, both individually and collectively, is a pre-condition for safeguarding and further developing the potential of intellectual property for creativity, the economy, the functioning of the Internal Market and societies at large.

Legislation of present and future EU Member States in this area is evolving together with emerging changes regarding technology and new markets. The Community legal framework on copyright and related rights, the *acquis communautaire*, makes reference to rights management, but does not include separate rules thereon. As there is no Community copyright, copyright protection is asserted and enforced on the national territorial basis of each Member State; and yet, rights management has increasingly become a cross-border activity.

The development of Digital Rights Management (DRM) systems should, in principle, be based on their acceptance by all stakeholders, including consumers, as well as on copyright policy of the legislature. A prerequisite to ensure Community-wide accessibility to DRM systems and services by rightholders as well as users and, in particular, consumers, is that DRM systems and services are interoperable.

A close monitoring of the market developments, notably through consultation of the stakeholders, remains essential.

2. Individual Rights Management

2.1. The Main Features

Individual rights management has been addressed, to some extent, in the Directives of the *acquis communautaire*. Directive 2001/29/EC confirms in its Recital (30) that the exclusive rights of reproduction, communication to the public including making available, and distribution (for authors) may be transferred, assigned or subject to the grant of contractual licences, without prejudice to the relevant national legislation on copyright and related rights. Similar provisions are contained in Articles 2(4), 7(2) and 9(4) of Directive 92/100/EEC regarding the exclusive rights of rental and lending and of reproduction and distribution. In addition, Articles 2(5) and (6) of Directive 92/100/EEC contain particular rules on presumptions relating to the transfer of rights.

2.2. The Issues

2.2.1. Ownership of Rights

Individual rights management is based on the initial allocation of ownership of rights: the initial owner of copyright in a work is, in principle, the natural person who created it. However, under some jurisdictions, also legal persons may be initial owner of rights.

On the specific issue of authorship of audiovisual works, a certain degree of harmonisation has been achieved at Community level. For example, all Member States designate at least the principal director of an audiovisual work as one of the authors of the work. This issue has been addressed in more detail in the Commission's Report of 6 December 2002 [11].

[11] Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM (2002) 691 final, 6.12.2002.

2.2.2. Statutory Conditions for the Transfer of Rights

Transfers of rights pertain to the transfer of economic rights of the author or performer (as the initial creative rightholder) to a third party by assignment or by licence [12]. The copyright legislation of most Member States imposes certain obligations on the contracting parties on the scope of the transfer of rights (e.g. on limitations on the transfer of rights relating to forms of exploitation that are known or foreseeable at the time the copyright contract was concluded or on rules on termination of contracts). Such conditions vary from one Member State to another.

[12] An assignment is a transfer of rights in an exclusive and definitive manner. A licence is the permission to perform an act, which without that permission would be an infringement of copyright or a related right. A licence may be exclusive or non-exclusive.

Most Member States require also formalities of some sort (usually a written document) for assignments or licenses to be valid or validly proven.

2.2.3. Content and Interpretations of Contracts

Many Member States apply a restrictive interpretation of copyright contracts: any transfer of rights shall be narrowly interpreted, consistent with the purpose of transfer and, in the case of some Member States, in favour of the author or performer, when in doubt.

Concerning the amount of the payment, as a basic rule, the majority of Member States have left this amount to be paid to the author or performer to be determined by the contracting parties. However, some Member States do require the payment be calculated as a proportional or an equitable share. The contract can be subject to modification if the remuneration agreed upon is disproportionate to the income generated from the use of the work (e.g. "best seller" clause or application of the equity and fairness principles).

2.3. Conclusions

There appears to be a considerable commonality of approach among Member States including Accession Countries on a number of issues in the area of individual rights management.

For the time being, the degree of common ground regarding the rules on copyright contracts across Member States appears to be sufficient, so as not to necessitate any immediate action at Community level. While, at this stage, national developments have not given rise to any particular concern from the point of view of the functioning of the Internal Market, the Commission will nevertheless have to continue to keep the matter under review.

