

SOCIAL FUNCTIONS OF COLLECTIVE MANAGEMENT SOCIETIES (CMS) PROVISORY CONCLUSIONS

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The social function of CMS – as is the case not only for the entire realm of activities of CMS but as well for Copyright-law as a whole – is undergoing a legitimacy crisis. The case of public lending right is very representative of the many difficulties Copyright law and CMS are facing, such as: what is their legal base? Who are their beneficiaries? How shall the profits be distributed? The public lending right is a “text-book case” demonstrating the balance of interests which are concerned by Copyright Law; on the one hand, the interest of the editor and the authors to be paid – in order to avoid working for loss – and on the other hand, that of the Society at large, which shall obtain access to “culture” through the free or almost free loans. European countries which have chosen the free loan system have done it in different ways. All of which are, however, based upon the promotion of domestic culture by encouraging free or almost free loans all the while remunerating and protecting the authors, without asking the final user to pay for this service. While Germany and France have preferred to introduce relevant norms in their Copyright law, the Scandinavian countries have opted for the implementation of fiscal provisions. The latter solution may be preferable as it limits the beneficiaries of the remuneration to national creators without provoking a wrath in international law. It also puts the burden of the authors’ social protection upon the society as a whole, not only upon the writers themselves.

The majority of literature addressing the social activities of copyright holders’ societies deals with the issue of international copyright law’s applicability upon compulsory licenses with statutory distribution. As a matter of fact, such a constellation does not present all the characteristics of a copyright, nor of a droit d’auteur or an Urheberrecht. This is due to the collective feature the legislator gave them, from perception to the distribution. The sums resulting from the remuneration of compulsory licenses are, in effect, most concerned by the levies attributed to

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The author wants to thank Maître S. Schmuck LL.M, avocat au barreau de Luxembourg, for his precious help with the translation.

social goals. We will see that the CMS usually distribute a part of their profits earned from the management of exclusive rights to public funds as well.

The legitimacy of compulsory licenses is all the more fragile as modern-day surveillance techniques permit the monitoring and the exact count of the large part of the uses. These uses have given way to compulsory licenses when such a precision was impossible. The disappearing of the choice given to the author regarding the uses of his works – stated otherwise, the disappearing of the voluntary grounds of the collective management – puts the system at risk. In order to reinforce the legitimacy of the distribution of profits resulting from compulsory licences to social funds, it is necessary to determine the legal foundation of the compulsory licenses' remuneration for private copies, library loans as well as those of the patrimonial rights of the authors. The current situation raises many questions: Is it the goal of copyright law and that of the private corporations which enforce it, to ensure a sort of minimum wage for the artists? If this is the case, would it not be preferable to transform copyright from a proprietary right to a right closer of labour law? Over and above the legal analysis, it can be useful to remind, that on a daily basis – in the fields of research, publishing or film production – the difference between labour and copyright law is nothing more than a simple matter of label. The choice between the two is often made in accordance with the financial structure, especially in consideration of the social security contributions. The latest reforms of the German Copyright Contracts Law, based on collective agreement which determine the applicable tariffs, offer a perfect example of this parallelism of the Copyright law and the labour law.

The issue of the justification of the social function of CMSs is mirrored by that of the justification of collective management as a whole. Today, the technological progress (the development of individual methods of management by means of digital identification of works) and social evolution (the development, in Europe, of a social welfare system and the public sponsorship system, which finances a large part of the cultural and scientific activities, more than Copyright fees) seem to put in question its "raison d'être". Since the legislators use the collective management as a tool for arbitration, the following question cannot be avoided: is it the wish of the authors to dispose of their rights and entrust their management to a corporation by which to be grouped, represented and defended as a whole, or is the need to enforce the law which justifies the existence of the CMS?

The social services provided by the CMSs are the products of two movements: firstly that of the authors who decide to allocate a portion of their revenues to – in the case of necessity -, an organised social welfare plan and secondly that which is imposed upon the authors by the

legislator to contribute cede a part of their rights to the specific social goals. In the second case, one may have the impression that the proverbial dog is chasing its tail : in the name of an extremely individual right – which in some countries stems from a personality right - the legislator gives this same right to an individualised person, thereby imposing its collectivisation... the fact that the firstly private initiative of the CMS is “overtaken” by the State – which legitimised this procedure by integrating it into domestic legislation, confirms the hybrid nature of collective management. It is a mix of private voluntary initiative on the one hand and on the other hand a bizarre statutory object : a tool for the legislators to enforce their arbitrations in the balance of interests, and a system in which the CMS merely perceive and distribute fees whose tariffs are not fixed by the societies themselves anymore.

When collective management is based on the authors’ contractual freedom to use their exclusive copyrights, the justification of the social activities of CMS is the authors’ wishes to dispose of their exclusive rights and of the profits arising from them, in the way they want to. Therefore it is only corporate and contractual law which should be applied. When collective management, and the allocation of a portion of the revenues stemming from normally exclusive and individual rights, whose “raison d’être” is purely statutory, one could hope that the legislator would not simply encourage CMS to work for the common good, but that it would also work to create a more established legal environment than that which is to be found in current legislations.

Before examining the various questions posed by the allocation of certain sums to collective social funds, we shall see what the actual social functions of the CMS are for the society as a whole.

THE SOCIAL FUNCTION OF THE CMS IN A BROADER MEANING

The CMS were created to fill the gaps of the national creativity protection systems. As they developed, they progressively took on the role of not only of a funds distributor body but also that of an important negotiator, representing the authors’ interests before the users and the legislator. Finally the various cultural services offered by the blanket licenses and their distribution criteria must be acknowledged.

The enforcement of the Copyrights

The first CMS were born out of the authors need to congregate in order to impose upon the users the respect of their rights recognized by law. This need still exists today as, despite the fact that though authors do not necessarily create on secluded retreats, their negotiation weight - before corporations or the state – remains too weak to ensure the parity necessary to fair

negotiations. However, the current practices of the “knowledge” and “entertainment” industry have transformed artistic works into a fungible thing. Statutory monopolies granted to the author on the use of his/her works are not sufficient to guarantee the author a position of strength at the negotiating table. This issue is examined by Mrs Dr. von Lewinski.

The collective defence and the pacification of the clearance market

By organising the authors as an entity, the CMS become “de facto” professional organization (such as professional orders, unions, or American guilds, or agents) in sectors in which the quantity of the relevant works and their utilisations permits an “individualised collective management” (for example the dramatic works in France).

The entire creative branch profits from the CMS’s workings as they “pacify” and rationalise the market by concluding collective licenses which stipulate a tariff system. This system profits the society as a whole both economically and culturally. Therefore, CMSs play the role of a sort of “collective mediator” between the authors and the public. Contract models are made available, which enable standardization and better information of the various actors of the profession. Seeing that this same tariff system in the CMS has the effect that the utilisation of ALL works is subject to the same tariff, it seems that the selection criteria of different works is not made in consideration of cost analysis. This is also for the best interest of the broadcasters and the producers in general who can utilise the works in complete legal security all the while saving time that may have otherwise been wasted on identifying and contacting the right holders and negotiating individually with them. When pacific attempts fail, the CMS become a sort of prosecutor of big-business, bringing such corporations before the courts in long and expensive proceedings dealing with the enforcement of the authors rights (for example, the case filed by the copying machines industry against the VG Wort).

CMS support as well the entirety of the “creative branch” and lobby both national and international legislators as well as the consumer on the relevant issues at stake in Copyright law and its enforcement. This activity is not to be ignored, not only for the results attained but as well as for the amounts of profits dedicated to.

The support of niche and national repertoires

This support takes two forms: on the one hand the support of contemporary creation by event financing or scholarship allocation and on the other hand the system of collection and distribution.

The allocation of a part of the revenues to cultural activities has a social dimension as it forms a substantial help to up-and-coming artists, including and especially those which are not yet able to be members of CMSs because of the conditions required by the CMSs' statutes. The tariff systems, the collective licenses, as well as the distribution system form a sort of equalisation system, transferring funds to less profitable artistic sectors of great cultural value, hence contributing to cultural diversity.

Before presenting the social activities provided by the CMS, it seems opportune to quote the résumé the French Competition office made about the necessity of collective management for Copyright law enforcement: "The collective management, as any cost mutualisation system and common administration of the perceived sums, proportionally to revenues of each member, permits solidarity amongst the beneficiaries. Less known artists, or those which are not active in Paris benefit from the negotiation strength of the SACD with theatres. As well, the evolution of the authors' revenues and the costs associated with the collection and distribution of copyright royalties makes for a system in which up and coming artists are largely beneficiaries of the mutualisation whilst becoming net contributors with the rise of their notoriety. Mutualisation permits, in the end, to control the administrative cost when paying attention to the perception of weak amounts. The system is therefore favourable to the consumers as it favours the diversity of the supply as well as a broadcast of various works making it possible to obtain copyright fees even when commercial revenues are limited"².