3. The Collective Management of Rights

3.1. The Functions of Collective Management

3.1.1. The Development of Joint Rights Management

Due to the number of uses and users as well as rightholders involved, licensing certain rights individually has been impractical, as previously seen. This is particularly the case for rights of remuneration. Consequently, rightholders have appointed agents to engage in the joint licensing of their works. Similarly, users have preferred to have a single point of reference when seeking a licence both in terms of authorisation and payment.

In view of the perceived advantages of collective management regarding remuneration rights, several legislatures require mandatory collective management, i.e. such rights may only be administered by collecting societies.

3.1.2. Main Features of Collective Management

The collecting society, a trustee, usually administers, monitors, collects and distributes the payment of royalties for an entire group of rightholders, on the basis of the national law of its territory, with respect to that territory.

Collecting societies administer rights in the area of music, literary and dramatic works as well as audiovisual works, productions and performances for activities such as communication to the public and cable retransmission of broadcasting programmes, mechanical reproductions, reprography, public lending, artist's resale right, private copying or certain educational uses. Most societies form part of a network of interlocking agreements, by which rights are cross-licensed between societies in different Member States.

From the users' viewpoint, therefore, collecting societies occupy a key position in the licensing of certain rights in so far as they provide access to a global catalogue of rights. Collecting societies function in this respect as a one-stop-shop of licensing. Collective management also allows particular rightholders, whether corporate or not, within a less lucrative or niche market, or who do not dispose of sufficient bargaining power, to manage their rights efficiently. From this perspective, collecting societies carry the joint social responsibility of rightholders to make sure that all of them benefit from their intellectual property rights at a reasonable cost.

3.2. The Legal Framework

3.2.1. Collective Management in the *acquis communautaire*

In many instances, the Directives of the *acquis communautaire* on copyright and related rights contain references to rights management by collecting societies. Directive 92/100/EEC, when harmonising the right to equitable remuneration, addresses in Articles 4(3) and (4) collective management as a model for its management. Under Article 9 of the Directive 93/83/EEC collective management is obligatory for cable redistribution rights. Article 1 (4) of that Directive contains a definition of the term "collecting society" [13].

[13] Article 1 (4) of the Satellite and Cable Directive reads as follows: "For the purposes of this Directive, 'collecting society' means any organisation which manages or administers copyright and right related to copyright as its sole purpose or as one of its main purposes".

The Directive 2001/29/EC on Copyright in the Information Society does not mention collective management in its Articles. However, with regard to the making available right, Recital (26) addresses the desirability of encouraging collective licensing arrangements in order to facilitate the clearance of the rights concerned in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part. Finally, the fact that collective management is relevant for the operation of the Directive is also apparent from its Recitals (17) and (18) [14].

[14] Recital (17) reads as follows: "It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules."; Recital (18) reads as follows: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences."

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

3.2.2. Collective Management in National Law

Collective rights management by collecting societies is regulated by law to a greater or lesser extent in most Member States. However, significant differences exist with respect to both legislation and practice. Moreover, Member States and Accession Countries' legislation on collective management is evolving further. In France, Belgium, the Netherlands, Luxemburg and Portugal, for instance, new legislation has been adopted or initiated with the aim of rendering rights management by collecting societies more transparent and of improving their accountability. It seems that such legislation does not necessarily share the same structure or objectives.

3.3. Consultations on Collective Management in the Internal Market

Ever since the discussions at Community level about copyright in the Information Society began in the 1990's, rights management in general and collective rights management in particular has been at the centre of attention and was discussed at each of the four international Copyright Conferences organised by the Commission [15]. In 1996, the Commission presented its preliminary views in the Communication on the follow-up to the 1995 Green Paper. In addition, the Commission organised, in November 2000, a two day hearing exclusively on collective rights management.