The implementation of a solidarity system

The CMS have always defined their activities as going beyond the simple "cash-in and distribution" activities. In actual fact, since their beginning, the CMS have chosen to help authors by fulfilling the lacks of the State activities through a "global system of dealing with the economic dimensions of Copyright law"³. It was necessary to develop an organisation which protects the legal rights – that the authors themselves could not defend – which the State did not ensure. A communal contribution to the centralised fund was also necessary to support authors in financial difficulties – be it at the beginning or the end of their career – as well as their orphans and

² *La gestion collective, comme tout système de mutualisation des coûts et de mise en commun des sommes perçues proportionnellement aux revenus des adhérents, permet la mise en place d'une solidarité entre les bénéficiaires. Les auteurs moins connus ou qui sont joués plutôt en province qu'à Paris bénéficient du pouvoir de négociation de la SACD auprès des théâtres. De même, l'évolution des revenus des auteurs et les coûts de la perception et de la répartition des droits d'auteur, conduit les auteurs à être majoritairement dans une position de bénéficiaire net de la mutualisation en début de carrière et de contributeur net lorsque leur notoriété s'accroît ainsi que leurs revenus. La mutualisation permet, enfin, une certaine maîtrise des taux de retenue statutaire au regard du coût du recouvrement des droits de faible montant. Le système est donc favorable au consommateur en ce qu'il favorise la diversité de l'offre et une large diffusion des oeuvres en rendant possible la perception des droits même dans les cas où les recettes commerciales sont limitées.* Points 92 and 93 of the decision of the French Competition Office, Conseil de la concurrence, of 26 April 2005, online available : www.conseil-concurrence.fr/pdf/avis/05d16.pdf

³ « Un système global de prise en charge de la dimension économique du droit de la propriété littéraire et artistique ». F. Siirainen, *Théorie générale de la gestion collective*, Fascicule 1550, Juris-classeur, propriété littéraire et artistique, 2006, n°5.

widows. Thus the statutes of the first CMS dating from 1829, the French SACD, contained the following: The creation of a support fund benefiting heirs, widows or family; the creation of a pension fund benefiting retired authors; the creation of a fund with the aim of redistributing profits and dividends. In the same train of thought, the statutes of the SACEM instituted, as well in the early 19th century, the following: A contribution of each member of a part of their profits to develop a social fund; contribution to pension funds as well as a support fund in concordance with the statutes. The German AFMA – founded in 1903- under the influence of R. Strauss allocated 10 % of its profits to a support fund for its members.

The goal of the activities of CMS was hence to reduce the natural brutalities of the market economy. The exhaustiveness of their repertory was a way for them to be unavoidable, thus obliging the major companies to collaborate, and to legitimate a cross-subsidies system. The technical evolution as well as pressures from the European Commission in favour of a more competitive system will it make necessary to find another *modus vivendi*, which will question and maybe force a revamping - of their functions which are more than the simple collection and distribution - of the social contribution.

SOCIAL SERVICES PROVIDED BY CMS

The majority of CMS whose members are private persons allocate a portion of the collected funds to a solidarity or "support" fund.

The social function exists only in *Droit d'auteur* countries

"In Europe, societies are active in the social sphere, while in the United States they do not exercise such a function"⁴. The situation in the UK is similar to that of the USA. There are a variety of hypotheses which lead to an understanding of the striking difference between Copyright and *Droit d'auteur*; the former protecting the creativity by encouraging the contracts in order to promote the dissemination of the works and the creation of capital whereas the latter – which is more creator-based –, may be more susceptible to social questions and evolution. It may also be limited to the perceived role of the state: the common law countries with their distinctly "laissez-faire" attitude as opposed to the interventionist state typical of civil law countries? Is it because other organizations are in charge of artist support? (such as the American guilds or the Irish Artist Council)?

⁴ C. Doutrelepont, *Raison d'être, economic importance and expansion of collective management societies and recent developments*, in *ALAI Conference Proceedings, Protection of authors and Performers through Contracts*, Editor G. Roussel, Les Éditions Yvon Blais Inc. Cowansville, 1998, p. 515, 557.

The activities of the CMS

Since their beginning, CMS have been allocating a portion of their revenues to common funds.

The percentage has – since the beginning – been fixed at the amount of 10 %. The performing right reciprocal agreement model of the CISAC, active in the musical sector, used this percentage all the while stipulating that each party may retain 10 % of the revenues due to the other party in compliance with the contract, if this percentage is used to encourage cultural activities and if the party does not perceive extra funds to ensure other social funds or for the development of national art. It is the 10 % rule.

The large part of revenues received by the CMS comes from royalties for public performances. Reciprocal contracts in the domain of mechanical copyright permits that the revenues received are equal only to the amounts necessary for collection.

There is no explanation for this situation. C. Doutrelepont gives us two possible answers concerning the Belgian situation: "The fact that performance royalties are targeted can be explained by two reasons. The first has historical roots. The system dates back to 1933 at which time performing rights societies were the most significant ones. The second reason is based upon practical grounds. It was thought best to avoid collecting on the basis of mechanical reproductions royalties, giving the fear that authors, wishing to have a pension granted to them, would organize the reproduction of their own works"⁵.

One may add another practical and psychological reason: in the most important area of collective management – music – performance royalties can be generated for the most part individually because the partners are few. To hold back substantial amounts on these royalties could have the effect of discouraging the right holders from participating in collective management.

Legal stated deduction upon remuneration rights

Since the 1970's, the legislators have been confronted with new difficulties imposing new types of arbitration: Mass utilisation making the distribution on a "per work" basis either impossible or extremely expensive as well as the artists' demands for social welfare. The legislator started using compulsory licenses attached to royalty rights coupled with the necessary membership in a CMS. This turned out to be the key to proper social and/or cultural distribution. The interventionism in the contractual liberty of Copyright allowed for a sort of

⁵ C. Doutrelepont, in *Conference proceedings, op. cit.* p. 558.

protection for the artists against the effects of “overtrusting” and the globalization of the entertaining and cultural production. This new system allowed for greater protection without the need to adapt contractual Copyright Law.

The highest percentages of revenues retained by the CMS are those dictated by the legislator. The rule being that of 10 %, some governments opt for a higher percentage, such as the 10 % held back in Spain on royalties received in areas from private copying to social activities. Following the German VG Wort model which holds back 45 % on public lending right royalties, which is thus allocated to an authors support fund, the French legislator introduced in the Code de propriété intellectuelle, by transposing the European directive 92/100/CEE⁶ and the compulsory license for public lending right, that a part of the sums from that PLR (max. the half) must be allocated to the complementary pensions funds. More recently, the Austrian collective management law imposed that 50 % of revenues coming from the private copying levies on blank tapes shall be allocated to institutions promoting social or cultural activities.

Calculating methods and their consequences

The calculation of the amounts allocated to social activities is usually based upon the net sum after deduction of the administrative costs, but before the repartition by work or by artist. The fact that the “social or cultural portion” is calculated upon the entire license revenues of the CMS has two effects. Firstly, seeing that the percentage contributed increases with the general diffusion, more popular authors participate on a larger scale to the social funds. Secondly, the deduction is also upon the revenues which correspond to that of authors who are member of other CMS, such as the foreign CMS which are signatories of reciprocal agreement) Yet most of the broadcasted works are from anglo-saxon repertoire, in other words from foreign CMS, since we told that deduction for social aim are only on the European continent to be found. The “mutualisation” of a part of the funds received by public diffusion/performance give way to a sort of double solidarity: Firstly, solidarity between all of the society’s members – between the large and small earners – and secondly, an international solidarity between authors bound by a reciprocal agreement as this system takes a part of the revenues of foreign authors.

In other words, in the musical domain, Anglo-Saxon CMS’s members show a large solidarity with their colleagues of droit d’auteur countries, because they do not receive a portion of the internationally collected funds. In the end, it is not surprising that the English CMSs protested against this practice.

⁶ Meanwhile the directive 2006/115/CE.

Types of services

Stricto sensu, the CMS's social activity is mainly that of a support fund for their members and their families as previously stated. In addition to this, some CMSs offer pension, health and disability benefits.

The rights most concerned by social support are the public lending right, the remuneration for private copying and the undistributed sums.

The services provided by a CMS are not available immediately after membership. One must have been a member for a number of years during which, a certain amount of fees must have been paid. This situation is often criticised as it is thought that the CMSs would only defend, for example, older more profitable authors because only well known artists sit on the boards. This criticism may not be unfounded. It is however necessary to consider that authors with the largest success contribute more to the solidarity funds. They are, for the most part, net contributors to CMS which all the while support contemporary creativity through festival support, bursaries, prizes and the valuation keys which promote less profitable sectors of creativity. The variety of cultural activities help young authors, as well as those who are not yet eligible for CMS membership, or CMS support.