[15] Florence (1996), Vienna (1998), Strasbourg (2000) and Santiago de Compostella (2002).

The general conclusions of these consultations were threefold. Firstly, there was overall consensus that an Internal Market in rights and exceptions could not be achieved without sufficient common ground on how the rights are exercised. Secondly, collective management is, in several sectors of the market, in the interest of both rightholders and users. Most stakeholders agree upon the economic, cultural and social functions of collecting societies. Thirdly, there is a widespread call for a higher degree of convergence of the conditions under which collecting societies operate with a view to increasing their efficiency and achieving more accessible licensing especially at Community level. However, the Commission notes that the perception of commercial users, consumers and rightholders themselves about collective management varies considerably. This has resulted in rather different positions in Member States as well as at Community level.

Criticism from users has focused on the tariffs, supervision of collecting societies and access to the courts or arbitration. More recently it has also extended to administrative fees charged by the societies, the length of the negotiations, alleged shortcomings in their internal decision-making process and an apparent lack of transparency regarding the pricing policy. Collective management is also subject to criticism from among certain rightholders. Those who dispose of sufficient bargaining power, such as major phonogram producers, increasingly seek not to depend on collecting societies to manage their rights. From their perspective, in facilitating the watermarking, identification and tracking of the use of works, digitisation has in principle empowered rightholders to individually control the licensing and royalty payment process, so that the role of collective rights management is questioned.

This view is not necessarily shared by rightholders with less bargaining power of their own, as they can manage certain rights only via collecting societies. However, most rightholders would like to opt for more

flexibility on the part of collecting societies in respect of the acquisition of rights and for greater influence in the distribution of royalties. In addition, concerning reciprocal agreements, there have been concerns among rightholders of related rights that the system of the so-called "B" contracts, under which no money is transferred and each society collects and distributes royalties used in its territory only to its own rightholders, does not function properly between the societies managing related rights [16].

[16] NB : « A » contracts provide for the reciprocal transfer of royalties collected without any deadlines applying to claim or transfer.

3.4. Collective Rights Management and Competition

As regards the application of EU competition law to collecting societies, intervention by the Court of Justice and the Commission traditionally addressed three broad issues: (i) the relationship between collecting societies and their members, (ii) the relationship between collecting societies and users and, lastly, (iii) the reciprocal relationship between different collecting societies. Recent technological developments such as the Internet have required the Commission to reassess some of the principles previously established in the analogue area.

(i) From the rightholders' viewpoint, collecting societies act as trustees, which manage their rights and interests. The basic framework of the relationship between collecting societies and their members remains that laid down by the Commission in the three GEMA decisions [17], in particular as regards the extent to which it is compatible with Articles 81 and 82 of the EC Treaty for societies to require the assignment of rights by their members in respect of all utilisation forms of a musical work. The Commission is of the view that there is a possible need, in the light of technological evolution, (e.g. online services), to reconsider the "GEMA categories" established in the 70's. In a more recent decision, the Commission considered that a mandatory requirement in the statute of a collecting society that all rights of an author be assigned, including their on-line exploitation, amounts to an abuse of a dominant position within the meaning of Article 82(a) of the Treaty, given that such practice corresponds to the imposition of an unfair trading condition [18]. As far as the membership of a collecting society is concerned, the Commission has also stated that a collecting society in a dominant position is not allowed to exclude rightholders from other Member States [19]. .

[17] GEMA I, Decision of 20.06.1971, OJ L134/15; GEMA II, Decision of 06.07.1972, OJ L 166/22; GEMA III, Decision of 04.12.1981, OJ L 94/12.

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

[19] GEMA I, Decision of 20.06.1971, OJ L134/15; GVL, Decision of 29.10.1981, OJ L370/49.