The situation of non-affiliated authors to distributing society

Their situation is problematic as they do not benefit from the social services of the CMSs to which they, however, pay a certain amount of fees.

The situation is different if the deductions are done in concordance with contractual or legal clauses

Firstly one must examine the case of a foreign author wishing to profit from the social funds.

The situation of foreign authors has raised questions concerning the principle of the specific treatment in national copyright law, in other words, the non-discrimination of EU nationals based on their nationality. The exclusion of foreign nationals from benefiting from the GEMA social funds has been judged contrary to art. 82 EC Treaty⁷. The Judgement was motivated by the abuse of dominant position. Since this judgement, the statutes of all EU CMSs have been changed as to not exclude the foreign (as long as they are from an EU member state) right holders of the benefits of their members. Therefore, exclusions are now based on membership rather than nationality. The author is thus free to choose the preferable CMS by comparing the different advantages offered.

⁷ Ex-article 86.

Deductions pursuant to CMS' regulations

The 10% rule is to be found in all reciprocal agreements between CMSs in the domain of public performance rights upon musical works in the following terms: « When the distributing society does not make any supplementary collection for the purpose of supporting its members' pensions, benevolent or provident funds, or for the encouragement of the national arts, or in favour of any funds serving similar purposes, each of the societies shall be entitled to deduct from the sums collected by it on behalf of the co-contracting Society 10% at the maximum, which shall be allocated to the said purposes ».

The earlier explored international solidarity would be easier to administer if social funds existed in all countries. However, neither the reciprocal agreements I could read, nor the CISAC's model contract, mention a reciprocity condition.

However the declaration of the collective administration of author's rights adopted by CISAC at its 38th congress in 1992 mentions precisely that the allocation of a portion of the sums due to the beneficiaries can only be done without the "explicit prior agreement having been received in this regard from the national and foreign right owners entitled to the sums in question or from the bodies or organisations which represent them".

Here we touch upon a sensitive matter in collective management: the scope of the willingness of the author to adhere to the collecting society agreement, the statutes of these associations, the decisions of the boards, the schedules of distribution, and the reciprocal agreement, to which all collecting society agreements refer. Through the mechanism of the "renvois"⁸, and the representation system⁹ the author becomes a party of the reciprocal agreement. This fictitious acquiescence (most authors have no idea how the reciprocal agreement system works, nor what is the scope of the "renvois") has been much criticized. However most of democracies are based on such a fiction.

This problem had already been discussed in 1958 by the CISAC. The latter defended its practice by referring to international solidarity and the indirect billing, in other words the compensation of the collecting services in the name of foreign CMSs. One must note the argument of the KEA in its report to the European Commission, "according to a British author: "this contribution remains acceptable in consideration of the fact that continental societies have higher royalties than the UK society – royalties collected in Germany or France can be 3 times higher than for a similar performance in the UK – Vive le droit d'auteur!".

⁸ The collecting society agreements stipulate that the member shall be bound by the statutes and the board's decisions.

⁹ The author mandates the society to handle on his/her behalf, the society then mandates a sister society to handle on its behalf.

Deductions pursuant to copyright acts

Like the majority of reciprocal agreements available, the CISAC Model contract has solved the problem of the possibly fictitious acquiescence through contractual “renvois” which stipulate, in the clause following that which defines the 10% rule, that “any other deductions, apart from taxes, that either of the contracting societies may [...] be obliged to make from the net royalties accruing to the other Society would require special arrangements between the contracting parties so as to enable the Society not making such deductions to recoup itself as far as possible from the royalties collected by it for the account of the other society ».

As far as the case of the public lending right is concerned, the CMS have generally left the choice of membership to the foreign authors. It would therefore be possible that foreign authors may become members of all the CMS in the countries in which their books are lent and PLR exists. The authors may accumulate as well as for pension funds.

Another way to solve the imbalance between two countries, when the law of only one of the countries imposes contribution to the social funds, would be to insert reciprocal clauses in international conventions concerning PLR and remuneration rights for private copying, similar to art. 14 ter (2) of the Berne Convention.

CONCLUSIONS

The allocation of certain amount of the collected sums to social and/or cultural activities should be a part of the definition of CMS.

The CMS’s social and cultural activities are characteristic of mutualisation and solidarity which are to be found in the CMSs of the droit d’auteur countries. This role allows for a distinction between the CMSs and the large-scale users such as the publishers and record companies, who manage copyrights as well. The latter however are more interested in the profitable exploitation of their repertory than in the defence of the interests of the authors.

It is also necessary to separate the CMS from the mere collecting agents (Inkassostelle, such as the German ZBT and ZPÜ for example, or the French SPRE and CFC) or the simple billing companies. A distinction is also necessary, as already mentioned, between the CMS and the large publishing houses. Such a distinction could be made by taking the example of § 1 of the German WarhnG.

The recognition of the 10% rule in an international convention would confirm copyright law's role of interest balancing. It may also encourage the rights holders of CMS who do not allocate a part of the fees to social or cultural activities, to introduce such allocation in their distribution schedule.

It would be fair to maintain the wording "social and cultural" in international law. In the countries which provide adequate social welfare, the contribution of CMS for social welfare makes up a small part of the services offered and on even smaller part of the funds managed by the CMS. The majority of the funds generated by the 10% rule go to cultural activities. On the other hand, for those countries whose social welfare is in its developing state, it is advisable to give the possibility to local CMS to allocate a larger amount of the revenues to support funds.

One could even mention that the allocation of a part of the fees to common funds could better match with some cultures where works, like land, are not object of individual property but do belong the community. The international solidarity would make way for a new viewpoint which would shift copyright law from a Hollywood cashier to an international help fund in application of the 10% rule, thus promoting copyright law as a tool promoting creativity in all of its aspects and diversity.

The distinction between the sources of the allocation to social and/or cultural activities – be it legal or contractual – must also be made. One must differentiate as well between voluntary (and costly) collective management of the exclusive rights, and the obligatory collective management of compulsory licenses, which represents – in its sheer number – the majority of the CMS. The confusion – be it in practice or in theory – would take away the legitimacy of the voluntary adhesion, which is an essential part of modern day collective management.

The current legislative trend in the domain seems to favour obligatory collective management. It is therefore necessary to protect the aforementioned differentiations. It may therefore be necessary to develop – within the domain of collective management – a sort of collective contract, following the example of labour law. Moreover, to correctly regulate, the different parties must be defined. The legislator could make a distinction between CMS which regroup primary right owners and the CMS collecting compulsory license fees which regroup, for the large part, most of the time not right owners but CMSs.

It is not in the authors' best interest to leave their social protection in the hand of the private sector; oriented de facto more towards profit making than social protection. If this were the case, the support of artistic and even scientific creativity would be left to the choice of the

markets, in other terms the choice of the mass of those who dispose of the greatest buying power.

On the contrary, by giving all of the social protection of the creative people to the government, one may run the risk of creating an atmosphere of censorship, judge-critique d'art or even of cultural dirigisme. It is fair, on the one hand to permit authors to voluntarily organise a system of allocation and, on the other hand, allow legislator wishes to use not only the infrastructure but also the experience of the CMS.

It is necessary that legislators - whilst making compulsory licenses attached to fees whose distribution is ruled by the law – foresee enforcement provisions for fees distribution, on the one hand to rights holders who are not members of CMS, and on the other hand to foreign beneficiaries.

Finally, we shall return to our original topic: the social function in its largest meaning. In order to recognize the key role of the CMS in the entire clearance system, and their responsibility as such, one should consider reinforcing the CMS's role of one-stop-shop, by giving them the charge to make available the whole licenses concerning the works of their repertoire, as well for the rights they do not manage. Such a list exists for example in France in the film industries. A centralisation of the information would be useful to all parties involved because it would simplify the legal use of works, thus solving the problem of the orphan works: if no right holder is available for the clearance of a right... than the CMS.

LAST DEVELOPMENTS

In German law, the organization CELAS¹⁰, which gathers together some CMS, will not be obliged to allocate some part of its revenues to welfare funds, because such an association is not a *Verwertungsgesellschaft* pursuant to the German law.

Contrary to numerous communications of the European Parliament, the Recommendation of the European Commission of 18 October 2005 ignored the social role of the collecting societies.

Yet, considering the cross-border nature of the licence CELAS will offer, some questions must be answered about the compulsory allocations: will these allocations be applicable to the entire perceived sums, wherever the managing society is located? Shall they be distributed in consideration of the residence of the right holder who entrusted the society? Will these

¹⁰ See S. Alich's paper.

allocations simply disappear because of the off-shoring of the collective rights managers to countries without such provisions?¹¹.

¹¹ See v. V.-L. Benabou, « Etude sur la recommandation de la Commission européenne relative à la gestion collective transfrontière du droit d'auteur et des droits voisins dans le domaine des services licites de musique en ligne du 18 octobre 2005, (159) <http://www.culture.gouv.fr/culture/cspla/gestioncollective11062.pdf>