(ii) The relationship between collecting societies and users has given rise to three main issues: effects on trade between Member States, the material scope of the licences granted to users and the level of tariffs charged to licensees. For example, as dominant (often even monopolistic) undertaking, a collecting society cannot refuse - under Article 82- to license a user in its own territory without a legitimate reason. The Court made it clear that collecting societies may not engage in a concerted action having the effect of systematically refusing to grant direct access to their repertoires by users located in foreign territories, a possible justification for such a refusal being the impracticability of setting up a monitoring system in the foreign territory [20]. In relation to the tariffs, the Court observed that one of the most marked differences amongst collecting societies in the Member States lies in the level of operating expenses. It has held that the possibility cannot be ruled out that it is the lack of competition in the market that accounts for high administrative costs and the high level of royalties [21]. The Court said also that Article 82 of the Treaty must be interpreted on the basis that a collecting society in a given Member State abuses its dominant position if it imposes unfair conditions on its trading partners by, namely, imposing appreciably higher tariffs than those applicable in other Member States unless the differences were justified by objective and relevant factors [22].

[20] *Ministère public v Tournier*, case 395/87, 13 July 1989, ECR (1989) p.2521.

[21] See previous footnote.

[22] *Lucazeau v SACEM*, cases 110/88, 241/88 and 242/88, 13 July 1989, ECR(1989) p.2811.

(iii) Concerning the reciprocal agreements between collecting societies, the Court of Justice addressed the reciprocal relationship between collecting societies in the *Tournier* and *Lucazeau* cases [23] back in 1989 and concluded that the reciprocal representation agreements entered into by the collecting societies in Europe did not, as such, fall under Article 81(1) of the Treaty, provided no concerted action or exclusivity was evidenced. Accordingly, the reciprocal representation agreements appeared economically justified in a context where physical monitoring of copyright usage was required. The recent Commission decision "Simulcasting" [24] adapts the existing principles to the online environment and carries out a new assessment under EC competition rules of rights management activities. The absence of territorial boundaries in the on-line environment induced by the internet and digital format of the products enables users to choose any collecting society in the EEA which is a member of the one stop shop mechanism for the delivering of the licence. Furthermore, the parties undertook to increase transparency as regards the payment charged by separating the tariff which covers the royalty proper from the fee meant to cover the administrative costs. This way, commercial users will be able to recognise the most efficient societies in the EEA and seek their licences from the collecting societies that provide them at lower cost.

[23] See above.

[24] Case COMP/C2/38.014 IFPI *Simulcasting*, Decision of 8 October 2002, OJ L107 of 30.04.2003, p.58.

3.5. The Issues that require a legislative approach

Whilst competition rules remain an effective instrument for regulating the market and the behaviour of the collecting societies, an Internal Market in the collective management of rights can be best achieved if the monitoring of collecting societies under competition rules is complemented by the establishment of a legislative framework on good governance.

The results of the consultation present a case for a legislative approach based on Internal Market rules and principles within the copyright framework, which would safeguard the functioning of the Internal Market for all players in respect of collective management. In order to achieve a level playing field on collective management in the Internal Market, common ground on the following features of collective rights management would be required:

3.5.1. The Establishment and Status of Collecting Societies

Diverging conditions and a number of models exist for establishing a collecting society. Regarding their status, collecting societies may be corporate, charitable, for profit or not for profit entities. The consultation process demonstrated that apparently, the efficiency of a collecting society is not linked to its legal form. A collecting society may be duly constituted in the form it chooses or is required under national law, as long as it complies with the relevant national legislation pertaining to any such entity and provided the respective national law has no discriminatory effects. This is subject to compliance with and review under Articles 82 and 86 of the Treaty where a collecting society is constituted as a legal monopoly or where it is granted special rights under national law.

However, as collecting societies, in their role as rightholders' trustees, have particular responsibilities due to the economic, cultural and social functions they fulfil, the establishment of a collecting society should be subject to similar conditions in all Member States. In order to promote good governance, common ground appears to be required at Community level in relation to the persons that may establish a society, the status of the latter, the necessary proof of efficiency, operability, accounting obligations, and a sufficient number of represented rightholders.

3.5.2. The Relation of Collecting Societies to Users

Collecting societies usually represent a wide, if not worldwide repertoire and have an exclusive mandate for the administration of rights in relation to their field of activity. This puts them in an exclusive and strong position vis-à-vis users. This position is appreciated by most, as it enables collecting societies to function as one-stop-shops for licensing. However, users express some concerns about collective management, usually focused on the tariffs they have to pay and the licensing conditions. Societies should be obliged to publish their tariffs and grant a licence on reasonable conditions. Furthermore, it is essential for users to be in a position to contest the tariffs, be it through access to the courts, specially created mediation tribunals or with the assistance of public authorities which supervise the activities of collecting societies.

With respect to the licensing conditions, it should be noted that in some Member States, the obligation of collecting societies to grant licences is combined with the rule that such licences should be granted under appropriate or reasonable conditions. In turn, use without payment should not be permitted. Some Member States provide that potential users, who contest the tariffs of the collecting society can only proceed with the exploitation of the rights, if they have deposited a certain amount with the collecting society. A Community-wide application of these principles should be established in order to promote or safeguard access to protected works and other subject matter on appropriate terms.

3.5.3. The Relation of Collecting Societies to Rightholders

Usually only one society operates for each group of rightholders in the territory in question as their trustee and it is the only gatekeeper of their market in respect of the collective management of their rights. The principles of good governance, non-discrimination, transparency and accountability of the collecting society in its relation to rightholders are, therefore, of particular importance. These principles should apply to the acquisition of rights (the mandate), the conditions of membership (including the end of that membership), of representation, and to the position of rightholders within the society (rightholders' access to internal documents and financial records in relation to distribution and licensing revenue and deductions, genuine influence of rightholders on the decision-making process as well as on the social and cultural policy of their society). Regarding the mandate, it should offer rightholders a reasonable degree of flexibility on its duration and scope. Furthermore, in the light of the deployment of Digital Rights Management (DRM) systems, rightholders should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually.

3.5.4. The External Control of Collecting Societies

In some Member States, collecting societies are subject to control by public authorities or specific bodies, but with very differing scope and efficiency. The external control encompasses the behaviour of the societies, their functioning, the control of tariffs and licensing conditions and also the dispute settlement. From an Internal Market viewpoint, the existing differences regarding the control of collecting societies are significant and cannot be ignored. Divergent rules on control from one Member State to another constitute obstacles to the interests of rightholders and users alike, given the exclusive position of most collecting societies and their network of reciprocal agreements. As a consequence, in all Member States, adequate external control mechanisms should be available. From an Internal Market viewpoint, it would appear useful to establish common ground on certain parameters of external control and make specific bodies (e.g. specialised tribunals, administrative authorities or arbitration boards) available in all Member States and to establish common ground on their competencies, their composition and the binding or non-binding nature of their decisions.

3.6. Conclusions

In order to achieve a genuine Internal Market for both the off-line and on-line exploitation of intellectual property, more common ground on several features of collective management is required. This would safeguard its functioning throughout the Community and permit it to continue to represent a valuable option for the management of rights benefiting rightholders and users alike. Achieving more common

ground on collective management should be guided by copyright principles and the needs of the Internal Market. It should result in more efficiency and transparency and a level playing field on certain features of collective management. Abstaining from any legislative action does not seem to be an option anymore. To rely on soft law, such as codes of conduct agreed upon by the market place, appears to be no appropriate option. The conclusions of the consultation process have confirmed the need for complementary action on those aspects of collective management, which affect cross-border trade and have been identified as impeding the full potential of the Internal Market. Such an action would respect the subsidiarity and proportionality principles and would harmonise certain features of collective management. In order to achieve the objectives outlined in this Communication, the Commission intends to propose a legislative instrument on certain aspects of collective management and good governance of the collecting societies. This initiative which will be subject to a public consultation, will take account of recent developments in the market and legislation of the present and the new Member States.